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Opinion

Students are Revolting: Learning Lessons from Student Protests from Berkeley in '64 to Paris in '68

Jean-Pierre Worms*

✉ Demonstrations; France; Human rights; Jurisprudence; Political activities; Students; United States

Over within a few months, the student protests in Paris fifty years ago and those of Berkeley four years before shook the world and transformed our understanding of the human right to protest. Those movements clearly established that freedom of association and assembly form the bedrock of a democratic society and are ignored at society's peril. They proved the power of protest as an engine for change. This compelling Opinion piece tells the story of those protests by someone who was there. The author explores the roots of those protest movements, what happened during them, their immediate consequences and reflects upon their wider impact and their relevance today. The result is an engrossing read by one of France's pre-eminent sociologists where the events of fifty years ago come vividly to life.

The following Opinion reflects on events which took place fifty plus years ago in which I was personally involved. This year, 2018, we celebrate a pivotal moment in the history of protest, the Paris student revolt of May 1968. Four years earlier an equally momentous expression of student protest had occurred in Berkeley, California. When juxtaposed, the Berkeley and Paris student protests reveal an important story which merits the retelling. What were these events: a renaissance, a revolution or an irrelevance, but one that led to a rebirth of the forces of reaction? What is not in dispute is that the beat of these protests pulsated across the globe. Those protests became the catalyst which informed future events. They brought the human right to protest to life. They became the backdrop to the last half of the 20th century. Together they challenge the sociologist as well as the social and political activist which, simultaneously, I always was. They may also be particularly useful in questioning the present state of our societies.

I. My Personal Involvement in the Berkeley and Paris Student Revolts

Berkeley, Autumn 1964

I had just joined the National Centre for Scientific Research (CNRS) a year before when, in 1963, a very generous American foundation offered me a scholarship that would give me the opportunity to meet and work with American sociologists who researched in areas similar to mine. There were a fair number of these, particularly in the Universities of Berkeley, Chicago and Harvard. I asked to have a placement at each of these three universities and I was accepted. I did not hesitate to leave France and the CNRS temporarily.

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I arrived in Berkeley in late August 1964 to begin an 18-month immersion in American society and sociology.

Fifteen days later the University was “occupied” by students, an occupation that lasted over two months. These events, soon to be known as the “Free Speech Movement” (FSM), had a considerable impact over the following years both on other student movements and on all sorts of social movements in Berkeley and California. These soon spread across the rest of the United States, into Europe, and notably in Paris in May 1968.

It’s worth recalling the context of American politics and society at the time. A year before President Kennedy had been assassinated. America was still deeply traumatised. After the dark years of McCarthyism, and regardless of what JFK’s real political record may have been, his presidency had allowed a long-suppressed breathing space to open up, a space of daring cultural, social and political innovation. New stars of anti-establishment song appeared (Bob Dylan, Joan Baez). New social movements emerged (hippies with the “Flower Children” in San Francisco). Women’s liberation movements grew with a renewed vigour and so did other sexual liberation movements. And long standing older political struggles also experienced a boost of energy: struggles for African Americans’ social and political rights, and resistance to the Vietnam War among others.

Young Americans and students, particularly at Berkeley, were at the forefront of all these protests.

1964 was an election year. Despite conditions of extreme violence, a campaign was organised to help black voter registration in the Southern States. Many Berkeley students took part in it, including Mario Savio who was to become the most charismatic leader of the FSM.

Berkeley University’s rules prohibited political activities on campus. A space was provided for this purpose, outside the Bancroft entrance to the campus on a piece of public sidewalk which, in fact, belonged to the University. This so-called “Bancroft Plaza” was traditionally littered with tables staffed by students and covered with political and other social literature.

For reasons still incomprehensible to this day, this “toleration” was withdrawn and, on 14 September, sanctions were initiated by the University against offenders. The next day tables appeared not only on Bancroft Plaza but inside the campus, in front of Sproul Hall—the central administration building—including a table set up by one of the most determined civil rights activists, Jack Weinberg. When a university police officer arrested him and dragged him to a police car, students who had witnessed the arrest immediately sat in front of the car to stop it from taking Jack away. Within minutes some 3,000 students joined them. The siege of the police car and its occupants lasted several days; its roof served as a platform from which to deliver speeches or songs, from which the occupation of the university was organised, and from which to inform students about the course of the occupation and the progress of negotiations regarding new rules and principles for the University. The student occupation of the campus lasted until December.

Having been a French student leader in the recent past and being still deeply involved in various issues concerning civil, social and political rights and particularly in anti-Vietnam War activities, I was obviously fascinated by what was taking place in Berkeley. I got to know many of the student leaders and particularly Mario Savio, who became a friend.

Paris, May 1968

Back in Paris in early 1966 I had returned to my lab, the Centre de Sociologie des Organisations (CSO), which Michel Crozier had launched in 1962. I had been his first research assistant and was now the senior member of the lab. Crozier was also teaching at Nanterre University, on the outskirts of Paris. Daniel Cohn-Bendit, who was to become the most charismatic leader of the May 68 student revolt, was one of his students! Dany, as he soon came to be called, was a self-proclaimed “libertarian-liberal”, highly resistant to any form of disciplinary coercion. Involved in the movement against the war in Vietnam and for various

civil and social rights, he had also organised a number of demonstrations against Nanterre University's conservative organisational and socio-political structures. Among his most recent protests, he had notably broken the rule prohibiting the presence of boys in girls' dorms!

On the night of 22 March he led a group occupation of the University's Council premises to demand the release of members of the Vietnam committee who had been arrested. The action took a dramatic turn and Dany's "March 22 Movement" was born. Numerous other incidents followed at Nanterre until 2 May, when it was decided to close the University. The next day Dany and other student leaders from Nanterre took their activism to the Sorbonne, in the heart of the Latin Quarter of Paris. Dany's March 22 Movement was joined by older and more established left and extreme left political youth organisations, giving birth to the "Mouvement de Mai".

One by one the other universities of the Latin Quarter were occupied, countless meetings and *assemblées générales* were organised, pavements were demolished and barricades erected. Street demonstrations led to violent confrontations with the police culminating in extreme violence during the night of 10 and 11 May.

There are many reasons why I felt personally involved in these events: the director of my lab, Michel Crozier, was teaching at Nanterre University where it all started and had Dany Cohn-Bendit among his students; the Sorbonne which became the strategic centre of the May 68 movement was the university where I had studied and been a student leader from 1957 to 1960; and, to top it all, Dany Cohn-Bendit happened to be the young brother of Gaby Cohn-Bendit who had been my best friend during those formative years. Unsurprisingly, when the time came, it was my wife, Miriam, who gathered the necessary signatures from major social and political personalities in order to have the ban lifted forbidding Dany, a German national, from setting foot again on French soil as punishment for his role in May 1968.

However, I was less directly involved with the students than I had been four years before in Berkeley. Unlike the US and most other countries, academic research in France is institutionally separated from universities. Hence, during the May "events", I was busy with practical considerations for the "self-government" of my lab, the CSO and presiding over the *Comité d'Action* of the CNRS to draft new statutory rules for scientific research in France.

In many ways, the historical context of the May 68 student revolt in Paris is not dissimilar to that of the FSM in Berkeley. The deep social and political trauma of the Algerian war, still vivid among students in Paris, could be compared with the trauma of the Vietnam War for Berkeley students and memories of the risk of a military coup in France at the end of the Algerian war were not unlike those surrounding JFK's assassination. And what is more, new social, cultural and political attitudes prevalent in the USA in 1964 can be compared with similar social trends in France in 1968: years of economic growth had made room for profound changes in cultural moods and innovative social mores: new "Yéyé" singers, "new wave" film directors, sexual liberation movements, "new left" political parties.

But the most interesting thoughts to be derived from the comparison of the two student movements concern their own intrinsic similarities and their relevance to today's socio-political and socio-cultural situation.

II. Intrinsic Similarities Between Berkeley And Paris

In Berkeley, as in Paris, movements of considerable magnitude were provoked by minor, even ludicrous incidents: a prohibition on the distribution of political literature at the entrance of Berkeley University; the ban on boys entering Nanterre University girls' dorms! None of these, obviously, tell us anything of significance about the importance of what happened in Berkeley in 1964 or in Paris in 1968.

In both cases, buried in the depths of American and French societies, important social, cultural and political changes had already been at work for some time, loaded with potential sources of social tensions and conflicts. It only needed a spark to start a fire that could spread into a conflagration. It happened in

Berkeley and in Paris four years later. It is often the case that important historical upheavals have anecdotal beginnings.

What were the social tensions and potential conflicts that started in Berkeley and grew to another dimension later in Paris?

The Status of the University

To students in both Berkeley and Paris the role, organisation and operating mode of the university seemed singularly obsolete. In the US, and specifically in Berkeley, as in France, the prevailing idea at the time was that access to “real” knowledge for students required the university to be distanced and, possibly, even detached from political and social commitments related to the issues of the day. The need for a frontier between university and society, the principle of academic political “neutrality”, was explicitly stated in Berkeley where it took the form of a ban on political activities on campus.

In the guise of “Republican elitism” it was much more pernicious in France.

French universities, like all the other institutions of the Republic, are based on the notion that society needs to generate an elite in order to be properly governed. Since Voltaire such an elite is defined by its privileged access to the “lights of universal reason” and by its abstraction from any concrete social specificity. Thus, the role of the University is precisely that of selecting and training the elite who will be able to govern the Nation, rationally and justly. Hence the need for its detachment from civic, social or political involvement. Pierre Bourdieu gave a clear demonstration how such a concept of republican elitism ensured the reproduction of a ruling class, its claim of a free and open access to higher education making it all the more effective.

However, such selective access to university faced the unavoidable challenge of democratisation as the result of the fantastically accelerated demographic growth of France post-World War II. Democratisation, in 1968, was the result of three quantitatively measurable factors: an important resurgence of birth rates after World War II, a decrease in mortality in the same period and the return to French soil of nearly a million French settlers from Algeria after its independence in 1962. In 25 years the French population grew by almost a third. To this quantitative demographic growth should be added the effects on the demand for higher education of the rapid urbanisation of a population that had remained predominantly rural in the first half of the century. Quite apart from any political intention, these simple facts resulted in a three-fold increase of college and student populations in the ten years before 1968.

In and of itself, such demographic pressure shook to the very roots the foundations of university institutions unable to accommodate it. Their inadequacy was first seen in terms of physical capacity; hence the rush to build new universities like Nanterre. These newcomers undoubtedly lacked the personality and spirit of tradition of older universities, but, just like the older ones, they proved to be profoundly inadequate in their structures and modes of operation to deal with the needs and expectations of the new student population. Teaching methods were not adapted to vast student attendance and became more and more depersonalised. Students experienced their anonymity as a humiliating alienation, added to the financial difficulties of youngsters, the vast majority of whom were no longer the wealthy “heirs” of olden times.

Criticisms of university bureaucratic and pedagogic inadequacy existed also in Berkeley, but they played a much larger role in student mobilisation in Paris. However, both in Berkeley and Paris, they were second to the social, cultural and political issues of the times which were the main fuel of student revolts.

New Issues and New Forms of Political Involvement

New Issues

These issues tended to be more specific and concrete than those with which national political debates were concerned but, at the same time, addressed fundamental questions by and large ignored in the more short-sighted political debates surrounding elections. This was obviously the case in Berkeley because of the moral as well as practical involvement of students in the protests against the Vietnam War or for civil and social rights of African Americans. Four years later, concerns for similar issues can be noted in the political involvement of Paris' student populations. The Vietnam War is still raging and, although France is not directly involved, French students feel personally concerned, not only for general ideological or geo-political reasons, but also because of what their parents' generation had experienced in the French wars in Indochina and more recently in Algeria, two inglorious post-colonial conflicts still very much part of students' moral historical awareness in 1968.

Similarly, the protests of Berkeley students in support of the civil, social and political rights of African Americans and more generally against all forms of racism resonate immediately with French students' similar anti-racist struggles in support of the civil, social and political rights of immigrants from the Maghreb, Sub-Saharan Africa or Indochina.

In addition, a number of common social and cultural battles took place on both sides of the Atlantic in which students from Berkeley and Paris were involved: women's rights, gay and lesbian rights, urban struggles, new forms of democracy, and many other social and cultural rights.

Both American and French students refuse to accept the continuing isolation of their universities and their teachings from the rest of society. Deeply concerned and personally involved in the fundamental issues of a world they aim to help build and make their own, they want to bring these issues with them to university. They want society, their society, to live and grow within the walls of their university.

New Forms of Political Involvement

It is important, first, to consider the very particular form of leadership of these two student movements. Neither Mario Savio nor Dany Cohn-Bendit came from any established or recognised political parties of the left, whether moderate or radical. Without being politically uneducated, far from it, their charisma and their ability to express, represent and mobilise the power and innovative potential of their fellow students came precisely from this lack of an anchor in the more traditional organisations of the left. But it was also their emergence from the margins which, on the one hand, brought both of them into serious conflict with political allies within their own movements, in terms of tactics, strategy and even their very existence, and, on the other hand, fuelled mistrust and even personalised hostility on the part of self-proclaimed progressive members of existing political parties: Democrats or Republicans in the States, communists, socialists or centrists in France. What is more, neither Mario nor Dany felt able to pursue a political career despite the fact that, as students, they had shown exceptional leadership qualities: Mario gave up politics all together; Dany, rejected by France, had to transfer his rare political acumen to Germany where he put it to good use in the Green Party in Frankfurt and in the European Parliament.

There are other features common to the two student movements in terms of the types of direct action they preferred and the forms of organisation they chose. "You must understand", Mario Savio once told me when I questioned why they did not chose more traditional types of action, "our first motive is to stuff chewing gum in Coca Cola machines." It says it all about the sort of collective action which would emerge in Berkeley and Paris. Essentially these actions would:

- be rooted in immediate and concrete personal exasperation and the anger of individuals against existing ideologies and hierarchical, authoritarian collective organisations and thus give due recognition and legitimacy to subjective aspects of individual involvement;
- not try to translate these demands for personal recognition into abstract general formulations but into concrete proposals and open spaces for free individual expression;
- not try to channel or formalise individual expressions into a common minimum synthetic standard (hence the diversity and creativity of slogans, signs, posters, songs produced overnight by unknown members of the crowd);
- make room for symbolic forms of action in preference to more traditional ones: speaking from the roof of a police car, occupying administrative premises, invading a policy meeting etc;
- welcome different points of view and different organisations in decision-making bodies and favour long debates in order to construct a consensus rather than majority voting which could be open to all sorts of manipulation and/or formalisation of pre-established ideological divisions.

III. What Were the Results of 1964 and 1968?

Then

The contrast is striking between, on one side, the brevity and fragility of these two events and, on the other, the importance and duration of their impact. Neither the FSM nor the May 68 movement would last long: just two months for the FSM, less than a month and a half for May 68. Their dynamism could not survive the tensions arising from conflicting strategies and microscopic quarrels between chapels of the small leftist, Trotskyist, Maoist groups associated with them.

A question remains: is collective creativity necessarily short lived? What would be the conditions for long-term stability compatible with sustained cultural, social and political innovative capability?

A violent political backlash rapidly took form in both Berkeley and Paris. The “political class” and the bourgeoisie were literally petrified with fear by the appearance in public and the massive entry into the political arena of a youth movement which did not respect any of the rules of the established political game. They saw it as a conspiracy and a subversive threat to basic democratic balances. And they responded vigorously.

In California, the November 1964 election saw a sharp turn to the right and the election of a Republican Senator, a second-rate Hollywood actor/dancer/singer/comedian, with limited political skills but strongly reactionary views: I remember him explaining the need to continue using Mexican manpower for crop harvesting in California because, being smaller than “true” Americans, they were closer to the ground. Two years later, another reactionary Hollywood actor was elected as governor of California, Ronald Reagan, whose ultra-liberal economic ideology was later to leave its mark for decades on the evolution of the World.

In Paris, politics also turned sharply to the right in the last days of May 1968. Things had deteriorated within the student movement. The Communist Party’s distrust of what they saw as Dany’s provocative tactics and a resulting student collective irresponsibility had turned to hostility. Leftist groups had turned to more extreme tactics. The risk of violent confrontations with the police increased (so far they had been controlled thanks to the pacifying influence of a remarkable police commissioner, the Préfet Maurice Grimaud). Faced with this dangerous situation and the rapidly diminishing support of the public a number of personalities and leaders of moderate left-wing political parties and trade unions called for a meeting on 27 May in Chalety sport stadium. Pierre Mendes-France took part hoping that his silent presence

would discourage violent actions from all sides. The meeting was a success: the stadium was full; no violence erupted.

For his part, General de Gaulle, in a move to regain control of the situation, made a dramatic visit to a French military base in Germany on 29 May, addressing the Nation from there to announce the dissolution of the National Assembly and call for national general elections in June. The next day, 30 May, 500,000 people marched on the Champs Élysées to express their hostility towards the student movement and support for de Gaulle. The elections of 23 and 30 June gave the right an overwhelming victory that would have been unthinkable two months earlier.

On one level, politically, the FSM and May 68 movement were quickly and dramatically defeated. But, even in the very short term, their other gains were quite notable.

In Berkeley itself, substantial changes were implemented to the University's modus operandi and students gained an extension of their rights and better representation in the running of the University. But the most important result of their action was the impact of the dynamics of their movement way beyond the walls of their university, to all other American universities in the following three years and to numerous social and cultural movements in other areas and throughout American society. Struggles for new individual and collective rights and for the extension of existing ones found in the FSM a source of inspiration and stimulation. Over the following years the rights of African Americans; of other ethnic, social and cultural minorities; of homosexuals and of many other groups were in some way directly the heirs of this remarkable movement for the freedom of speech. I even sometimes wonder if the hopes the Obama presidency set in motion in America and across the world were not in a small part an extension of the hopes of the Berkeley students' Free Speech Movement.

The short-term victories of the Paris May 68 movement are much more significant.

After the June elections Edgar Faure was appointed Minister of Education in the new government. With the intelligence and tactical skills that were his trademark he introduced a series of reforms in universities' procedures, processes and structures, opening new channels for student participation capable of satisfying the participants of May 68. He accelerated the building of new universities and promoted organisational and teaching experiments in some of them, most notably in Vincennes. In short, he introduced a number of innovations, some structural, others more superficial but with strong symbolic value, with which he hoped to defuse future student revolts.

But by far the most important impact of the student May 68 revolt was outside the world of academia. The student movement had opened wide breaches for other than student demands. The labour movement rushed to make use of them. Strikes had occurred in all sectors of the economy, rapidly leading to a general strike. By 22 May seven million workers were on strike. The focus was on qualitative demands for better representation of workers in a number of important negotiating or decision-making bodies and procedures. The pressure was also and mainly on quantitative demands for significant pay increases long stifled, but which 20 years of growth could obviously now satisfy. The government of Georges Pompidou hastened to satisfy these labour demands in the hope of putting an end to workers' solidarity with students before the ultimate showdown with the student movement. And it worked. Negotiations on 25 and 26 May led to the "Grenelle agreements", opening the way to better representation of workers in a number of instances and to important wage increases: 10 per cent on average and 35 per cent on the minimum wage.

The most significant immediate result of the May 68 student revolt led to the breaking of student/worker solidarity and paved the way for a considerable political defeat of the left a month later.

And Now

What remains today of these considerable social upheavals, fifty years after May 68 in Paris and fifty-four years after the Berkeley FSM?

The state of the world could hardly be more different.

We are no longer enjoying the benefits of a long period of strong economic growth, allowing audacious intellectual, cultural and social changes and justifying the demands of youth to break down the barriers of the old world that block, impede or slow their full development.

We are no longer at the end of a historical movement of decolonisation and the emergence of democratic rights for peoples in the process of political emancipation.

And, finally, we are no longer in a geo-political context where international institutions seem able to contain the risks of major conflicts between super powers or of a global breakdown of world peace. In short, the time for optimism is behind us.

Today we wonder whether we are really coming out of one of the most traumatic world financial and economic crises for decades and whether we will not have to face an even worse one in the near future.

Today violence between nation states still appears to be contained but world peace seems more fragile in the hands of world leaders avid for power and whose rationality (if there is such a thing in the case of Donald Trump?) is not always easy to decipher.

Today violence within a single state is on the rise and far from contained: terrorism, civil wars, ethnic conflicts, religious conflicts. Many wars are no longer fought between soldiers of armies of different countries but between civilians of the same country. Civilians have become the main victims, targets and actors of such conflicts. The potential for extreme violence and barbarity has always existed in all human societies. It was unleashed between the major states in the last two World Wars. It has now moved into the hands of civil societies.

And, today, what are all these threats compared to environmental ones? For the first time in human history serious scientists question humanity's chances of survival in a foreseeable future unless drastic changes occur rapidly in the form and content of our economic and social development.

To face challenges of such magnitude, the capabilities of our democratic institutions seem singularly inadequate. Even in some European countries (Poland, Hungary, Austria) democracy is in serious danger. The situation in Russia, China, Turkey and many other African or Asian countries is not more reassuring. And what about the state of democracy in Trump's America and in Brexit Great Britain, historically the two main pillars of democratic progress? And what about France where the hopes of a new political democratic system rest on the collapse of the two political forces which, for the last 70 years, provided the basic structure of French democracy?

Serious concerns about the future darken our social horizons; the audacity of optimism has given way to rational and emotional pessimism. This can lead to populist and/or authoritarian forms of government and to the cautious withdrawal of citizens towards the most hackneyed conservatism or towards the frenzy of accumulation and rapid renewal of perishable goods.

Paradoxically, however, there is also in our society a profusion of initiatives by citizens who take upon themselves the responsibility of building, here and now and piece by piece, the sort of society they want to leave to future generations, a society capable of answering the challenges of times to come. A society more respectful of natural resources and of each individual, more just and more friendly. This takes place in every area of social life. Everywhere citizens are already actively inventing new ways of bringing up a family, of educating children and taking care of the old, of growing food and feeding themselves, experimenting in new relations with work, with cultural activities, with the world and with their immediate neighbourhood etc.

The values that inspire such initiatives are very close to those of Mario Savio or Dany Cohn-Bendit half a century ago. Today we would recognise these values as underpinning the global human rights movement: respect for individual freedom and personal responsibility in producing the common good of a shared society; distaste for all forms of coercion and a taste for dialogue between people of different opinions and cultural backgrounds as the basis for group cohesion, moving through specific and concrete

experience towards general ideas and abstract concepts and theories regarding academic rights, social rights, economic rights, political rights and civil rights.

Even more than is the case with other principles of government, two forces must combine to give human rights their effectiveness and their power. On the one hand, obviously they need the authority of higher principles inscribed in constitutions, international treaties and other legal documents that have precedence over ordinary institutional documents or contractual agreements. But on the other hand, citizens must recognise their practical utility and adopt them as their own principles in order to grant them the social legitimacy they need to be effective. Without both, those charged with their implementation might distort the structures of human rights principles and potentially citizens might seek to avoid or bypass them; and then leading to a possible democratic crisis. When society is changing rapidly, the social legitimacy of its fundamental laws must be periodically revisited and reconstructed.

This was precisely the problem universities in Berkeley and Paris were facing when, given the obsolescence of their basic rules, they were confronted with the changing needs of society and demands of their student citizenry. Revisiting the history and lessons of the FSM and of May 68 is essential. This Opinion piece shares my recollections of the events. These reflections are not a rigorous academic study, but they are intended to capture an extraordinary moment in 20th century history which I was privileged to witness. As we observe and inevitably commend the events of May '68 in Paris this year, I attempt to assess some of the causes and consequences of what took place and why. At the heart of the events in both Berkeley and Paris was the power of protest. The rights to assembly and association unleash a potency that can transform and enhance democracy. The true legacy of May '68 in Paris is the affirmation of the power of protest and the form of democratic society that was ushered in as a consequence.

Point of View

Brexit, human rights and the constitutional future of these islands

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✉ Brexit; Constitutional law; Equal treatment; European Union; Human rights; Northern Ireland

Many predicted that Brexit would have a destabilising impact on relationships across these islands. The fact that these assessments turned out to be correct is of little comfort now. One of the more intriguing aspects of the discussion, however, is the renewed attention being paid to the situation in Northern Ireland, as well as questions around human rights in general.¹ This includes a debate on the future of the EU Charter of Fundamental Rights. As will be explained, these matters are now bound together.

Who would have thought that Brexit would lead to EU-wide endorsement of the Belfast/Good Friday Agreement 1998?² It is hard to read the “Ireland/Northern Ireland” section of the Joint Report on Phase 1 of the negotiations in any other way.³ The risk in this is that casual references to that Agreement might discourage attention to detail, and avoidance of hard constitutional, legal and political realities. The Agreement is a multi-party political agreement but it is also underpinned by international law (a bi-lateral British-Irish Agreement⁴) and that component can be neglected. As it advances through the Brexit process, the UK Government is legally bound by this international agreement and remains (with the Irish Government) a co-guarantor. With that in mind, there are a few things to underline.

First, human rights and equality are at the heart of the 1998 Agreement. When people refer to this document is it essential that they are reminded of this. It is also vital to recall that substantial projects from 1998, including a Bill of Rights for Northern Ireland and a Charter of Rights for the island of Ireland, are adrift with no responsibility currently being taken for their practical advancement. As if this was not worrying enough, once the Conservative Party has taken care of Brexit it plans to revisit its promise to repeal and replace the Human Rights Act 1998.⁵ The failure to deliver on this promise *thus far* should not deceive us into complacency. Where will attention turn once liberation from the EU has been secured? It would be foolish to believe that rights and equality guarantees (for EU citizens, for example) will necessarily stick or to trust in promises that are not firmly nailed down now. In these discussions, future enforcement and implementation must be in our minds. The limits of the UK’s flexible constitution are well known and this fact is an ever-present risk to basic guarantees. The Joint Report is clear that the UK Government will ensure that there will be “no diminution” of rights in Northern Ireland as a result of Brexit.⁶ It is also plain that the intention is that Irish citizens in Northern Ireland will retain rights as EU citizens (as one

¹ Explained also, of course, by the “Confidence and Supply Agreement” between the DUP and the Conservative Party, www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-ununionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament [Accessed 15 December 2017].

² The Belfast Agreement, 10 April 1998, www.gov.uk/government/publications/the-belfast-agreement [Accessed 15 December 2017].

³ Joint report from the negotiators of the EU and the UK government on progress during phase 1 of negotiations under art.50 of the TEU on the UK’s orderly withdrawal from the EU, https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en [Accessed 22 January 2018].

⁴ See <http://treaties.fco.gov.uk/docs/pdf/2000/TS0050.pdf> [Accessed 22 January 2018].

⁵ *Forward Together: Our Plan for a Stronger and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017*, www.conervatives.com/manifesto [Accessed 22 January 2018], p.37.

⁶ See fn.3 above at para.53.

part of respecting the right to choose to be Irish or British or both).⁷ Work will continue in the negotiations within the separate strand that is considering Ireland/Northern Ireland matters. But this raises an immediate question. The decision of the UK Government to remove the EU Charter of Fundamental Rights appears to be in breach of these commitments (as they relate to Northern Ireland).

Second, the Agreement is structured around relationships across these islands. Its values and principles are intended to be embedded within linked institutions, including the Northern Ireland Assembly and Executive, the North-South Ministerial Council, the British-Irish Council and the British-Irish Intergovernmental Conference (among others). There have been changes since 1998, and the political dynamic has altered significantly. But that sort of *relational* thinking (anchored in respect for human rights and equality) is badly needed again. Brexit has rocked the foundations and plunged everyone into a state of heightened constitutional anxiety. Those who suggest that this is an overreaction miss how much faith people had invested in the “constitutional fundamentals” of the peace process in Northern Ireland. It is only by securely returning to those “fundamentals” that a sustainable future is possible, and that means continuing respect for the vision of human rights and equality outlined in the 1998 Agreement.

Third, there is a neglected and misunderstood human rights component. It is the option of “the people of the island of Ireland” to exercise “their right of self-determination”.⁸ The formula is complex and was worked out over decades. There must be no “external impediment” and it must be based on “consent, freely and concurrently given” in both jurisdictions.⁹ Northern Ireland has a lock on the process, “as this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland”.¹⁰ The current democratic will rests Northern Ireland within the UK (for now), and “status as part of the United Kingdom reflects and relies upon that wish”.¹¹ If, however, the right of self-determination is exercised in the way outlined, and the outcome is agreement in both jurisdictions, then there is a “binding obligation” on both governments to “introduce and support legislation … to give effect to that wish”.¹² The right is recognised in international law (British-Irish Agreement) and reflected in domestic law in both states (in the Irish Constitution and in the Northern Ireland Act 1998). As is well known, the Northern Ireland Act 1998 gives the Secretary of State a key decision-making role for Northern Ireland (“the Secretary of State shall exercise the power … if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland”).¹³ The adopted formulation remains intriguing. Why is this right of self-determination so significant now? Because one way for Northern Ireland to remain in the EU is to leave the UK. Stating this is likely to invite quite strong reactions, and that is troubling. If, as so many never tire of observing, the constitutional status of Northern Ireland rests on consent alone then what is the problem with testing it? The responses can be unintentionally revealing, because they suggest that this aspect of the Agreement is in fact not really accepted. There is much about the debate over this right that is open for discussion, and the challenges are real. The point is that Ireland and Northern Ireland already have an *agreed mechanism* for exercising this right of self-determination (in a world where even that is a fundamentally contested notion). As well as insisting that “no diminution” has immediate implications for the EU (Withdrawal) Bill, it is also time to normalise this aspect of the “consent conversation”, especially when there is such current fondness for the 1998 Agreement. It is vital to be clear about what is being said and not said. The priority remains securing specific solutions that fully respect the special constitutional status that Northern Ireland already has (remember too that Northern Ireland voted to remain). However, if no specific solutions can be found to accommodate these unique circumstances then

⁷ See fn.3 above at para.52.

⁸ See fn.2 above, “Constitutional Issues”, para.1.

⁹ See fn.2 above, “Constitutional Issues”, para.1(ii).

¹⁰ See fn.2 above, “Constitutional Issues”, para.1(ii) and see also (iii).

¹¹ See fn.2 above, “Constitutional Issues”, para.1(iii).

¹² See fn.2 above, “Constitutional Issues”, para.1(iv).

¹³ Northern Ireland Act 1998 Sch.1, para.2.

what is the precise problem with asking people if they want to remain in one union by leaving another? This really is an existential conversation about the constitutional future of the UK and relationships across these islands.

Bulletin: European Court of Human Rights and Council of Europe

European Court of Human Rights

The Court issued, inter alia, judgments and decisions in the following cases in October–November 2017:

Articles 2 and 3 of the Convention

- *Boukrourou v France*, finding that the police were not responsible for the death in custody of an individual, suffering from psychiatric disorders, as they could not have known about his undiagnosed heart condition and had taken prompt measures once he was seen to be in cardiac distress, but that the coercive methods used by police officers in arresting him had amounted to inhuman treatment;
- *Tsalikidis v Greece*, finding that there had not been an effective investigation into the death of a phone company employee shortly before disclosures of a high level phone-tapping scandal.

Article 3

- *Blair v Italy*, and *Azzolina v Italy*, finding that the applicants had been subjected to torture at the hands of the police during incidents at the G8 summit in Genoa and that the investigative procedures had been ineffective, due largely to the application of the statute of limitations to most of the acts of violence;
- *Cirino and Renne v Italy*, finding that the applicant prisoners had been subjected to torture by prison officers and that the legislative framework was deficient in holding the perpetrators of such conduct to account;
- *Hentschel and Stark v Germany*, finding that the applicant football supporters had not established beyond a reasonable doubt that they had been ill-treated by police officers but that the investigation into their complaints had been inadequate as regarding the difficulties of identifying the helmeted riot police who had been involved;
- *Dorneanu v Romania*, finding a violation where the applicant, a prisoner with terminal cancer, was unable to obtain release before his death.

Articles 3, 5 and 34

- *Braga v the Republic of Moldova and Russia* and *Draci v the Republic of Moldova and Russia*, finding various violations in respect of two applicants arrested and detained in the MRT (the self-proclaimed “Moldavian Republic of Transdnistria”) concerning ill-treatment on arrest and conditions while detained in prison, and unlawfulness of detention as well as a hindrance in the right of individual petition where the Moldovan authorities permitted the transfer of one of the applicants from hospital to prison in the MRT, thus preventing him communicating with the Court about his application.

Articles 3 and 13

- *Valentin Bastovoi v the Republic of Moldova*, finding that the conditions of the applicant’s detention in prison were inhuman and degrading and that there was no remedy in that regard.

Article 5(1) and (4)

- *N v Romania*, finding violations arising out of the continued detention of the applicant on psychiatric grounds.

Article 5(1) and (3) and Article 18

- *Merabishvili v Georgia* (Grand Chamber), finding a violation of art5(3) in that the pre-trial detention of the applicant, a former Prime Minister, had ceased to be justified by the original grounds and that there had been a violation of art.18 in that the detention had pursued other aims of information gathering concerning other matters; other complaints under art.5(1) and (3) disclosed no violation;

Article 6(1)

- *Tibet Menteş v Turkey*, finding no violation where the applicants, employees at an airport, who had sued for allegedly unpaid overtime, complained that the Court of Cassation ruling unfairly interpreted overtime in favour of employers;
- *Miller v Ireland*, rejecting as inadmissible the applicant's complaints, tried on drugs offences, that he had been subject to entrapment by undercover police officers;
- *Cherednichenko v Russia*, finding a violation arising from the lack of uniform rules in the starting-point for calculating the time for making appeals in civil procedures;
- *Ilgar Mammadov v Azerbaijan* (No.2), finding serious defects in the criminal proceedings brought against an opposition politician.

Article 6(1) and (3)(d)

- *Cafagna v Italy*, finding a violation where the applicant was convicted on the basis of a statement by a witness who was not traceable and did not attend the trial.

Articles 6 and 7

- *Navalnyy v Russia*, finding that the convictions of the applicant, an opposition activist, and his brother, for fraud and money laundering were the result of arbitrary and unfair proceedings and not foreseeably based on existing legal provisions;
- *Kamenos v Cyprus* finding that the disciplinary proceedings brought against the applicant, judge and President of the Industrial Disputes Court, were not conducted by an impartial tribunal, due to the nature of the roles taken on by the Supreme Court and Supreme Council of the Judicature in that regard.

Articles 6 and 8

- *Eker v Turkey*, finding no violation arising out of the court decisions requiring the applicant, a newspaper publisher, to publish a reply by a journalists' association responding to a critical article in its regard;
- *Dragoş Ioan Rusu v Romania*, finding that there had been a lack of procedural safeguards attaching to the seizure of the applicant's correspondence but that the use of it in proceedings against him for drug trafficking had not been unfair.

Articles 6 and 7

- *Haarde v Iceland*, finding no violations arising out of the conviction of the applicant, formerly Prime Minister, for negligence in the handling of the 2008 banking crisis.

Articles 6(1) and 13 and Article 1 of Protocol No.1

- *Burmych v Ukraine*, striking out five test cases raising complaints about non-enforcement of domestic judgments as well as more than 12,000 similar pending cases and transmitting them to the Committee of Ministers to be dealt with in the framework of the general enforcement measures set out in the pilot judgment, *Ivanov v Ukraine*.

Article 8

- *Fuchsmann v Germany*, finding no lack of respect for private life when the domestic courts refused an injunction to the applicant, an international businessman complaining about allegations in the online version of the *New York Times*, that he had connections with organised crime;
- *Lebois v Bulgaria*, finding a violation where the applicant, a Frenchman serving a prison sentence, had suffered restrictions on his access to a telephone and on his visits from family;
- *Achim v Romania*, finding that the temporary placement of the applicants' seven children in care pending improvements in the family situation at home disclosed no breach;
- *Egill Einarsson v Iceland*, finding that the domestic courts had not struck the right balance where they rejected the defamation complaint lodged by the applicant, a blogger, in respect of an Instagram comment describing him as a "rapist bastard";
- *Tsalikidis v Greece*, finding that there had not been an effective investigation into the death of a phone company employee shortly before disclosures of a high level phone-tapping scandal.

Article 8, in addition to Article 3, Article 5(3) and (4), Article 6(1) and (2) and Article 13

- *Akhlyustin v Russia*, *Dudchenko v Russia*, *Konstantin Moskalev v Russia*, *Moskalev v Russia* and *Zubkov v Russia*, finding principally violations of art.8 with regard to complaints of interception and surveillance measures taken in the context of criminal investigations.

Article 9

- *Adyan v Armenia*, finding a violation where four Jehovah's Witnesses were convicted for refusing military service and alternative civilian service, the Court finding that the alternative service was insufficiently detached from the military and was punitively long.

Article 11

- *İşikurık v Turkey*, finding a violation where the applicant had been convicted of membership in a proscribed organisation (the PKK) on the basis of attending a funeral.

Article 14 in conjunction with Article 8

- *Ratzenböck and Seydl v Austria*, finding no violation arising out of the complaints of a heterosexual couple that they were unable to enter into a registered partnership instead of marriage.

Article 35 of the Convention

- *Domján v Hungary*, finding that applicants complaining about poor conditions of detention should exhaust the newly-provided domestic remedies.

Article 1 of Protocol No.1

- *Činga v Lithuania*, finding that a decision retrospectively ruling invalid earlier court decisions in the applicant's favour with the effect of requiring him to return to the state a plot of land on which he had installed utilities and with only token compensation had failed to strike a fair balance.

Article 2 of Protocol No.4

- *Garib v Netherlands* (Grand Chamber), finding no violation where the applicant, living on welfare payments, was refused a housing permit to live in the district of her choice.

The Court held hearings in the following cases:

- *Denisov v Ukraine* (Grand Chamber), concerning the complaints of the applicant under arts 6 and 8 that he had been dismissed from his position as President of the Kyiv Administrative Court of Appeal;
- *Big Brother Watch v United Kingdom, Bureau of Investigative Journalism and Alice Ross v United Kingdom* and *10 Human Rights Organisations v United Kingdom*, concerning the applicant organisations' complaints under arts 6, 8, 10 and 14 of the Convention about the bulk interception of communications by the UK intelligence services and the sharing of data between the US and UK intelligence services, in the context of the disclosures of Edward Snowden, former employee of a contractor for the National Security Agency of the US;
- *Nicolae Virgiliu Tănase v Romania* (Grand Chamber) concerning the applicant's complaints under arts 2, 3, 6, 8 and 13 of the Convention concerning the events where the applicant was seriously injured in a car accident and the criminal proceedings against the driver of the car which impacted his were terminated due to the expiry of a statutory limitation-period;
- *Berlusconi v Italy*, concerning the applicant's complaints under arts 7 and 13 of the Convention and art.3 of Protocol No.1 arising out his removal from the elected office of Senator following a conviction for fraud;
- *Ilneseher v Germany* (Grand Chamber), concerning the applicant's complaints under arts 5(4), 6 and 7 about his preventive detention.

CPT

From October to November 2017, the CPT made the following visits: a 12-day visit to Bulgaria, a seven-day visit to Montenegro; an ad hoc visit to Hungary to look at the treatment and conditions of detention of foreign nationals held under aliens legislation; and a seven-day visit to Azerbaijan.

It issued reports on its 2016 visit to the former Yugoslav Republic of Macedonia making highly critical findings on conditions in prisons; on its 2015 visit to immigration detention centres in Turkey; and its 2016 visit to Spain criticising the use of mechanical restraints on prisoners and juveniles.

Council of Europe

- Stella Kyriakides (Cyprus) has been elected President of the Parliamentary Assembly of the Council of Europe, following the resignation of Pedro Agramunt (Spain) amid allegations of various misconduct.
- The Committee of Ministers of the Council of Europe notified Azerbaijan of its intention to launch a special procedure against Azerbaijan under art.46(4) of the European Convention

on Human Rights with regard to non-implementation of the judgment of *Ilgar Mammadov v Azerbaijan*.

Signatures and ratifications

Austria, Bulgaria, Luxembourg, Norway and Switzerland were the first to sign the Additional Protocol to the Convention on the Transfer of Sentenced Persons, taking into account the evolution in international cooperation in this field since its entry into force in June 2000. The purpose of the Additional Protocol is to provide rules applicable to the transfer of the execution of sentences where a sentenced person has left the sentencing state before having completed the execution of the sentence and is in the state of his or her nationality.

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during October–November 2017 (all Articles refer to the EU Charter, unless otherwise specified):

Article 21

- *Voigt, Petrov and Others v Parliament* (T-452/15 and T-618/15), 20 November 2017, access was refused to Russian nationals for an event in the European Parliament, consistent with a European Parliament resolution on EU–Russia relations. It was held that the applicants could not rely on the Charter because they were not EU nationals and the reasons for refusal of access were pursuing a legally permitted aim and proportionate to the objective pursued.

Article 41

- *Aurora v OCVV – SES Vanderhave (M 02205)* (T-140/15), 23 November 2017, where a Community plant variety right was granted by the Community Plant Variety Office (CPVO), but the applicant sought to contest this on grounds that the plant variety lacked distinctness. The claim was initially rejected so upon further appeal it was argued that a careful and impartial examination of all relevant particulars had to be carried out. The appeal was upheld.

Articles 41, 48, 49

- *Icap and Others v Commission* (T-180/15), 10 November 2017, voice and electronic interdealer brokers involved in LIBOR and TIBOR rate manipulations on the Japanese Yen interest rate derivatives market were fined for infringement of competition law, which they appealed. Their argument that the offences were not clearly defined was rejected, and the irregularity arising from a possible lack of objective impartiality on the part of the Commission could not have had an impact the final decision, so was also dismissed as a ground of appeal.

Articles 47, 48, 41(1), 17

- *Mabrouk v Council* (T-175/15), 5 October 2017, annulment was sought of a decision that included the applicant on a sanctions list against certain individuals in Tunisia on grounds that the Council did not take a reasonable time to conclude proceedings, infringed presumption of innocence, good administration and right to property. It was held that the claims could not be considered under art.47 because Tunisia is a non-EU country, and all other claims dismissed.

Articles 49 & 50

- *Marine Harvest v Commission* (T-704/14), 26 October 2017, a fine was issued to the applicant by the Commission for failing to notify of its acquisition of another company. It was held that the *ne bis in idem* principle does not apply to a situation in which several penalties are imposed in a single decision, even if those penalties are imposed for the same actions. On the requirement for a clear definition of penalties and offences in law, the challenge was rejected because the wording of the provisions was clear and did not include indeterminate concepts which required definition.

Court of Justice of the European Union

The Court issued, inter alia, judgments and decisions in the following during October–November 2017 (all Articles refer to the EU Charter, unless otherwise specified):

Articles 16, 21, 49, 50

- *BB construct* (C-534/16), 26 October 2017, the claimant applied for registration for VAT purposes which required a EUR 500,000 guarantee for 12 months within 20 days. Claimant appealed for a reduction or annulment of this guarantee on grounds that it was against the freedom to conduct business and was disproportionate considering its turnover. Articles 49 and 50 were held to be inapplicable and art.16 was held not to be absolute. The principle of equal treatment must be interpreted as not precluding the tax authority from requiring a new taxable person to provide a guarantee such as that in the proceedings.

Articles 20 & 47

- *SolarWorld v Council* (C-204/16 and C-205/16 P), 9 November 2017, anti-dumping duty imposed on the applicants for products originating or consigned from China was appealed. The Court found the claim on equality before the law to be inadmissible. It also rejected the claim of a violation of art.47 arising from the applicants' inability to challenge part of the regulation only, since they could challenge the regulation at issue in its entirety.

Article 31

- *Maio Marques da Rosa* (C-306/16,) 9 November 2017, the applicant was made collectively redundant and sought compensation from the company for overtime not paid and for not benefitting from additional rest days during his employment as he often worked seven days consecutively. It was held that the minimum uninterrupted weekly rest period of 24 hours to which a worker is entitled does not have to be provided before the day following a period of six consecutive working days, but requires that rest period to be provided within each seven-day period.

Article 47

- *British Airways v Commission* (C-122/16 P), 14 November 2017, in which the applicant submitted an application for leniency to the Commission in regard to fines for being involved in a cartel case. The Commission nevertheless adopted the decision against them. Upon appeal, their claims about effective judicial protection were rejected because the principle does not require the courts to extend their review to cover aspects of a decision that have not been put in issue in the dispute before them;
- *Shiri* (C-201/16), 25 October 2017, Iranian national entered EU via Bulgaria then travelled to Austria; applied for international protection in both countries. Bulgaria accepted the returns transfer request from Austria after his international protection application was rejected by Austria, restarting the time limit for transfer of six months which had expired as far as Austria was concerned. Held that an applicant for international protection must have an effective and rapid remedy available to him after the six-month time limit expires;
- *King* (C-214/16), 29 November 2017, the claimant worked as “self-employed” for the defendant until he retired. If he took annual leave, it was unpaid. When the employment ended, he sought payment for annual leave, a claim which was rejected on grounds he was self-employed. It was held that the Claimant had the right to an effective remedy and did

not have to confirm whether he could be paid for the leave before taking the leave and later claiming compensation for it.

European Court of Human Rights

The Court did not invoke the Charter of Fundamental Rights in the dispositive of its judgments in October–November 2017.

UK Appellate Courts

The appellate courts in the United Kingdom issued, *inter alia*, judgments and decisions in the following during October–November 2017 (all Articles refer to the EU Charter, unless otherwise specified):

Article 4

- *R. (on the application of HK (Iraq)) v The Secretary of State for the Home Department* [2017] EWCA Civ 1871, in which asylum seekers sought to challenge their removal to Bulgaria under the Dublin III Regulations. Their claim that they would face a real risk of treatment in Bulgaria in violation of art.3 ECHR and art. 4 EU Charter was unsuccessful.

Article 7, 47, and 51–52

- *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755, in which the Court of Appeal considered the Upper Tribunal's previous ruling that there is no statutory right of appeal against the Secretary of State's decision not to grant a person who claims to be an extended family member a residence card. It was held that there was such a right, to the First Tier Tribunal, and the earlier decision was incorrect.

Article 11, Article 47

- *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834, in allowing an appeal in relation to breach of contract and trademark use, reference was made to the EU Charter and to the ECHR. The case was remitted for re-hearing in the High Court.

Article 21, Article 51

- *R. (on the application of HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, in which the appellant was entitled to remain in the UK, as the primary carer of two UK and EU citizens, but was precluded from claiming certain income-related benefits. Her appeal that the denial of benefits was contrary to the Charter and the Convention (art.14 ECHR) was dismissed.

Article 21, Article 47

- *P v Commissioner of Police of the Metropolis* [2017] UKSC 65, in which the Supreme Court considered the application of the right to equal treatment to police officers. It was held that EU law requires that officers who have been dismissed by a police misconduct panel not have their claims barred by judicial immunity but be able bring claims in the Employment Tribunal.

Article 47

- *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, in which the appellants sought to rely upon rights under EU labour law, the operation

of which might be precluded by the State Immunities Act 1978, in disputes with embassies in the UK. It was held that there was a breach of art.6 ECHR, and a coextensive violation of art.47 EU Charter, and therefore the provisions of the State Immunities Act were to be disapplied. The case was remitted to the Employment Tribunal for determination on its merits.

Speaking in UNISON? Access to Justice and the Convention¹

Judge Tim Eicke*

Judge at the European Court of Human Rights elected in respect of the UK

Access to justice; Complementarity principle; Democracy; European Court of Human Rights; Right of access to court; Rule of law; Subsidiarity

Abstract

Access to justice in civil proceedings has been an increasingly prominent subject in judicial, extrajudicial and academic discourse. This article considers the subject from the perspective of the case-law of the European Court of Human Rights. Using the recent UK Supreme Court decision in UNISON as a starting point, similarities in approach between Strasbourg and UK constitutional law are highlighted. By reference to either or both courts have defended a core principle of access to justice, which must be practically understood and applied. Barriers to accessing the European Court of Human Rights itself reflect this tension between pragmatism and principle. The principle of subsidiarity should mean that the primary locus for ensuring the right of access to justice is in national bodies, with the European Court of Human Rights acting as a “safety net”. Meaningful access to justice is a shared project for all legal professionals which protects and promotes democracy.

Access to justice is a subject that has been well-covered recently, both as concerns formal and practical obstacles to access to court. As such it has been addressed by Lord Neuberger in his welcoming speech to the Australian Bar Association,² the new Irish Chief Justice, Mr Justice Frank Clarke, speaking both judicially³ as well as extra-judicially at the opening of the latest legal term,⁴ leading public lawyers,⁵ and was considered at length in the Supreme Court’s judgments in the *Coventry v Lawrence* saga, most recently judgment No.3,⁶ and in *R. (UNISON) v Lord Chancellor*.⁷

The Supreme Court’s judgment in *UNISON*, given by Lord Reed, clearly sets out the right of access to justice as an essential part of the UK constitution. He rightly reminds us that the right of access to the courts is “inherent in the rule of law”.⁸ Certainly, no democracy worthy of the name can function without the rule of law, which in turn requires, in order to be effective, a meaningful right of access to the courts. This article considers the right of access to a court in civil proceedings from the perspective of the European Court of Human Rights. This is not to detract from the vital role of domestic courts, but rather seeks to reaffirm the complementarity between the judgments on this subject which have emanated from Strasbourg

¹ Based on the ALBA Annual Lecture, delivered at the Inner Temple on 30 November 2017.

* With thanks to Miranda Butler, barrister at Garden Court Chambers and *stagiaire* at the Court.

² D. Neuberger “Access to Justice”, welcome address to the Australian Bar Association Biennial Conference <https://www.supremecourt.uk/docs/speech-170703.pdf> [Accessed 25 January 2018].

³ In his judgment in *Persona Digital Telephony Limited v Minister for Public Enterprise* [2017] I.E.S.C. 27.

⁴ F. Clarke “Statement for New Legal Year 2017” (26 September 2017), <https://scoir.wordpress.com/2017/09/26/new-chief-justice-lays-out-important-priorities-for-the-coming-legal-year/> [Accessed 25 January 2018].

⁵ See, e.g. T. Hickman, “Public Law’s Disgrace: Part 2” (26 October 2017), U.K. Const. L. Blog, <https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/> [Accessed 25 January 2018].

⁶ *Coventry v Lawrence* [2015] UKSC 50.

⁷ *R. (UNISON) v Lord Chancellor* [2017] UKSC 51.

⁸ *R. (UNISON)* [2017] UKSC 51 at [66].

and those issued by UK courts and the importance of their judgments to the effective working of the Convention system.

In 1949 the Statute of the Council of Europe reaffirmed its Member States' devotion to "the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". This is emphasised in art.3 of the Statute, whereby "every Member of the Council of Europe must accept the principle of the rule of law". The Council of Europe's drafting of the Convention and establishment of the Court pursued this vision of "genuine democracy", based on the rule of law.

Those principles continue to inform the Court's work and must be borne in mind as the Court faces new and varying challenges both in relation to its caseload and the legal principles which it is the Court's task to interpret. Protecting and promoting access to justice and the rule of law is not just the work of the Court or the Council of Europe, but first and foremost that of national authorities.

The right of access to a court

Strasbourg's case-law has long recognised, frequently in cases emanating from the UK, the right of access to a court as being a significant component of art.6 of the Convention. The case of *Golder v United Kingdom* was one of the first in which this issue arose.⁹ Mr Golder was a serving prisoner who had been wrongly accused of participation in a prison riot and who had been denied the right to consult with a solicitor about a proposed civil action he wished to bring against the prison officer who implicated him in wrongdoing. The Court found that the Home Secretary, by refusing Mr Golder's request to consult with a lawyer, had prevented him from bringing legal proceedings and violated his rights under art.6(1).

The Court noted that art.6(1) does not expressly provide for a right of access to the courts or tribunals. Rather, "it enunciates rights which are distinct from but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term".¹⁰ The Court put significant weight on the passage in the Preamble to the Convention whereby the signatory Governments declare that they are "resolved as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the right steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."

In this seminal judgment the Court connected the right of access to the courts with the principles on which the Council and the Court were founded. The Court also considered that, if the Convention did not protect the right of access to justice, governments could arrogate to themselves the jurisdiction to determine certain classes of civil—and one might add, public law—actions. It held that "such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the [principles of access to justice and the rule of law]".¹¹

In the absence of any express right to access to justice in the text of the Convention, the Court took a pragmatic view, concluding that the express rights to fair, public and expeditious proceedings under art.6 would have no value if there were no access to courts and therefore no such proceedings to begin with.

This conception of the primacy of access to justice echoes Lord Diplock's reasoning, two years earlier, in *Attorney General v Times Newspapers Ltd* that:

"The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts ..., *secondly* that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias and whose decision will be based upon those facts only that have been proved in evidence before it in accordance with the procedure

⁹ *Golder v United Kingdom* (1975) 1 E.H.R.R. 524.

¹⁰ *Golder* (1975) 1 E.H.R.R. 524 at [28].

¹¹ *Golder* (1975) 1 E.H.R.R. 524 at [35].

adopted in courts of law, and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court.”¹²

Unhindered access to the courts is the necessary predicate of a fair trial. No other body, particularly no executive body, should be entitled to interfere with exercise of the court’s functions. We see the same essential reasoning applied independently by the House of Lords and then the European Court of Human Rights.

Golder is an instructive example of how the Convention, emerging out of this common pan-European heritage, is shaped and informed by the fundamental values at the heart of that heritage. The Court was able to identify a right of access to the courts in much the same way as the House of Lords and Supreme Court have done by invoking the rule of law and the dangerousness of arbitrary power. Neither court needed to refer to each other’s reasoning as they were drawing on the same normative values which shaped, and continue to shape, both the UK constitution and the Convention.

A few years later the Court handed down another significant judgment on access to justice in *Airey v Ireland*,¹³ which related to a victim of domestic violence who could not afford the costs of a judicial separation from her abusive husband. Legal aid was not available for this or indeed any civil action. The Court considered that the complicated points of law raised by the case possibly required expert evidence and witness handling. This, as well as the emotional involvement in these sorts of proceedings, meant that a person in the position of Mrs Airey would be very unlikely to be able to present their own case effectively. A violation of art.6(1) was found once again.

While emphasising that the Convention did not require Member States to provide free legal aid in all civil proceedings, the Court held that they were nevertheless obliged to ensure that legal representation was available when such assistance was “indispensable for an effective access to court”,¹⁴ whether this was because legal representation was compulsory or due to the complexity of the procedure or the case. Litigants were guaranteed an effective right of access to the courts in civil matters, but the state was, in principle, free to choose how to achieve it. A legal aid scheme was one way of doing this but other means of providing access were available, such as a simplification of procedure.

Another of the striking features of the *Airey* case is the Court’s willingness to confront the economic implications of its decision. Judges, whether at a domestic or international level, are rightly slow to intervene in this highly technical area which requires difficult (social and economic) policy choices to be made. As *Airey* acknowledges, there is likely to be a range of options open to the state to enable effective access to justice. Plainly, it is not for the courts to dictate policy choices to the government. Nonetheless, the core entitlement of access to justice must be protected. The courts’ natural deference in these areas should not restrain judges when applying the law but, in doing so, they must take a practical view and squarely confront the potential individual as well as systemic implications of their judgments in this politically-sensitive area.

The later case of *P, C and S v United Kingdom*¹⁵ took this pragmatic approach further. This case concerned the requirement to provide a lawyer to parents involved in complex care proceedings. The Court again reiterated that the right of access to a court is not absolute but may be subject to legitimate and proportionate restrictions. There will only be a violation of art.6 where the “very essence of the right” of access is impaired.¹⁶ The Court realistically acknowledged that pursuing litigation without representation is not easy, but held that “the limited public funds available for civil actions renders a procedure of selection a

¹² *Attorney General v Times Newspapers Ltd* [1974] A.C. 273 at [309].

¹³ *Airey v Ireland* (1979) 2 E.H.R.R. 305.

¹⁴ *Airey* (1979) 2 E.H.R.R. 305 at [26].

¹⁵ *P, C and S v United Kingdom* (2002) 35 E.H.R.R. 31.

¹⁶ *P, C and S* (2002) 35 E.H.R.R. 31 at [90].

necessary feature of the system of administration of justice".¹⁷ That difficult selection procedure falls to the state, provided they do not act arbitrarily or disproportionately.

Allowing for the significant differences between domestic administrative law and the Convention, there is a useful comparison to be drawn between cases such as *P* and the line of cases in which the courts of England and Wales have upheld the right of access to the courts. Judges considering challenges to various barriers to legal advice, representation and the courts have required clear justification for such interference with the right of access to justice.¹⁸ Some interference with the right of access to the courts has been permitted, but it has been held that this must meet a pressing need.

In *R. v Lord Chancellor, Ex p. Witham* the High Court considered the Lord Chancellor's power to set court fees for civil proceedings. Despite the apparently wide discretion to set such fees, they were subject to the implied limitation that he could not "exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts".¹⁹ Under the common law, as under the Convention, judges recognise and protect a core right of access to justice. This does not preclude the imposition of fees, costs and other barriers to court, provided they are not unduly onerous. Inherent in the rule of law is an irreducible minimum right of access to the courts, and to justice more generally, which judges at all levels can recognise and protect.

A similar approach to that in *Ex p. Witham* was taken at the European level in *Anghel v Italy*,²⁰ where the Court emphasised that there was no obligation to provide legal aid for all civil proceedings. Nevertheless, it held that the state may have to provide such legal aid where, taking the relevant proceedings as a whole, the legal representation was not practical and effective. In *Anghel*, although legal aid lawyers had been provided, they had offered erroneous advice and their error had not been remedied by the courts, resulting in a lack of practical and effective representation which incurred the state's liability under art.6(1). The Court insisted that the right of access to a court must be exercised in a "concrete and effective manner".²¹

The similarity of reasoning used by Strasbourg and by courts in the UK was the subject of comment by Lord Reed in *UNISON*. He rightly noted that the common law's requirement that the degree of intrusion into the right of access to justice be no greater than is justified by the objectives which the measure is intended to serve, is analogous to the principle of proportionality.²² This suggests that the parallels in approach between the Supreme Court considering the UK constitution and the European Court interpreting the Convention may be fertile ground for the development of this area of law.

Today, as others have noted already, the obstacles facing modern litigants stem in part from an increasingly complex system of laws and court procedures, which makes self-representation an ever more challenging prospect. Against the background of diminishing legal aid budgets and increased court fees and costs, legal professionals have a responsibility to protect access to justice in two ways. Firstly, judges must apply and uphold the constitutional right of access to justice, whether applying the common law, the Convention or otherwise. It is important to remain alert for those cases in which what may appear to be a mere restriction on access to justice in reality threatens to impair the very essence of a party's right to access to court. The Convention and the common law tell us that this is a fact-sensitive question which requires constant vigilance.

Secondly, legal professionals must recognise their duty to facilitate access to justice in and out of the courtroom. Judges can and do provide significant assistance and support for litigants in person and should be pragmatic when it appears that procedural or other rules will likely interfere with a party's right of access to the court. Lawyers can—and of course frequently do—support the system by providing *pro*

¹⁷ *P. C and S* (2002) 35 E.H.R.R. 31 at [90].

¹⁸ See, inter alia, *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; *R. v Secretary of State for the Home Department, Ex p. Simms* [2000] 2 A.C. 115; *R. v Secretary of State for the Home Department, Ex p. Leech* [1994] Q.B. 198.

¹⁹ *R. v Lord Chancellor, Ex p. Witham* [1998] Q.B. 575 at [580].

²⁰ *Anghel v Italy* (App. No.5968/09), judgment of 4 November 2013.

²¹ *Anghel* (App. No.5968/09) at [54].

²² *UNISON* [2017] UKSC 51 at [89].

bono representation or acting on no-win-no-fee and other arrangements which support indigent litigants. Those inside and outside the legal profession can work together to find more efficient, simplified ways to conduct litigation and facilitate access to the court for everyone. This in no way undercuts the principle of access to court, rather it should stand as a reminder that everyone in the legal profession has a role to play in facilitating the fundamental right of access to justice.

Access to the European Court of Human Rights

The same need for a right of practical and effective access to court extends to the European Court of Human Rights as much as to national courts and tribunals. The Court was established to provide individual applicants with access to a supranational forum for redress. Judgments from the Court have played a crucial role in embedding the Convention's principles at the national level. However, as the Court has acknowledged in *Golder* in respect of access to Court in the domestic context, "the right of access to the courts is not absolute" and, as long as they do not injure the substance of the right, may be subject to regulation. In the case of the Court, these are the requirements set out in arts 34 and 35 of the Convention, including the requirement to have exhausted domestic remedies, as well as those in r.47 of the Rules of Court.

As its caseload has grown, the Court has sought to ensure that the right of individual application remains practical and effective while also ensuring that the objectives of the Convention are achieved.

As is well known, the number of applications at the Court has risen exponentially since its creation until 2011 even if it has subsequently been somewhat reduced. In 1981 the Court received a mere 404 registered applications, a number which had reached 4,750 in 1997 and an astonishing 151,600 applications by 2011.²³ Even in 2017, after various changes to the Court's procedure have been implemented, there are still more than 60,000 cases pending before the Court.²⁴ This surge in applications to the Court brought home the need for a more pragmatic and rigorous approach to the fundamental principle of individuals' access to the Court. It is wholly unrealistic to expect that each of the tens of thousands of annual applications require determination by a full panel of the Court, possibly with an oral hearing. Nevertheless, that is, still, what many if not most applicants are hoping for. Given the Court's limited budget and judicial resources, this would be patently impossible. Such an approach would have led the Court to fail in its duties to applicants by being unable to give timely consideration to meritorious and urgent applications. Access for all would, in those circumstances, have meant effective access for none.

In order to deal with this problem, in 2010, Protocol No.14 to the Convention introduced significant changes to the Court's procedures. It introduced systems designed to help the Court make admissibility decisions in straightforward cases more efficiently and without disproportionate use of judicial time through the use of the single judge²⁵ or the committee procedure.²⁶ It also introduced the "no significant disadvantage" criterion, a de minimis rule intended to filter out cases of so little significance that they do not require the Court's intervention.²⁷ This criterion was, however, made subject to various safeguards whereby an otherwise inadmissible case is admitted if respect for human rights requires an examination of the case on its merits or where the case has not been duly considered by a domestic tribunal. This latter safeguard is, of course, due to fall away once Protocol No.15 enters into force.

Another new feature was the prioritising of urgent or important cases. This seeks to ensure that the Court's backlog does not result in otherwise meritorious cases becoming academic or significant injustice

²³ Council of Europe, "Annual Report 2011 of the European Court of Human Rights", http://www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf [Accessed 25 January 2018].

²⁴ European Court of Human Rights, "Pending applications allocated to a judicial formation 31/10/2017", http://www.echr.coe.int/Documents/Stats_pending_2017_BIL.pdf [Accessed 25 January 2018].

²⁵ Article 27 of the Convention and r.27A of the Rules of the Court.

²⁶ Article 28 of the Convention and r.27 of the Rules of Court.

²⁷ ECHR, art.35(3)(b).

being allowed to occur while a case is pending. The Court's approach to compliance with r.47, which sets out the requirements for a valid application, has also been significantly tightened. Where the relevant criteria are not met the application is rejected without being considered by a judge. While, in principle, this should and does lead to a higher standard of presentation in applications and facilitates the Registry's task in preparing meritorious cases for communication or decision there is, perhaps surprisingly, still a very significant proportion of applications from the UK which are rejected at this first hurdle.

At the level of judicial decision-making, the Court has adopted a practice of accepting unilateral declarations by states. This is a process whereby, in appropriate cases, the Court will strike out applications where a respondent government, in the form of a public declaration, clearly acknowledges that there has been a violation of the Convention and undertakes to provide adequate redress and, as appropriate, to take necessary remedial measures. However, the exercise of the Court's strike out jurisdiction is predicated on it being satisfied that the declaration offers a sufficient basis for finding that respect for human rights does not require it to continue its examination of the application.²⁸

The Court has also introduced the pilot-judgment procedure, whereby repetitive cases can be stayed behind a pilot judgment, identifying the existence of a structural or systemic problem or other similar dysfunction giving rise to similar applications, while the relevant state adopts measures to satisfy the lead judgment.²⁹ The pilot judgment procedure was designed in response to structural or systemic rights violations giving rise to very high volumes of similar applications which, due to their sheer number, may jeopardise the effective functioning of the Convention system.

As the NGO JUSTICE has commented, the backlog of applications seen in the early 21st century posed a risk to the effectiveness and credibility of the entire Convention system.³⁰ The Court was struggling to deal appropriately with so many cases and the time spent on clearly inadmissible cases became unsustainable and disproportionate. It would be a serious failure on the part of the Court if it were incapable of responding to urgent cases quickly or allowed serious and widespread human rights abuses to go unchallenged for long periods.

The competing requirements of pragmatism, procedural strictness and access to justice have come to the fore in the very recent judgment of the Grand Chamber in *Burmych v Ukraine*.³¹ This case arose from systemic failings in enforcement of domestic court decisions in the Ukraine, combined with an absence of effective domestic remedies. The Court had given a pilot judgment in 2009³² but the Ukrainian government has so far failed to implement the general measures required to rectify the systemic problem and provide effective remedies. This continued failure led to the Court adopting a practice of dealing with follow-up cases in an accelerated fashion, making grouped judgments and strike-out decisions which were essentially limited to a statement of a violation and an award of just satisfaction. By the date of the *Burmych* judgment there were more than 12,000 of such applications pending and reportedly ten times that number of further potential applications to the Court. This backlog of cases not only imposed an unsustainable workload on the Court and its Registry, but ran the risk of the Court operating as part of the Ukrainian legal enforcement system, fulfilling the role which should be played by the domestic authorities.

The majority in *Burmych* considered that it was necessary to adopt a new approach to such cases. They considered that execution of judgments was, under art.46 of the Convention, a matter for the Committee of Ministers. The Court's principal role was defined by art.19, namely to ensure the High Contracting Parties' observance of the Convention. This did not necessarily require it to give individual consideration to each of the pending cases. The Court decided to strike out the pending cases and any future such

²⁸ Under r.62A of the Rules of the Court.

²⁹ Under r.61 of the Rules of the Court, see also *Broniowski v Poland* [2005] 40 E.H.R.R. 21.

³⁰ JUSTICE, "Submission on the longer-term future of the system of the European Convention", <https://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Patrick.pdf> [Accessed 25 January 2018].

³¹ *Burmych v Ukraine* (App. No.46852/13), judgment of 12 October 2017.

³² *Ivanov v Ukraine* (App. No.40450/04), judgment of 15 October 2009.

applications, holding that there was nothing to be gained, nor would justice be served, by the Court repeating its findings in repetitive cases where this would have an impact on its caseload.³³

The minority took a sharply different view. They held that the approach championed by the majority “completely changes the well-established paradigm of the Convention system” and the principle that Convention rights should be practical and effective.³⁴ They criticised the majority’s decision as in breach of the Court’s judicial responsibility, denying an individualised judicial examination to pending and future cases, which they argue undermines the effectiveness of the Convention system, the protection of individual rights and the rule of law.

The changes in procedure mentioned above have inevitably attracted criticism, not least in the form of the powerful dissent in *Burmymch*.³⁵ While these concerns are understandable, a more nuanced approach to access to justice, arising from the Court’s own case law, should be applied. Provided the core of the right to access the Court in Strasbourg is protected, a realistic and pragmatic approach which gives appropriate priority to urgent and meritorious cases should be adopted. While we have yet to see what broader impact, if any, *Burmymch* is likely to have, the majority’s realistic analysis of the meaning of justice has much to recommend it. The Grand Chamber reminded us that justice may not be done more broadly if the Court insisted on access to the Court in each individual case.

The unusual course taken by the Court in *Burmymch* is the result of non-implementation of judgments at the national level, which compelled Strasbourg to act. In the Declarations of Interlaken, Izmir, Brighton and Brussels the State Parties to the Convention committed themselves to the full execution of judgments. Realising the Convention’s vision is a task shared between the Court, the Council of Europe, and the Member States, the Court cannot be, nor should it be, an enforcement mechanism. It is increasingly important that the Court’s recognition of its appropriate role is matched by effective and robust domestic systems of rights protection, including the prompt execution of judgments in full. This leads naturally to the principle of subsidiarity.

Subsidiarity and complementarity

The protection of access to justice under the Convention was identified in *Golder* as arising directly out of the shared adherence to the rule of law among the Member States. As the Convention preamble underlines, the work of the Strasbourg Court is based upon a common heritage of political traditions, ideals, freedom and the rule of law, including the right of access to justice. But it is ultimately only through the domestic courts, with the Strasbourg Court as a safety net, that this and the other rights derived from the Convention can be made real and effective.

The principle of subsidiarity recognises that the European Court of Human Rights should only entertain an application where the issue cannot be determined more effectively at the local level. In recent times this principle has gained greater prominence, with the Court repeatedly showing willingness to defer to national courts’ assessments of their state’s compliance with the Convention. This reflects the Court’s role as a facilitator of the rule of law in Europe, respecting the varying views and different legal histories of its Member States.

³³ See in particular [174].

³⁴ Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakå, De Gaetano, Laffranque and Motoc at [1].

³⁵ See D. Shelton, “Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights” (2016) 16 H.R.L.R. 303; X. Ruedin, “De Minimis non Curat the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No.14)” [2008] E.H.R.L.R. 80, 97; H. Keller, A. Fischer and D. Kühne, “Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals” (2010) 21(4) E.J.I.L. 1025; A. Tickell, “Is the European Court of Human Rights Obsessively Interventionist?” (22 January 2012) UK Human Rights Blog, <https://ukhumanrightsblog.com/2012/01/22/is-the-european-court-of-human-rights-obsessively-interventionist-andrew-tickell/> [Accessed 25 January 2018] and D. Kurban “Forsaking Individual Justice: The Implications of the European Court of Human Rights’ Pilot Judgment Procedure for Victims of Gross and Systematic Violations” (2016) 4 H.R.L.R. 731.

The former president of the Court, Jean-Paul Costa, has identified the requirement to exhaust domestic remedies before applying to Strasbourg as a “key provision” which enshrines the principle of subsidiarity.³⁶ The exhaustion of domestic remedies rule ensures that national courts remain the primary site of interpretation and application of the Convention. This system is intended to foster a culture of rights protection at the national level subject to the safeguard provided by effective access to the European Court of Human Rights.

The obligation to exhaust domestic remedies requires an applicant to make normal use of the domestic remedies which are available and sufficient in respect of their Convention grievances. Applicants must be diligent in raising Convention complaints at the domestic level so that local courts have a meaningful opportunity to resolve the human rights issues without recourse to Strasbourg.³⁷ However, this rule is subject to two qualifiers: first, the applicant will only be required to exhaust domestic remedies which are available and effective “not only in theory but in practice”³⁸ and secondly, the Court applies the exhaustion rule with some degree of flexibility and without excessive formalism.

Obstacles arising out of the actual or possible costs of litigation may be relevant to the issue of whether an applicant has exhausted all remedies which were “not only in theory but in practice” available to her. This is not an issue of whether litigation costs are themselves Convention-compatible,³⁹ rather it is an example of a situation in which the difficulty in accessing domestic courts may make it more likely that litigants apply to Strasbourg without proper exhaustion of domestic remedies, which is undesirable both from a domestic and supranational perspective.

While still very much the exception, the Court, in its judgment in *Shamoyan v Armenia*, has shown itself receptive to the applicant’s argument that, in light of her difficult financial situation, the absence both of legal aid and of evidence that counsel may be willing to act *pro bono*, the Government’s argument of non-exhaustion should be dismissed.⁴⁰ This might be said to highlight the risk that practical as well as formal barriers to access to justice at the national level, whether or not they fall foul of art.6(1), increase the likelihood that the principle of subsidiarity will be fundamentally undermined; leaving the Strasbourg Court in the unattractive situation of having to act as a first instance court; deprived of the benefit of the usually detailed and careful consideration of the issues by the national court(s).

This is not how the Convention should function. The principle site for the interpretation and application should be domestic courts. In his recent speech at Middlesex University Judge Robert Spano, President of Section II of the Court, expressed a similar view, stating that “it is the national forum which is the primary arena for resolving Convention disputes not Strasbourg”.⁴¹ He argues persuasively that the Court has developed over time, moving from the formulation of key principles and doctrines of European human rights law, to a more recent shift which places the onus on national decision makers. National bodies should be empowered and incentivised to apply and enforce human rights norms in good faith without undue deference being accorded to states which fail to uphold human rights and the rule of law.

The national court’s role as part of this subsidiary system was considered in another of Lord Reed’s judgments in *Osborn v Parole Board*, where he held that:

“The error in the approach adopted on behalf of the appellants … is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem

³⁶ J-P. Costa “The Relationship between the European Court of Human Rights and the National Courts” [2013] E.H.R.L.R. 264, 267.

³⁷ See *Vuckovic v Serbia* (2015) 61 E.H.R.R. 13 at [69]-[77].

³⁸ *Vuckovic* (2015) 61 E.H.R.R. 13 at [71].

³⁹ An issue considered in detail, in the context of art.6(1), by the UK Supreme Court in *Coventry v Lawrence* [2015] UKSC 50, [2015] H.R.L.R. 16, [2015] 1 W.L.R. 3485, by reference to the conclusion reached, in the context of art.10, by the Court in *MGN Limited v United Kingdom* (2011) 53 E.H.R.R. 5. This case is currently pending in Strasbourg (App. No.6016/16), communicated on 12 May 2017.

⁴⁰ *Shamoyan v Armenia* (App. No.18499/08), judgment of 7 July 2015. See also *Ferreira Alves v Portugal* (No.6) (App. Nos 46436/06 and 55676/08), judgments of 13 July 2010.

⁴¹ R. Spano, “The Future of the European Court of Human Rights—Towards Process-based Review?”, Middlesex University School of Law, 6 October 2017.

should begin and end with the Strasbourg case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court.”⁴²

He quoted Lord Justice-General Rodger, saying:

“It would be wrong ... to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth they soak through and permeate the areas of our law in which they apply.”⁴³

These important statements reflect both the cooperative nature of the Convention, with the principle of subsidiarity at its core, and the responsibility of the national courts to resolve Convention issues, whether under domestic law or by applying the principles developed by the Strasbourg Court. Thus understood, the Convention is a backdrop; a safety net that can catch cases which may not have been adequately resolved at domestic level. Domestic courts and national legal systems become the essential *locus* for the protection and enforcement of human rights. This approach promotes effectiveness, increases respect for human rights and enhances the legitimacy of courts at all levels as none is obliged to intrude on the other’s area of competence under the Convention.

Effective access to justice at the domestic level is therefore an important factor in enabling the Strasbourg Court to fulfil its proper role as a safety net in relation to the Convention rights. As the Court has repeatedly stressed, a thorough and detailed domestic debate of the human rights issues under consideration will be given significant weight. This is not limited to the scrutiny afforded by domestic courts, it also encompasses national legislatures.

In *Animal Defenders v United Kingdom*, the Court recognised that the quality of the parliamentary and judicial review of the necessity of the relevant measure was important to the assessment of proportionality, including the margin of appreciation.⁴⁴ This year alone, the Grand Chamber of the Court has, on two occasions, reaffirmed this approach. In *Satakunnan v Finland* the Grand Chamber considered that the “exacting and pertinent” review of the relevant legislation at a parliamentary and judicial level led to Finland being entitled to a wider margin of appreciation in deciding how to strike a fair balance between the respective rights under arts 8 and 10 of the Convention in that case.⁴⁵ Also, just this month the Grand Chamber dealt with the issue again in the case of *Garib v Netherlands*, in which it held:

“It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices.”⁴⁶

Just as the European Court may consider the exhaustion requirement to be satisfied without an applicant having sought recourse before the domestic authorities where there is no effective and accessible remedy at the domestic level, so it is much more likely to show deference where the national consideration, in the courts and, where relevant, in Parliament, is of a high quality.

We can learn from these contrasting examples that the principle of subsidiarity is not a rigidly formalistic division between Strasbourg and nation states; rather it should create a meaningful dialogue which promotes and enhances rights protection and access to justice at all levels. It respects the views and attitudes of Member States where these are clear, considered and not incompatible with effective rights protection. Judge Spano has referred to this as a “qualitative, democracy-enhancing approach”.⁴⁷ This approach also

⁴² *Osborn v Parole Board* [2013] UKSC 61 at [63].

⁴³ *HM Advocate v Montgomery* [2000] JC 111 at [117].

⁴⁴ *Animal Defenders v United Kingdom* (2013) 57 E.H.R.R. 21.

⁴⁵ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (App. No.931/13), judgment of 27 June 2017 at [192]-[196].

⁴⁶ *Garib v Netherlands* (App. No.43494/09), judgment of 6 November 2017 at [138].

⁴⁷ R. Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity” (2013) 14(3) H.R.L.R. 487, 499.

enhances the rule of law by promoting meaningful access to justice and effective judicial oversight at the local level.

The heart of the Convention system is this complementarity at a national and supranational level. The Court was founded on the democratic and rule of law heritage of the nations over which it has jurisdiction and seeks to assist them in protecting such norms. National authorities are recognised as being best placed to interpret and apply the law compatibly with the fundamental principle of access to justice, but where necessary the core universal principle, the effective right of access to court across Europe, is ultimately protected and promoted by the European Court.

Democracy and the rule of law

It is of the utmost importance that courts of all levels observe and uphold the principle of meaningful access to justice. This is part of the courts' function as guardians of the rule of law in the context of a system based on representative democracy. This essential democratic function was, of course, expressly recognised in the Court's case-law as long ago as *Golder v United Kingdom*. When identifying a right of access to the courts as an inherent part of art.6(1), the Court based its reasoning partly upon the danger of arbitrary power and lawlessness which would result in the absence of an effective civil justice system.

This approach is mirrored in the common law. As Lord Reed said in the *UNISON* case "without [access to the courts], laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade".⁴⁸ Power, without enforceable legal remedies, is likely to lead to anarchy and is incompatible with the existence of a modern representative democracy. The proper functioning of a representative democracy, including its inherent obligation to protect the political rights of those not currently represented by the majority as well as their fundamental rights and their right and opportunity to become the next majority by democratic means,⁴⁹ has guided both the Supreme Court and Strasbourg in addressing barriers to access to justice.

The drafters of the Convention recognised that democracy cannot exist without the rule of law. This is why the Court has continually invoked the rule of law and the Convention's democratic underpinnings when concluding that the rights under art.6(1) must be practical and effective. In *Bertuzzi v France* the Court emphasised that this is particularly true in the case of the right of access to the courts "in view of the prominent place held in a democratic society by the right to a fair trial".⁵⁰ Similarly, in *Kreuz v Poland*, the Court held that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the Courts".⁵¹ The Court's reasoning, like that of courts in the UK, aims to protect and foster the rule of law and democracy.

Viewed through the historic and more recent experience of the Strasbourg Court, there is little doubt that arbitrary power threatens a society which does not uphold the right of access to justice in two ways. Firstly, there is an absence of meaningful public law constraints on government decision-making. Without effective and independent judicial oversight, the executive will, by mistake or design, make unlawful decisions which go unchallenged. This has obvious repercussions for the protection of human rights and civil liberties but also has a less immediate, indirect effect upon public confidence in the government. Judicial review is a safeguard against the misuse of power which loses all value if inaccessible to those affected by governmental decision-making. Without access to the administrative courts, people's loss of

⁴⁸ *UNISON* [2017] UKSC 51 at [68].

⁴⁹ See A. Voßkuhle, "Ein Populist ist ein Gegner der Demokratie" ("A populist is an enemy of democracy") (23 November 2017) Frankfurter Allgemeine Zeitung, <http://www.faz.net/aktuell/politik/inland/bundesverfassungsrichter-vosskuhle-und-sein-rezept-gegen-populismus-15304961.html> [Accessed 25 January 2018].

⁵⁰ *Bertuzzi v France* (App. No.36378/97), judgment of 13 February 2003 at [24].

⁵¹ *Kreuz v Poland* (1998) 25 E.H.R.R. CD80 I9 at [52].

faith in the government is exacerbated. Without review or challenge, the quality of public decision-making deteriorates. This in turn undermines the credibility of the democratic system as a whole.

Secondly, in a state which does not respect access to justice arbitrary power is rarely limited to the executive and affects relations between private individuals. Employers can unfairly dismiss employees without fear of reprisal, businesses can exploit consumers and competitors, professionals' negligence goes unpunished. The fabric of rights and obligations which weaves society together loses its integrity in the absence of an available and effective enforcement mechanism in the form of the legal system. Accessible civil remedies provide both redress and deterrence. Where there is access to justice, employers are incentivised to treat employees fairly, businesses are meaningfully regulated and professionals hold themselves to a higher standard. In this way, society as a whole benefits from upholding access to justice in civil proceedings.

The threat of arbitrary power to which *Golder v United Kingdom* referred remains relevant today. The Court, State Parties and the Council of Europe more generally are confronted with real threats to the rule of law as a result of the rise of movements and even governments that challenge the principles which form the basis of all genuine democracy as identified by the Statute of the Council of Europe and described as part of our common heritage. If the Convention system is to rise to these challenges, it will require leadership at all levels and a renewed commitment to fundamental rights and access to justice. It is of real concern that some Member States of the Council of Europe and beyond appear to be resiling from the commitments which they have made to respect the rule of law, including access to independent and impartial courts, and democracy. All Member States, including the UK, have a role to play in reaffirming these principles and leading by example on access to justice and meaningful rights protection.

A democracy is not a dictatorship of the majority. In their Joint Concurring Opinion in the recent case of *Dakir v Belgium*—concerning the Belgian law prohibiting face covering in public—Judges Spano and Karakaş recalled that majoritarian interests, once embedded in legislation, can threaten fundamental rights and exclude vulnerable minorities from access to justice. Courts at all levels have a duty to identify and reject such measures.⁵² Human rights, inherently counter-majoritarian in nature, are a check on the arbitrary use of power by the majority. Courts provide a unique reckoning mechanism which empowers wronged individuals, allowing them to seek redress against those persons and institutions which would otherwise be more powerful than them. The judicial system and legal profession hold public and private power to account, thereby promoting the diversity and pluralism on which democracy is based. By facilitating and protecting access to the courts, we strengthen democracy within and among nations.

It is disappointing that, more than 40 years after *Golder*, there is still a need to call for the elimination of barriers to access to justice. On the other hand, it is heartening that so many leading members of the legal profession and the judiciary are drawing attention to the issue. The details of court fees and legal costs are generally not headline-grabbing but require scrutiny from lawyers and judges alike. It is only by speaking in unison under the common law and the Convention that our legal system, at a domestic and supranational level, can achieve meaningful and effective access to justice for all.

⁵² *Dakir v Belgium* (App. No.4619/12), judgment of 11 July 2017, Joint Concurring Opinion at [9].

Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights

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✉ European Court of Human Rights; Human rights; Margin of appreciation; Marriage; Right to marry; Same sex partners

Abstract

There remains no right to same-sex marriage before the European Court of Human Rights (the Court). Yet it seems likely that at some stage the Court will recognise same-sex marriage. Recent dicta stresses the movement towards legal recognition across Member States. It is only a lack of consensus, leading to a wide Margin of Appreciation, which prevents the Court recognising same-sex marriage. This article proposes that if the Court continues with this approach, they should at least outline in future judgments how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a same-sex couple to know when their marriage will be legally recognised. If done in a consistent manner, this would increase the legitimacy of the Court and has the major advantages of transparency, certainty and predictability.

1. Introduction

There continues to be no right to same sex-marriage before the Court.¹ Following *Oliari v Italy*, Member States are obliged to provide same-sex couples with some form of civil partnership or registered partnership.² This is a breakthrough for same-sex partners³ although in its judgment the Court concentrated upon the difference between the lack of legal and protections in Italy and the “social reality of the applicants” who were widely accepted.⁴ Fenwick and Hayward argue that the Court by doing this “sought to relate its scope to circumstances arising locally, in Italy, and most likely to arise in Western European States”⁵. In addition, although civil partnership is increasingly seen as having an intrinsic value in itself⁶ this will also not satisfy those proponents of same-sex marriage who view marriage as the gold standard.⁷

However, recognition of same-sex marriage by the Court at some stage now seems likely. Stress was placed by the Court in *Oliari v Italy* on the “movement towards legal recognition” and the “continuing

¹ *Schalk v Austria* (App. No.30141/04), judgment of 24 June 2010; *Hämäläinen v Finland* (App. No.37359/09), judgment of 16 July 2014; and *Chapin v France* (App. No.40183/07), judgment of 9 June 2016.

² *Oliari v Italy* (App. Nos 18766/11 and 36030/11), judgment of 31 July 2015.

³ G. Zago, “A Victory for Italian Same-Sex Couples, a Victory for European Homosexuals? A Commentary on *Oliari v Italy*” (2015) *Articolo 29* (Leiden University).

⁴ *Oliari v Italy* (App. Nos 18766/11 and 36030/11) at [73].

⁵ H. Fenwick and A. Hayward, “Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically” [2017] E.H.R.L.R. 544, 551.

⁶ *Vallianatos v Greece* (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013; *Oliari v Italy* (App. Nos 18766/11 and 36030/11); and Fenwick and Hayward, “Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically” [2017] E.H.R.L.R. 544.

⁷ See Sue Wilkinson in her Witness Statement contained in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) at [6].

international trend of legal recognition of same-sex couples".⁸ The Court justifies the reason for not introducing same-sex marriage on the lack of consensus between Member States.⁹ This lack of consensus leads to a wide Margin of Appreciation (MoA), otherwise known as area of discretion,¹⁰ given to Member States. Today, 15 Member States recognise same-sex marriage.¹¹ This accords with a "global movement to legalise same-sex marriage".¹² Reform is by no means complete, as certain Central and Eastern European states continue to ban same-sex marriage and constitutionally define marriage as between a man and a woman.¹³ Russia, a Council of Europe Member State, seems to be a long way away from considering protections for same-sex couples.¹⁴ A claim is now being brought to the Court from three same-sex couples in Russia who are claiming a right to same-sex marriage.¹⁵ As Russia has no form of legal protection for same-sex couples, the Court is considering the matter as a "claim for some means of formalising their relationship in Russia, via a form of registered partnership".¹⁶ It remains to be seen whether the Court will confine *Oliari v Italy* to countries where same-sex couples are socially accepted, which is very different from the homophobia present in Russian society. What will be crucial in the Court's analysis here is the level of consensus deemed to exist between Member States on this issue.

It remains debateable whether the Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation to same-sex marriage. Commentators argue that placing such emphasis on consensus ignores the interests of the minority group.¹⁷ They also argue that in cases that fall within the MoA doctrine due to there being no consensus, there is a lack of legal analysis¹⁸ and no high level of scrutiny.¹⁹ Instead, the consensus standards results in a fact-dependent

⁸ See *Oliari* (App. Nos 18766/11 and 36030/11). E. Sutherland, "A Step Closer to Same-Sex Marriage Throughout Europe" (2011) 15 Edin. L. Rev. 97, 98 states that "[e]ven on the Court's reasoning, it is arguably only a matter of time (perhaps some time) until the right to marry becomes a reality for same-sex couples throughout Europe". Interestingly, the trend towards greater rights being given to same-sex couples is also reflected in the Yogyakarta Principles Plus 10 adopted on 10 November 2017 and available at <http://yogyakartaprinciples.org/> [Accessed 22 January 2018]. They note in the Preamble that there "have been significant developments in international human rights law and jurisprudence on issues relating to sexual orientation, gender identity, gender expression and sex characteristics ..." and that discrimination on these grounds can be compounded by discrimination on other grounds including that of amongst a lengthy list "marital or family status ...". Although the Yogyakarta Principles Plus 10 contain nothing specifically in relation to same-sex marriage, they do include an Additional State Obligation relating to Equality and Non-Discrimination (Principle 2) which states that Contracting States should "[t]ake all appropriate steps to ensure that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics".

⁹ See *Schalk* (App. No.30141/04) at [57], *Hämäläinen* (App. No.37359/09) at [39] and *Chapin v France* (App. No.40183/07).

¹⁰ See P. Butler, "Margin of Appreciation—A Note Towards a Solution for the Pacific (2008–2009) 39 Vic. U. Wellington L. Rev. 687 and H.C. Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Netherlands, Brill, 1996).

¹¹ Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland).

¹² C.A.R.L. Poppelwell-Scevak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach", *Norwegian Open Research Archives* (NORA), 2016.

¹³ Same-sex marriage is not recognised in several European countries and, in addition, marriage is defined as a union solely between a man and a woman in the constitutions of Armenia, Bulgaria, Croatia, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia and Ukraine. See H. Fenwick, "Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis" [2016] E.H.R.L.R. 248. See also Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544.

¹⁴ See Fenwick, "Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis" [2016] E.H.R.L.R. 248, 270 who explains that gay propaganda laws are still in force in Russia. See also Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544 who refer to the "state-based and social acceptance of homophobia". See also P. Johnson, "Homosexual Propaganda in the Russian Federation: Are They in Violation of the European Convention on Human Rights?" (2015) 3(2) Russ. L.J. 37.

¹⁵ *Fedetova and Shipitko v Russia*, communicated on 2 May 2016.

¹⁶ Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 557.

¹⁷ See Fenwick, "Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis" [2016] E.H.R.L.R. 248 and K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534; L. Hodson, "A Marriage by Any Other Name? Shalk and Kopf v Austria" (2011) 11(1) H.R.L.R. 170; J.A. Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era (2005) 54 I.C.L.Q. 459; Lord Lester, "The European Convention in the New Architecture of Europe" (1996) P.L. 6; and E. Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 NYUJ of Inter. L. and Politics 843.

¹⁸ T. Lewis, "What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation" (2007) 56 I.C.L.Q. 395, 414 comments that the MoA should not be used as an "intellectually lazy option of running for cover".

¹⁹ See for discussion M. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638 and J. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113.

approach, with “little, if any constraints on state power”.²⁰ This author has written elsewhere that such an approach means that Member States could be relying on erroneous²¹ or discriminatory reasons in refusing to sanction same-sex marriage, reasons which are not investigated by the Court.²² This article sets out a novel approach by suggesting that if the Court continues to stress the need for consensus in future judgements regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know when their marriage will be legally recognised.²³ This is also stressed by international case-law²⁴ and international human rights covenants.²⁵ Marriage bestows many legal rights²⁶ and is often connected to citizenship.²⁷

The suggested approach will increase the legitimacy of the Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of Member States. This is needed at a time when certain political factions are discussing leaving the Council of Europe.²⁸ The proposed reform also has the major advantages of transparency, certainty and predictability. The next section sets out the conundrum facing the Court in balancing the competing tensions of universalism and relativism in relation to same-sex marriage. Section 3 details a critique of the existing interpretation of consensus. Section 4 sets out case-law from the area of sexualities demonstrating the lack of certainty over how consensus is determined. Finally, section 5 considers the proposed reform in more detail and considers the advantages this would bring.

2. The compromise between universalism and relativism

One of the central challenges for the Court is to uphold the universal standard of human rights, whilst respecting regional differences. Fenwick and Hayward explain that in the context of rights to legal recognition of same-sex couples, there is much difficulty for the Court in “adjudicating in an increasingly nationalistic context”²⁹ where Eastern European countries take a much more conservative approach in this regard.³⁰ Yet this approach by the Court attracts much criticism. Popplewell-Scevak argues that given the European Convention on Human Rights (European Convention) Preamble’s promise to “protect and enforce human rights … it is perplexing to see the court refrain from legalising same-sex marriage … ”.³¹

²⁰ Y. Shany, “Toward a General Margin of Appreciation Doctrine in International Law” (2005) 16(5) Eur. J. of Inter. L. 907, 912

²¹ For example, Member States could be relying on discredited arguments such as the slippery slope argument (that same-sex marriage would lead to polygamy for example) as well as the definitional argument (that “traditions change and dictionaries are not the law” and the procreation argument (that marriage is for procreative purposes only).

²² F. Hamilton, “Why the Margin of Appreciation is not the Answer to the Gay Marriage Debate” [2013] E.H.R.L.R. 47.

²³ In *Estin v Estin* 334 US 541, 553 (1948) Robert Jackson J commented that “one thing that people are entitled to know from the law is whether they are formally married”. See also B. Stark, “When Globalization Hits Home: International Family Law Comes of Age” (2006) 36 Vanderbilt J. of Trans. L. 1551, and L. McClain, “Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage” (1997–1998) Fordham L.R. 1241.

²⁴ See, e.g. *Goodridge v Department of Public Health* 798 NE 2d 941 (Mass., 2003); *Loving v Virginia* 388 US 1 (1967); and *Obergefell v Hodges* 576 US (2015).

²⁵ E.g. art.12 Right to Marry European Convention on Human Rights.

²⁶ E.g. on intestacy, inheritance and tax purposes.

²⁷ See N. Bamforth, “Sexuality and Citizenship in Contemporary Constitutional Argument” (2012) 10(2) Inter. J. Const. L. 477; R. Frimston, “Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law” (2006) P.C.B. 352; and E. Aloni, “Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage” (2010–2011) 18 Duke J. of Gender L. and Pol’y 105.

²⁸ E. Bribosia, I. Rorive and L. Van den Eynde, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1 referring to R. Wintemute, “Consensus is the right approach for the European Court of Human Rights” (12 August 2010), *The Guardian*, <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> [Accessed 22 January 2018].

²⁹ Fenwick and Hayward, “Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically” [2017] E.H.R.L.R. 544, 545.

³⁰ See Fenwick and Hayward, “Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically” [2017] E.H.R.L.R. 544, 545 and fn.14.

³¹ Popplewell-Scevak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach”, *Norwegian Open Research Archives*, p.1.

Some commentators state that the Court should have a leading, standard setting, aspirational role.³² Benvenisti, for example, argues that the Court has a “duty to set universal standards”³³. This would mean in relation to same-sex marriage that the Court should no longer rely on a lack of consensus leading to a wide MoA. Indeed, the Court is well aware that the European Convention cannot be “frozen in time”³⁴. Concepts such as “living instrument” allow the Court to operate “evolutive” and “dynamic” interpretative techniques so that the European Convention can be interpreted in the light of present-day conditions rather than what the drafters thought back in the 1950s.³⁵ Such techniques are used throughout the case-law which will be examined in the relevant area of sexualities and family law.³⁶

However, in an area as sensitive as same-sex marriage, the Court wishes to avoid any charge that it is engaging in “judicial politics”.³⁷ Unlike the role of the Supreme Court in the US for instance, the Court has to constantly adhere to the states’ MoA.³⁸ There needs to be a compromise between the competing interests at stake. The MoA alongside consensus (which the latter is one of the key factors in determining the width of the MoA) are the “primary tools”³⁹ employed by the Court in its case-law on same-sex marriage in ensuring it does not overstep the “primary responsibility”⁴⁰ given under the European Convention to Member States to secure human rights.⁴¹ The doctrine of subsidiarity⁴² has been recently re-emphasised.⁴³ The role of the Court is in fact secondary. Its task is to “examine the domestic decision” and ensure compatibility with the European Convention.⁴⁴ This is all part of securing agreement and social cooperation in the face of moral pluralism,⁴⁵ which is particularly important in an area such as same-sex marriage. As set out above, it remains debateable whether the Court is following the correct approach in this regard.⁴⁶ However, as the Court currently determines that a lack of consensus is decisive in reaching a wide MoA,⁴⁷ this article argues that at least more clarity and guidance is needed as to when a consensus is deemed to have been reached. As stated above, there are constitutional, manifold legal and symbolic implications of marriage.⁴⁸ Couples are entitled to know when they will be able to enter into a same-sex marriage.

³² See Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 540. Dzehtsiarou at 540 also refers to Ronald Macdonald, “The Margin of Appreciation”, in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martin Nijhoff Publishers, 1993), p.24 who argues that consensus would mean the European Court would “forfeit its aspirational role”. N. Shuibne, “Margins of Appreciation; National Values, Fundamental Rights and EC Free Movement Law” (2009) 34(2) Eur. L. Rev. 230, 256 also argues that when interpreting the role of the EU Charter in an EU context there is a “discrete supranational” purpose in advancing fundamental rights.

³³ Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 843.

³⁴ B. Tobin, “Gay Marriage—A Bridge Too Far?” (2007) 15 Ire. Stud. L. Rev. 175 referring to the Irish Supreme Court decision in *Zappone and Gilligan v Revenue Commissioners* [2008] 2 IR 417.

³⁵ See G. Letsas, “Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer” (2010) 21(3) E.J.I.L. 509 for further explanation.

³⁶ E.g. transgender persons have transformed their position, to allow full recognition of rights in their new sex. See *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123. See Section 4.

³⁷ Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 846.

³⁸ See D. Teutonico, “Pajic v Croatia” (2016–2017) 25 Tulane J. of Inter. and Comp. L. 461.

³⁹ D.L. Donoho, “Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right” (2001) 15 Em. Inter. L. Rev. 391, 451.

⁴⁰ D. McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee” (2016) 65(1) I.C.L.Q. 21, 32.

⁴¹ Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638.

⁴² Article 1 of the European Convention. Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248, 250 also emphasises the importance of “subsidiarity related devices”.

⁴³ Council of Europe, “Brighton Declaration High Level Conference on the Future of the ECHR”, http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (2012) B 12 [Accessed 22 January 2018].

⁴⁴ Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638, 640.

⁴⁵ McClain, “Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage” (1997–1998) Fordham L.R. 1241.

⁴⁶ See Section 1 Introduction.

⁴⁷ *Schalk* (App. No.30141/04) at [57], *Hämäläinen* (App. No.37359/09) at [39] and *Chapin* (App. No.40183/07).

⁴⁸ See Section 1 Introduction.

3. The consensus standard critiqued

Commentators argue that consensus, in relation to many human rights, is often the most important factor in determining the width of the MoA given to a Member State.⁴⁹ When considering same-sex marriage, it is clear that lack of consensus is the critical factor.⁵⁰ The MoA varies greatly depending on what rights are involved.⁵¹ It can and frequently does evolve over time. Factors which are commonly cited in determining the width of the MoA include the importance of the right, the Member State interest involved and whether there is a consensus on an issue.⁵² Certain rights are given a narrow MoA.⁵³ Equally, certain vulnerable groups, including gay people, are given extra protection.⁵⁴ Where discrimination concerns gay people, for example, the Member State will need to have “very weighty reasons for the restriction in question”.⁵⁵ Logically, now that same-sex couples fall under the definition of family under art.8,⁵⁶ the “very weighty reasons” test should lead to a breach of art.12 (right to marriage) being found in relation to same-sex couples bar from marriage. Such was the view of the minority judges in *Schalk v Austria*.⁵⁷ It is only because the Court determines there to be a wide MoA (due to a lack of consensus) in relation to marriage under art.12 which prevents the Court moving forward in this area.⁵⁸

Many of the criticisms surrounding MoA and its key factor of consensus centre around the fact that it is very difficult to understand how it works and that it is lacking in predictability.⁵⁹ Some commentators even argue that it is not “consistent with the rule of law”.⁶⁰ There is no certainty as to when the Court will determine that sufficient consensus has been reached to recognise same-sex marriage. Bribosia et al. reject the consensus argument on the basis that it is “fraught with methodological imprecision”⁶¹. Confusion reigns with regards to the terminology used, and multiple terms are used including “common European standard”, “common European approach”, “emerging consensus” or “trend”.⁶² The Court also demonstrates no consistency in determining what sources are appropriate for establishing a consensus.⁶³ For example, on occasion emphasis has been placed on scientific reports, and this emphasis is later disregarded in similar

⁴⁹ E.g. Lewis, “What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation” (2007) 56 I.C.L.Q. 395; E. Wada, “The Margin of Appreciation and the Right to Assisted Suicide” (2005) 27 Loy. of L.A. Inter. and Comp. L. Rev. 275; Butler, “Margin of Appreciation—A Note Towards a Solution for the Pacific” (2008–2009) 39 Vic. U. Wellington L. Rev. 687; R. Nigro, “The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil” (2010) 11 H.R.L.R. 531; Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638; Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113; and McClain, “Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage” (1997–1998) Fordham L.R. 1241.

⁵⁰ *Schalk v Austria* (App. No.30141/04) at [57], *Hämäläinen* (App. No.37359/09) at [39] and *Chapin* (App. No.40183/07).

⁵¹ Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248, 251 states that in practice “uncertainty arises in respect of every aspect of it”. See also Poppelwell-Scevak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016).

⁵² See Donoho, “Autonomy, Self-Governance, and the Margin of Appreciation: Developing A Jurisprudence of Diversity Within Universal Human Right” (2001) 15 Em. Inter. L. Rev. 391, for further explanation.

⁵³ For example privacy and personal autonomy: *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149.

⁵⁴ *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149. See McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee” (2016) 65(1) I.C.L.Q. 21, 25.

⁵⁵ *Karner v Austria* (2003) 38 E.H.R.R. 528.

⁵⁶ *Schalk* (App. No.30141/04).

⁵⁷ *Schalk* (App. No.30141/04). Dissenting Opinion of Judges Rozakis, Spielmann and Jebens at [8].

⁵⁸ See, e.g. *Schalk* (App. No.30141/04).

⁵⁹ Wada, “The Margin of Appreciation and the Right to Assisted Suicide” (2005) 27 Loy. of L.A. Inter. and Comp. L. Rev. 275, 280; Butler “Margin of Appreciation—A Note Towards a Solution for the Pacific” (2008–2009) 39 Vic. U. Wellington L. Rev. 687, 702; Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638, 641; Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113, 121; Shanly, “Toward a General Margin of Appreciation Doctrine in International Law” (2005) 16(5) Eur. J. of Int. L. 907, 932; Benvenisti, “Margin of Appreciation, Consensus and Universal Standards (1998–1999) 31 NYUJ of Int. L. and Politics 843, 844; McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee” (2016) 65(1) I.C.L.Q. 21, and Lester, “The European Convention in the New Architecture of Europe” (1996) P.L. 6.

⁶⁰ Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113, 138.

⁶¹ Bribosia et al., “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1, 18.

⁶² Poppelwell-Scevak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016), p.39.

⁶³ Dzhetsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 544.

cases.⁶⁴ There are also issues arising in relation to the thoroughness of the research on which the Court makes its decision.⁶⁵

However, the emphasis placed on consensus as the determinative factor for the width of the MoA ensures that the Court is acting in concert with domestic authorities and within the dictates of subsidiarity.⁶⁶ Debate continues about the appropriateness of stressing consensus in relation to same-sex marriage.⁶⁷ This article suggests that if the Court in future judgments continues to concentrate on the need for consensus, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court, as it will link the Court's decision back to the democratic mandate of the Member States' legislatures. If applied in such a manner, the doctrine of consensus could be an important legitimising tool. This could give the Court's judgments in this area extra weight, which is useful at a time when certain political factions are discussing leaving the Council of Europe.⁶⁸ The next section examines the lack of certainty resulting from how the Court has applied the doctrine of consensus in its developing line of case-law concerning sexualities.

4. Case-law demonstrating the lack of certainty over how consensus is determined

In the area of family law and sexualities, the Court has employed a dynamic interpretative technique. The Court has not been insistent on demonstrating consensus in order to move case-law forwards. Indeed, it has been prepared to depart from previous precedents in the areas of decriminalisation of same-sex sexual activity,⁶⁹ equalisation of the age of consent for same-sex couples,⁷⁰ same-sex couples' tenancy rights,⁷¹ employment of gay people in the military,⁷² definition of family concerning gay people,⁷³ gay persons' right to adopt⁷⁴ and most recently same-sex couples' rights to form civil partnerships,⁷⁵ all without demonstrating a consistent method as to how consensus is determined. All of this case-law has meant a progressive approach to the development of gay rights and has to be applauded as such. Fenwick and Hayward also argue that a further move towards an increasing consensus in relation to legal recognition of same-sex couples rights can be done by removing "asymmetry of access" to protected legal partnerships.⁷⁶ They explain asymmetry of access to arise when same-sex and opposite-sex couples are given different legal statuses. Erasing asymmetry of access in the context of Western European countries this would mean removing inequalities where same-sex couples can only access registered partnerships and not marriage.⁷⁷ Such a course of action together with an increasing number of Eastern European countries introducing

⁶⁴ Look at adoption cases *Frette v France* (2002) 38 E.H.R.R. 438 which placed emphasis on the division in the scientific community about the effect which individual gay adoption would have on the child. This approach was subsequently regarded as discriminatory: *X v Austria* (2013) 57 E.H.R.R. 14.

⁶⁵ Dzhehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 539.

⁶⁶ McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 28 referring to Nicolas Bratza, *Evidence to UK Joint Committee on Human Rights*, 13 March 2012, HC 873-iii Q140, former President of the European Court, who saw this as a safeguard "to prevent any rapid and arbitrary development of the Convention". See also Dzhehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534.

⁶⁷ See Section 1 Introduction.

⁶⁸ See E. Briosa, I. Rorive and L. Van den Eynde, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1 referring to R. Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), *The Guardian*.

⁶⁹ *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149.

⁷⁰ *Sutherland v United Kingdom* (1996) 22 E.H.R.R. CD182.

⁷¹ *Simpson v United Kingdom* (App. No.11716/85), judgment of 14 May 1986, and *Karner v Austria* (2003) 38 E.H.R.R. 528.

⁷² *Smith and Grady v United Kingdom* (1999) 29 E.H.R.R. 493, and *Lustig-Prean and Beckett v United Kingdom* (2001) 31 E.H.R.R. 601.

⁷³ *X and Y v United Kingdom* (App. No.21830/93), judgment of 22 April 1997; *Kerkhoven v Netherlands* (App. No.15666/89), decision of 19 May 1992); *JRM v Netherlands* (App. No.16944/90), decision of 8 February 1993; and *Schalk* (App. No.30141/04).

⁷⁴ *Frette v France* (2002) 38 E.H.R.R. 438 and *EB v France* (2008) 47 E.H.R.R. 21.

⁷⁵ *Oliari* (App. Nos 18766/11 and 36030/11).

⁷⁶ They define asymmetry of access to mean

⁷⁷ Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544.

for the first time some level of registered partnership, would undoubtedly increase the pressure on the Court to recognise an increasing level of consensus. In turn this would make the position of Eastern European countries which afford same-sex couples no legal protections as being seen to be “starkly anomalous”.⁷⁸ However, there would still remain doubt as to when the Court would deem there to be a sufficient level of consensus to recognise a right to same-sex marriage. There is an underlying problem in that the Court has shown no consistent application as to determine when consensus exists. The Court is insistent on consensus being the decisive factor here,⁷⁹ but its case-law leaves no clues as to when this will be determined to exist. Key cases are now examined in more detail.

The first in this important line of cases is *Dudgeon v United Kingdom*, which concerned criminalisation of sodomy in Northern Ireland. This was subsequently found to contravene art.8 (right to respect for private life) and has been lauded as “open[ing] the door for LGBTQI rights to be include under the [European] Convention”.⁸⁰ A flaw in the judgment, for those seeking to understand when the Court will advance the case for same-sex marriage, is that the Court never thoroughly explained its departure from previous case-law. The reversal of precedent was done on the basis of a “better understanding, and in consequence an increased tolerance, of homosexual behaviour in the great majority of Member States”.⁸¹ Little guidance was given as to what was meant about a “better understanding”.⁸² The Court did consider other domestic laws⁸³ but never thoroughly documented how many other Member States’ legislatures were required to have introduced legislation. Letsas criticises this as instance of the Court making a “moral” decision, rather than determining “some commonly accepted standards”.⁸⁴ Confusing terminology such as “better understanding” does little to develop our understanding of when a sufficient consensus will be reached in relation to same-sex marriage.

Brauch also considers that case-law demonstrates that the Court utilises the concept of MoA, with its key factor of consensus, in a manner which results in the standard sometimes changing without warning.⁸⁵ The case he discusses concerned gay peoples’ employment in the military.⁸⁶ Previously national security defences put forward by Member States were given a wide MoA.⁸⁷ In *Smith v United Kingdom*, the Court determined (despite the argument to the contrary by the UK government)⁸⁸ that no defence could be upheld on the basis of national security. This was because “particularly serious reasons” had to exist in relation to restrictions which concerned the “most intimate part of an individuals’ private life”.⁸⁹ Ultimately, the UK were not successful in their defence which the Court interpreted as “founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation”.⁹⁰ Despite national security defences previously being given a wide MoA,⁹¹ suddenly no MoA was given to the UK. Again, although advancing LGBT rights, the sudden shift in position by the Court was unpredictable. The UK had prepared

⁷⁸ Fenwick and Hayward, “Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically” [2017] E.H.R.L.R. 544, 563 define asymmetry of access to mean where different sex couples have “two options: cohabitation or marriage, while same-sex couples are confined to cohabitation only. But a form of asymmetry also arises in states which have introduced registered partnerships for same-sex couples, leaving availability of marriage only to different-sex couples”.

⁷⁹ *Schalk* (App. No.30141/04); *Oliari* (App. Nos 18766/11 and 36030/11); and *Chapin* (App. No.40183/07).

⁸⁰ Popplewell-Scezak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016), p.9.

⁸¹ *Dudgeon* (1982) 4 E.H.R.R. 149 at [60].

⁸² *Dudgeon* (1982) 4 E.H.R.R. 149 at [60].

⁸³ *Dudgeon* (1982) 4 E.H.R.R. 149 at [60].

⁸⁴ Letsas, “Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer” (2010) 21(3) E.J.I.L. 509, 531.

⁸⁵ Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113, 137.

⁸⁶ *Smith* (1999) 29 E.H.R.R. 493.

⁸⁷ *Smith* (1999) 29 E.H.R.R. 493 at [3], referring to *Leander v Sweden* (1987) 9 E.H.R.R. 433 at [59] and *Engel v Netherlands* (1976) 1 E.H.R.R. 647 at [57].

⁸⁸ See *Smith* (1999) 29 E.H.R.R. 493 at [61] where the UK Homosexuality Policy Assessment Team indicated a “military risk from a policy change...”. See also [66] where the Parliamentary Select Committee Report dated 24 April 1991 stated that “the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness ...”.

⁸⁹ *Smith* (1999) 29 E.H.R.R. 493 at [89].

⁹⁰ *Smith* (1999) 29 E.H.R.R. 493 at [96].

⁹¹ *Smith* (1999) 29 E.H.R.R. 493 at [3] referring to *Leander* (1987) 9 E.H.R.R. 433 at [59] and *Engel* (1976) 1 E.H.R.R. 647 at [57].

its defence on the basis of a wide MoA and had no notice from the Court that this no longer existed, arguably meaning that the UK did not prepare its case to best effect.

The case of *Karner v Austria*,⁹² considered the rights of a surviving same-sex partner to inherit a tenancy. The Court again departed from previous precedent⁹³ to find a breach of art.14 (equality) in conjunction with art.8 (privacy).⁹⁴ The issue of consensus was avoided. Although third party interveners brought up international examples of equal treatment of unmarried same-sex and opposite-sex couples,⁹⁵ these were not considered in the Court's judgment. Instead, the Court introduced a new dicta that "weighty reasons" were needed in justifying differences in treatment between opposite-sex and same-sex partners.⁹⁶ Whilst the case was obviously an advance for LGBT rights by making any Member States' discriminatory law against gay people subject to a heightened test, it did not address the issue concerning consensus. It offers no clues to be able to predict when a consensus will be deemed to exist in relation to same-sex marriage.

Another change from previous case-law occurred in the recognition of same-sex relationships under the "family" aspect of art.8. The Court had a long entrenched approach⁹⁷ to not recognising same-sex relationships under the family aspect of art.8.⁹⁸ Instead, such relationships were always considered under the private life aspect.⁹⁹ It was not until *Schalk v Austria* (2010) that same-sex couples were recognised as having family rights.¹⁰⁰ This has been described as "remarkable"¹⁰¹ progress. The Court justified its extension of case-law on the basis of the "rapid evolution of social attitudes towards same-sex couples".¹⁰² Again, although this case illustrates the dynamic interpretative techniques of the Court, there was no explanation as to how the Court gauged the change in social attitudes. There was consideration of the legislative status of same-sex couples internationally, but the Court stated this was insufficient to amount to a European consensus in relation to same-sex marriage.¹⁰³ Yet despite the lack of consensus in relation to same-sex marriage, the Court did transform previous case-law to recognise same-sex couples having a right to family life under art.8. This approach of the Court is confusing. A "rapid evolution of social attitudes" cannot be the same as consensus, as no consensus was determined to exist in relation to the right to marry.¹⁰⁴ It appears from *Schalk v Austria* (2010) that consensus is not needed for art.8 (right to a private and family life), but is required for art.12 (right to marry.) Yet again, however, there is no clue as to when consensus will be reached for the purpose of art.12. This article sets out a suggestion that the Court should clarify in future judgments when consensus will be deemed to have been reached.

The lack of clarity as to the weight given to consensus arguments in this area is further revealed by the most recent line of cases before the Court concerning civil partnership. In *Vallianatos v Greece* consensus played an important role in determining that there was a breach of art.14, taken in conjunction with art.8.¹⁰⁵ Where Greece had reserved civil partnership rights to opposite-sex couples only, an "evolving" or "minority" consensus¹⁰⁶ was deemed important as only two states which had introduced such statuses had reserved them specifically to opposite-sex couples. Confusingly this "minority" consensus was seen as

⁹² *Karner v Austria* (2003) 38 E.H.R.R. 528.

⁹³ *Simpson v United Kingdom* (App. No.11716/85).

⁹⁴ *Karner* (2003) 38 E.H.R.R. 528.

⁹⁵ *Karner* (2003) 38 E.H.R.R. 528 at [36]. The third party interveners were ILGA Europe, Liberty and Stonewall.

⁹⁶ *Karner* (2003) 38 E.H.R.R. 528 at [37].

⁹⁷ S. Caballero, "Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?" (2004–2005) 11 Col. J. of Eur. L. 151, 166.

⁹⁸ E.g. see *X v United Kingdom* (App. No.21830/93); *Simpson* (App. No.11716/85) and *Kerkhoven v Netherlands* (App. No.15666/89).

⁹⁹ Caballero, "Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?" (2004–2005) 11 Col. J. of Eur. L. 151, 152.

¹⁰⁰ *Schalk* (App. No.30141/04) at [94].

¹⁰¹ Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria" (2011) 11(1) H.R.L.R. 170, 175. See also Bribosia et al., "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" (2014) 32(1) Berkeley J. of Inter. L. 1.

¹⁰² *Schalk* (App. No.30141/04) at [93].

¹⁰³ *Schalk* (App. No.30141/04).

¹⁰⁴ *Schalk* (App. No.30141/04).

¹⁰⁵ *Vallianatos v Greece* (App. Nos 29381/09 and 32684/09).

¹⁰⁶ Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 550, referring to [91] and [92].

more important than the fact that overall (at that stage) only a minority of Contracting States had introduced same-sex registered partnerships. This judgment shows that in some cases the Court looks at consensus within a selected group of Member States, rather than consensus across all Member States.

In *Oliari v Italy* (2015) consensus played an important role.¹⁰⁷ The Court performed an extensive survey of comparative law and found that for the first time a “thin majority” of states recognised a right to some level of civil partnership.¹⁰⁸ This was an important reason for the Court’s decision that art.8 had been breached. Yet in other cases the Court has taken no regard of consensus. In the recent case of *Ratzenbock v Austria*,¹⁰⁹ which concerned an opposite-sex couple wishing to enter into a civil partnership, on the grounds that this was a lighter form of recognition, the Court did not consider consensus at all. Instead, the majority of the Court considered that different-sex couples were not in a comparable situation to that of same-sex couples. This was because the “institutions of marriage and ... registered partnership [were] essentially complementary in Austrian law”.¹¹⁰ As no comparator was found the Court did not go on to “assess the difference of treatment or the justification for the difference”.¹¹¹ This seems at odds with previous decisions made in *Schalk v Austria* and *Vallianatos v Greece* where a comparison was made between same and opposite-sex couples and their access to legal statuses.¹¹² It also meant that the Court never considered a consensus analysis at all, despite this being seen as decisive in *Oliari v Italy*.¹¹³ Interestingly, Fenwick and Hayward argue that a consensus could be found in this area, depending on how the question is framed.¹¹⁴ If the Court had asked if following the introduction of same-sex partnerships, the majority of Member States had confined them to same-sex partners the answer would have been in the affirmative. However, if the Court had asked instead whether the majority of states following introduction of same-sex partnerships had “maintained asymmetry of access” the answer would have been in the negative, as most Member States following the introduction of registered partnerships had gone on to introduce same-sex marriage.¹¹⁵ Austria is one of the few countries to have maintained registered partnerships for same-sex couples and marriage for opposite-sex couples. This further serves to highlight the confusing treatment of consensus by the Court.

In a similar manner to the transformation of the legal treatment of gay people before the Court, the treatment of transgender persons by the Court has also undergone a major change.¹¹⁶ Early case-law resulted in a denial of transpersons’ rights and a wide MoA, deemed necessary due to a lack of consensus.¹¹⁷ Yet 16 years later transpersons’ rights were recognised, including the right to marry in their new sex.¹¹⁸ The Court made a clear commitment to a “dynamic and evolutive approach” in order to “render [the European Convention’s] rights practical and effective, not theoretical and illusory”.¹¹⁹ However, when reviewing the case-law before the Court, no clear explanation was given as to how the Court justified this change in

¹⁰⁷ *Oliari* (App. Nos. 18766/11 and 36030/11).

¹⁰⁸ *Oliari* (App. Nos. 18766/11 and 36030/11).

¹⁰⁹ *Ratzenbock v Austria* (App. No.28475/12), judgment of 26 October 2017.

¹¹⁰ *Ratzenbock* (App. No.28475/12) at [40].

¹¹¹ H. Fenwick and A. Hayward, “Equal Civil Partnerships: Implications of Strasbourg’s Latest Ruling for Steinfeld and Keidan”, UK *Human Rights Blog*, 21 November 2017, <https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourg-s-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/> [Accessed 22 January 2018].

¹¹² *Schalk* (App. No.30141/04) and *Vallianatos* (App. Nos 29381/09 and 32684/09).

¹¹³ *Oliari* (App. Nos 18766/11 and 36030/11).

¹¹⁴ H. Fenwick and A. Hayward, “Equal Civil Partnerships: Implications of Strasbourg’s Latest Ruling for Steinfeld and Keidan”, UK *Human Rights Blog*, 21 November 2017, <https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourg-s-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/> [Accessed 22 January 2018].

¹¹⁵ H. Fenwick and A. Hayward, “Equal Civil Partnerships: Implications of Strasbourg’s Latest Ruling for Steinfeld and Keidan”, UK *Human Rights Blog*, 21 November 2017, <https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourg-s-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/> [Accessed 22 January 2018].

¹¹⁶ See for comment M. Grigolo, “Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject” (2003) 14(5) Eur. J. of Inter. L. 1023, 1025.

¹¹⁷ *Rees v UK* (1987) 9 E.H.R.R. 56. See also Popplewell-Scezak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016), for comment.

¹¹⁸ *Goodwin* (1996) 22 E.H.R.R. 123.

¹¹⁹ *Goodwin* (1996) 22 E.H.R.R. 123 at [74].

approach. The first in the line of case-law did not deem it appropriate to consider the domestic law in Member States¹²⁰ and merely stated that the matter be kept “under review”.¹²¹ Further case-law did at least take note of international comparisons and established this as a valid methodology towards consensus building.¹²² Eventually, 16 years later, the Court was swayed by an “emerging consensus”,¹²³ and reference was also made to a “continuing international trend”.¹²⁴ The variety of terminology used leads to confusion.¹²⁵ On the facts as well, over the 16-year period examined, there had been very little progress in the number of European countries recognising transpersons’ rights.¹²⁶ To add to the confusion, the Court also examined states outside of Europe, including Australia and New Zealand. Brauch concludes that there are no legal standards to be found in such decisions, arguing that the Court was not “engaged in legal analysis, but in policy making”.¹²⁷ It creates difficulties for those wishing to determine when a consensus will be determined to have been reached in relation to same-sex marriage. This leads to a lack of clarity and predictability as to when the Court will introduce same-sex marriage. The Court frequently reverses previous cases. Reliance is made upon a consensus standard that is not thoroughly explained. Change is needed here. If the Court determines that a matter falls within the MoA due to a lack of consensus, as is the case for same-sex marriage, Member States should be able to predict when a sufficient consensus will be deemed to have been reached.

5. Proposed reform and the advantages this would bring

This article suggests that if the Court continues to stress the need for consensus in future judgments regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court and also has major advantages of transparency, certainty and predictability. Legitimacy is a particularly important at present with certain political factions threatening to leave the Council of Europe.¹²⁸ The “legitimacy of international law is usually attributed to the States’ [original] consent”.¹²⁹ This argument surely holds less weight 50 years after the originally signatures.¹³⁰ The question can also be raised as to how true the original consent argument holds in the face of the fact of the extensive interpretative techniques used by the Court. As demonstrated above, the case-law concerning sexualities has evolved rapidly over the course of the last few years.¹³¹ A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)¹³² to ensure enforcement of any judgment in this area.

¹²⁰ *Rees* (1987) 9 E.H.R.R. 56 at [42].

¹²¹ *Rees* (1987) 9 E.H.R.R. 56 at [47].

¹²² *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622.

¹²³ *Goodwin* (1996) 22 E.H.R.R. 123 at [84]. See also *Tobin*, “Gay Marriage—A Bridge Too Far?” (2007) 15 Ire. Stud. L. Rev. 175.

¹²⁴ *Goodwin* (1996) 22 E.H.R.R. 123 at [84].

¹²⁵ Dzhehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 541. See also Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113.

¹²⁶ McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee” (2016) 65(1) I.C.L.Q. 21.

¹²⁷ Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113, 147. See also Popplewell-Szezak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016).

¹²⁸ See E. Briosa, I. Rorive and L. Van den Eynde, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1 referring to R. Wintemute “Consensus is the right approach for the European Court of Human Rights” (12 August 2010), *The Guardian*.

¹²⁹ Dzhehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 536 referring to Macdonald, “The Margin of Appreciation” (1993), p.123, a former judge of the European Court, who states the whole system of European human rights protection “rests on the fragile foundations of the consent of the Contracting Parties”.

¹³⁰ Dzhehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 536 referring to G. Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR” (2004) 15 Eur. J. of Inter. L. 279, 304

¹³¹ See Section 4.

¹³² See Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248.

As Wintemute comments, forcing minority views on the rest of the countries would “risk a political backlash, which could cause some governments [to] threaten to leave the convention system”.¹³³ The Court also faces “a substantial structural handicap”¹³⁴ in getting its decisions enforced, as this depends upon the actions of Member States.¹³⁵ Were the Court to take a leading role, too far in advance of public opinion, this could lead to a lack of enforcement. Examples of Member States failing to enforce decisions of the Court are easy to find.¹³⁶ Consensus remains an important argument and is “a vital force in judicial policy that the European Court uses when it fears that going against consensus will render its rulings ineffectual”.¹³⁷ Several judges in the Court have also opined that they believe there is a link between consensus and enforcement and acceptance of judgments.¹³⁸ As an international court, the Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of Member States, this will increase the legitimacy of the Court’s role. The proposed reform also has the major advantages of increasing legitimacy, transparency, certainty and predictability. The Court would be operating within the rule of law and not trespassing into a political role.

6. Conclusion

In recent years there has been a transformation in the treatment of LGBT rights. The Court now requires Member States to offer some form of legal protection to same-sex couples Europe-wide (although this could be confined to countries where same-sex couples are accepted socially),¹³⁹ but there continues to be no right to same-sex marriage.¹⁴⁰ This is because of the lack of consensus among Member States on the issue.¹⁴¹ There remains a divide between the largely liberal Western states and the more conservative states of Central and Eastern Europe.¹⁴² It seems likely, however, that at some stage the Court will determine that there is a right to same-sex marriage.¹⁴³ The difficulty remains that currently proponents of same-sex marriage are left with little to guide them as to when the Court will determine this moment has arrived. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know if they can legally marry.¹⁴⁴

The issue of same-sex marriage recognition across Europe illustrates the difficult balance, which the Court has to make, between upholding the universal standard of human rights, whilst respecting regional differences. In relation to same-sex marriage, it remains debateable as to whether the Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation

¹³³ See Wintemute, “Consensus is the right approach for the European Court of Human Rights” (12 August 2010), *The Guardian*.

¹³⁴ Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 534.

¹³⁵ Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248 who explains that the European Court cannot “rely on coercion”. This is in contrast to domestic legislatures who have their decisions enforced immediately. See also Donoho, “Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right (2001) 15 Em. Inter. L. Rev. 391, 422.

¹³⁶ For example *Hirst v United Kingdom (No.2)* (2004) 38 E.H.R.R. 825 removing the blanket ban on prisoners’ voting rights has met with delayed enforcement in the UK. A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press, 2016), p.245 who comment on this as an important example for those who assert the primacy of Parliament.

¹³⁷ Briobria, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1, 19.

¹³⁸ Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] 3 *Public Law* 534, 544–545 referring to K. Dzehtsiarou, *Interview with Judge of the ECtHR Corneliu Birsan* (European Court of Human Rights, Strasbourg, 2010) and K. Dzehtsiarou, *Interview with Judge of the ECtHR Renate Jaeger* (European Court of Human Rights, Strasbourg, 2010).

¹³⁹ *Oliari* (App. Nos 18766/11 and 36030/11).

¹⁴⁰ *Schalk* (App. No.30141/04).

¹⁴¹ *Schalk* (App. No.30141/04) at [57].

¹⁴² See Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248 for discussion.

¹⁴³ *Schalk* (App. No.30141/04) at [105] and *Oliari* (App. Nos 18766/11 and 36030/11) at [178].

¹⁴⁴ See Section 1.

to same-sex marriage. Critics argue that this ignores minorities¹⁴⁵ and results in a lack of legal analysis¹⁴⁶ and no high level of scrutiny.¹⁴⁷ However, in politically sensitive areas such as same-sex marriage, the Court wishes to avoid any charge that it is engaging in “judicial politics”.¹⁴⁸ A wide MoA, due to the emphasis on lack of consensus ensures that the Court does not overstep the “primary responsibility”¹⁴⁹ given under the European Convention to Member States to secure human rights.¹⁵⁰ Despite the emphasis on consensus it is far from clear how the Court determines whether a consensus exists.¹⁵¹ There are also confusions in relation to the terminology used around consensus, where numerous versions of the name are used.¹⁵² Again, no consistency is demonstrated in determining what sources are appropriate for establishing a consensus.¹⁵³ Analysis of case-law relating to sexualities and family law reveals very little to aid our understanding. Despite advancing human rights protections for gay people and same-sex couples, case-law demonstrates a very inconsistent and confusing approach to the use of consensus.¹⁵⁴ Even worse, it results in the charge that the Court is not acting in accordance with the rule of law.¹⁵⁵

This article sets out a novel approach by suggesting that if the Court continues to stress the need for consensus in future judgments regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of the Member States concerned. This is needed at a time when certain political factions are discussing leaving the Council of Europe.¹⁵⁶ Case-law concerning sexualities has evolved rapidly over the last few years.¹⁵⁷ A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)¹⁵⁸ to ensure enforcement of any judgment in this area. The Court also faces “a substantial structural handicap”¹⁵⁹ in getting its decisions enforced, as this depends upon the actions of Member States.¹⁶⁰ Forcing minority views on countries which would otherwise be opposed could also result in a

¹⁴⁵ See Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248, 270; Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, Hodson, “A Marriage by Any Other Name? Shalk and Kopf v Austria (2011) 11(1) H.R.L.R. 170; Sweeney, “Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era” (2005) 54 I.C.L.Q. 459; Lester, “The European Convention in the New Architecture of Europe” (1996) 1 *Public Law* 6; and Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1998–1999) 31 NYUJ of Inter. L. and Politics 843.

¹⁴⁶ See Lewis, “What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation” (2007) 56 I.C.L.Q. 395, 414.

¹⁴⁷ See for discussion Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638 and Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113, 137.

¹⁴⁸ Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 846.

¹⁴⁹ McGoldrick, “A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee” (2016) 65(1) I.C.L.Q. 21, 32.

¹⁵⁰ Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 I.C.L.Q. 638.

¹⁵¹ Briobosia, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1.

¹⁵² Popplewell-Scezak, “The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach” (2016).

¹⁵³ Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534, 544.

¹⁵⁴ See Section 3.

¹⁵⁵ See, e.g. Brauch, “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004–2005) 11 Columbia J. of Eur. Law 113.

¹⁵⁶ Briobosia, Rorive and Van den Eynde, “Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience” 2014 32(1) Berkeley J. of Inter. L. 1 referring to Wintemute, “Consensus is the right approach for the European Court of Human Rights” (12 August 2010), *The Guardian*, <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> [Accessed 22 January 2018].

¹⁵⁷ See Section 4.

¹⁵⁸ See Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248.

¹⁵⁹ Dzehtsiarou, “Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights” [2011] P.L. 534.

¹⁶⁰ Fenwick, “Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis” [2016] E.H.R.L.R. 248 and Donoho, “Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right (2001) 15 Em. Inter. L. Rev. 391, 422

political backlash.¹⁶¹ Consensus therefore remains an important argument which many European judges opine is linked to enforcement and acceptance of judgements.¹⁶² As an international court, the Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of the Member States concerned this can increase the legitimacy of the Court's role. Consensus could therefore, if applied in the suggested more consistent manner, aid the legitimacy of judgments. The proposed reform would also improve transparency, certainty and predictability as proponents of same-sex marriage would be able to judge when the necessary consensus had arrived.

¹⁶¹ See Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), *The Guardian*. See also Y. Zylan, *States of Passion: Law, Identity and Social Construction of Desire* (Oxford University Press, 2011), p.214 and R. Verchick, "Same-Sex and the City" (2005) 37 Urban L. Rev. 191 who discuss backlash following the Massachusetts Supreme Court decision in *Goodridge v Department of Public Health* (2003) 798 N.E. 2d 941, to introduce same-sex marriage in that state in 2003 was widely linked to a backlash in public opinion across the US

¹⁶² See Dzhehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 544–545 referring to K. Dzehtsiarou, *Interview with Judge of the ECtHR Corneliu Birsan* (European Court of Human Rights, Strasbourg, 2010) and K. Dzehtsiarou, *Interview with Judge of the ECtHR Renate Jaeger* (Strasbourg, European Court of Human Rights, 2010).

European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures

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¤ Competence; Courts' powers and duties; Declaratory judgments; Enforcement; European Court of Human Rights; Execution

Abstract

For the 40 years of its existence, the European Court of Human Rights (the Court), in cases where a violation of the European Convention on Human Rights (ECHR) was found, limited itself to the issuing of declaratory judgments, being primarily concerned with whether it was necessary to order awards of monetary just satisfaction to applicants. Increasingly though, over the last two decades, the Court's role in the execution of its own judgments has become more proactive, and in certain categories of judgments it has moved in the direction of indicating non-monetary remedial measures, giving rise to a debate regarding its competence to do so as well as the reasons for and circumstances in which this may be justifiable. In what follows we review the Court's evolving role from issuing only declaratory judgments to exceptionally indicating individual and general remedial measures for the purpose of assisting in the implementation of its judgments.

I. Introduction

For the first 40 years of its existence, the European Court of Human Rights (the Court), in cases where a violation of the European Convention on Human Rights (ECHR) was found, limited itself to the issuing of declaratory judgments, being primarily concerned with whether it was necessary to order awards of monetary just satisfaction to applicants. The Court did not seem to be confident that it had the power to make recommendations to respondent states regarding the steps to be taken to remedy the consequences of the violation of the ECHR. Similarly, it had habitually abstained from making any consequential orders or statements, holding that it falls to the Committee of Ministers (CoM) to supervise the execution of its judgments.

Increasingly though, over the last two decades, the Court's role in the execution of its own judgments has become more proactive than under the traditional dualist view, according to which the Court's judgments are declaratory and it is for the states to choose the means of implementing them within their domestic legal order.¹ It has been aptly noted that this development is reflected in the Court's practice of making reference to art.46 of the ECHR in its judgments,² and setting out its reasoning under para.1 of that article

¹ *Airey v Ireland* (1979) 2 E.H.R.R. 305 at [26], "it is not the Court's function to indicate, let alone to dictate which measures should be taken".

² L.-A. Sicilianos, "The Role of the European Court of Human Rights in the Execution of its Own Judgments", in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (Germany: Ashgate-Nomos, 2014), pp.285–315.

even where the judgments remain declaratory in principle.³ At the same time, in some cases, the Court appears to be claiming a decisive role in the delivering of *restitutio in integrum* to the successful applicants.

Under art.46 of the ECHR, “the High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties”. The Court may deliver declaratory judgments as to whether a certain action by state organs is in conflict with the provisions of the ECHR. In accordance with the principle of subsidiarity,⁴ the Member States enjoy a margin of appreciation in the implementation of the ECHR and the judgments of the Court. Under art.41 the Court may, where *restitutio in integrum* is legally and/or physically impossible, award compensation as “just satisfaction” to the successful applicant for pecuniary and non-pecuniary damage.

Whereas in the large majority of its judgments, the Court’s jurisprudence follows the traditional approach, in certain categories of judgments it has moved in the direction of indicating non-monetary remedial measures. The Court’s indication of non-monetary remedial measures to respondent states in either the operative part of its judgments or in its reasoning has given rise to a debate regarding its competence to do so as well as the reasons for and circumstances in which this may be justifiable. In what follows we review the Court’s evolving role from issuing only declaratory judgments to exceptionally indicating individual and general remedial measures for the purpose of assisting in the implementation of its judgments.

II. Execution of Court’s judgments: a three-fold obligation

A Court’s judgment finding a violation of ECHR imposes three types of obligations on the respondent state: to take the steps to put an end to the violation, to adopt general measures to end similar violations and prevent future ones, and to make reparation to the affected parties for the violation⁵ in order to restore to the extent possible the situation in place before the breach (“*restitutio in integrum*”). Implementation of the Court judgment is thus “a multifaceted task”,⁶ and the obligation of the state goes well beyond the mere payment of damages.⁷

The Court has considered that, whenever *restitutio in integrum* is impossible, either de jure or de facto, the respondent state can only offer partial reparation under art.46 and hence it is for the Court to afford the applicant just reparation.⁸ When the Court has deemed it necessary to award just satisfaction, it is the state’s duty to pay the applicants the relevant sums. “Just satisfaction” has, until recently, been the only measure that the Court could *order* a state responsible for a violation of the ECHR to take, conferring on such a judgment the value of judgment ordering performance, in contrast to its classic declaratory judgment.⁹

Under art.46 Member States are bound to adopt such individual measures in order to ensure that the successful applicant is put, insofar as possible, in the same situation as prior to the violation of the ECHR. In addition, states may have to take general measures, such as the implementation of legislative amendments, in order to prevent further violations of a similar nature. The obligation of the states to adopt general measures is also associated with art.46 of the ECHR and with the requirement not to repeat the violation.¹⁰

³ E. Lambert-Abdelgawad, “The Execution of the Judgments of the European Court of Human Rights: Towards a Non-Coercive and Participatory Model of Accountability” (2009) 69(3) *Heidelberg Journal of International Law* 471, 475.

⁴ See High Level Conference on the future of the European Court of Human Rights, Brighton Declaration (20 April 2012) at http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf [Accessed 25 January 2018].

⁵ E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2nd edn, (Strasbourg: Council of Europe Publishing, 2008), p.10.

⁶ D. Anagnostou and A. Mungiu-Pippidi, *Why Do States Implement Differently the European Court of Human Rights Judgments? The Case Law on Civil Liberties and the Rights of Minorities* (work in progress) (JURISTRAS Project-2009), p.20.

⁷ See, e.g. *Scozzari v Italy* (App. Nos 39221/98 and 41963/98), judgment of 13 July 2000 at [249].

⁸ J.P. Costa, “The Provision of Compensation Under Article 41 of the ECHR”, in D. Fairgrieve, M. Andenas and J. Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: British Institute of International and Comparative Law, 2002), p.6.

⁹ See Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (2008). According to Elisabeth Lambert-Abdelgawad it is “an obligation capable of direct and clear performance”, p.10.

¹⁰ Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, 2nd edn, (Strasbourg: Council of Europe Publishing, 2008), p.20.

It is an obligation to eliminate the cause(s) of the violation, so subsequent applications, whose complaint arises from the same circumstances, should be seen as a problem of execution.¹¹

III. Restitutio in integrum

A judgment finding a violation entails for the respondent state a legal obligation to put an end to the breach and to make reparation for its consequences, so as to restore as far as possible the situation existing prior to the violation, i.e. *restitutio in integrum*.¹² Subject to monitoring by the CoM, the respondent state remains free to choose the means by which it will discharge its legal obligation under art.46 of the ECHR, provided that such means are compatible with the conclusions set out in the Court's judgment.¹³

Reparation, as ordered by the Court under art.41, is intended to place the applicant as close as possible to the position in which he would have been had the violation of the ECHR not taken place.¹⁴ In the landmark case of *Papamichalopoulos v Greece*, the Court held that:

“a judgment in which the Court finds a breach of the Convention imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”¹⁵

Under art.41, *restitutio in integrum* is only required insofar as it is possible under the municipal law of the respondent state.¹⁶

In its judgment in *Guiso-Galliani v Italy*,¹⁷ the Grand Chamber reiterated its position on art.41:

“If the nature of the violation allows for *restitutio in integrum* it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, however, national law does not allow—or allows only partial—reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.”¹⁸

The Court, in the case of *Papamichalopoulos v Greece*, confirmed the principle of *restitutio in integrum* as “it enshrines the obligation on a State that is guilty of a violation to make reparations for the consequences of the violation found”.¹⁹ Failure by the respondent state to execute a Court judgment will also engage the state's international responsibility,²⁰ as a state is “under an obligation to make restitution ... provided that restitution is not ‘materially impossible’” and “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.²¹

Despite the internationally well-established jurisprudence regarding reparation often referred to by the Court in its judgments, its traditional approach remained “essentially declaratory”,²² evincing a lack of

¹¹ L. Wildhaber, “The European Court of Human Rights in Action” (2004) 21 *Ritsumeikan Law Review* 83, 90.

¹² The principle of *restitutio in integrum*, as a principle of international law on reparation, was initiated by the Permanent Court of Justice in its judgment concerning the Factory at Chorzów C.P.J.I., 13 September 1928, *Case concerning the Factory at Chorzów, (Claim for Indemnity) (merits)*, Series A No.17.

¹³ *Scovazzi and Giunta v Italy* (App. Nos 39221/98 and 41963/98) at [249].

¹⁴ *Piersack v Belgium* (App. No.8692/79), judgment of 26 October 1984 at [12], [15]–[16].

¹⁵ *Papamichalopoulos v Greece* (App. No.14556/89), judgment of 31 October 1995 at [34].

¹⁶ *Papamichalopoulos* (App. No.14556/89) at [34].

¹⁷ The judgment in this case marks a departure from the case-law regarding just satisfaction under art.41 in connection with art.1 of Protocol No.1 as pointed out in Judge Spielman's Dissenting Opinion.

¹⁸ *Guiso-Gallisy v Italy* (App. No.58858/00), judgment of 22 December 2009 at [90].

¹⁹ *Guiso-Gallisy* (App. No.58858/00), Dissenting Opinion of Judge Spielman, stressing the importance of *restitutio in integrum*.

²⁰ P. Leach, “No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies”, in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), pp.142–180.

²¹ *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (No.2) (App. No.32772/02), judgment of 30 June 2009 at [85].

²² E.g. *Marckx v Belgium* (1979) 2 E.H.R.R. 330 at [58]; *Assanidze v Georgia* (2004) 39 E.H.R.R. 32 at [202].

confidence regarding “the scope of powers to provide remedies and states’ willingness to comply ...”.²³ This reluctance on the part of the Court to be more prescriptive in its judgments regarding the nature of remedial measures to be taken by a state is under the traditional view a corollary of the conventional respect for state sovereignty in the context of international law and the Court’s adherence to the related principle of subsidiarity.²⁴

It is worth reiterating that the granting of just satisfaction does not always mean that the case at hand is over, as no amount of money awards can prevent similar future violations.²⁵ Under art.46, and where the Court finds a breach, the respondent state is legally obligated not just to pay the money awarded under art.41, but to adopt general and/or individual measures to put an end to the violation both in the present and for the future.

The logical interconnection²⁶ between arts 41 and 46 has been underlined, as has the fact that despite its evolving jurisprudence on art.46, the Court’s approach to art.41 has remained static.²⁷ Since money awards under art.41 are only one of the many measures that can be implemented to redress the violation, the jurisprudence of the Court on art.41 needs to be developed to better reflect the correlation between art.41 and art.46.²⁸

IV. Declaratory judgments

Normally, the judgments of international courts, including the Court, do not have a direct effect within the domestic legal order. They only bind the respondent states, which have the obligation to fulfil and respond to the different orders set out in the operative part of the judgment.²⁹

In *Marckx v Belgium*, the Court stated that its “judgment is essentially declaratory and leaves to the state the choice of the means to be utilised in its domestic legal system for performance of its obligations under art.46(1) [then 53] and cannot of itself annul or repeal inconsistent national law or judgments”.³⁰ The Court has, over the years, reiterated this position³¹ and has refrained from either offering a general approach or from spelling out the measures to be adopted for implementation of its judgments by the Member States. Thus in *Dickson v United Kingdom*, the Court refused the applicant’s request to direct the government to take a specific action, noting that “the Court’s function is, in principle, to rule on the compatibility with the Convention of the existing measures and it does not consider it appropriate in the present case to issue the requested direction”.³²

A judgment by the Court finding a violation of the ECHR is essentially declaratory in character, not prescriptive,³³ amounting to the determination of an internationally wrongful act.³⁴ The Court determines whether the conduct of state authorities by action or omission, in a concrete case, was in conformity with

²³ See Leach, “No Longer Offering Fine Mantras to a Parched Child? The European Court’s Developing Approach to Remedies”, in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (2013), p.145.

²⁴ See the Partly Concurring Opinion of Judge Costa in *Assanidze v Georgia* (2004) 39 E.H.R.R. 32 at [4].

²⁵ J. Laffranque, “Can’t Get Just Satisfaction”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (Germany: Ashgate-Nomos, 2014), pp.75–114.

²⁶ Laffranque, “Can’t Get Just Satisfaction”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (2014), pp.75–114.

²⁷ E. Lambert-Abdelgawad, “Is There a Need to Advance with Regard to Just Satisfaction”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (Germany: Ashgate-Nomos, 2014), pp.115–136.

²⁸ Lambert-Abdelgawad, “Is There a Need to Advance with Regard to Just Satisfaction”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (2014), pp.115–136.

²⁹ G. Ress, “The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order” (2005) 40(3) *Texas International Law Journal* 359, 374.

³⁰ *Marckx v Belgium* (1979) 2 E.H.R.R. 330 at [58].

³¹ See e.g. *Siliver v United Kingdom* (App. Nos 5947/72, 6205/73, 7052/75, 7113/75 and 7136/75), judgment of 25 March 1983 at [113(d)]; *Oleksandr Volkov v Ukraine* (App. No.21722/11), judgment of 9 January 2013 at [194].

³² *Dickson v United Kingdom* (2007) 44 E.H.R.R. 21 at [89].

³³ R. Ryssdal, “The Enforcement System Set Up Under the ECHR”, in M. K. Bulterman and M. Kuijer, (eds), *Compliance With Judgments of International Courts* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996), p.50.

³⁴ J. Polakiewicz, “The Execution of Judgments of the European Court of Human Rights”, in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe* (Oxford: Oxford University Press, 2001), p.56.

the ECHR. Accordingly, where an applicant succeeds in establishing violation of the ECHR, the Court's practice has traditionally been to issue a declaration that the ECHR has been violated.³⁵ The judgments of the Court, as opposed to the judgments of the Inter-American Court of Human Rights,³⁶ were not supposed to have direct effect on domestic law and national authorities unless the domestic law itself requires or at least permits national authorities to apply or execute them.³⁷

Consequently a Court's judgment does not in itself have the effect of quashing a decision³⁸ of the national authorities or abrogating national legislation found to be at variance with the requirements of the ECHR. As the Strasbourg Court itself has repeatedly held, it has no competence to annul, repeal or modify statutory provisions or individual decisions taken by administrative, judicial, or other national authorities.³⁹ It is up to the national organs of the Member States to draw the necessary conclusions from such a decision and Member States "have a wide discretion in the choice of the means to be used"⁴⁰ in implementing the Court's judgments.

V. Indications of individual and general measures

The Court did not, as mentioned above, consider itself competent to make recommendations as to which steps should be taken to remedy the consequences of the ECHR violation⁴¹ and had habitually abstained from making any consequential orders or statements, holding that it falls to the CoM to supervise the execution of its judgments.⁴² Hence the Court would refrain, as a matter of principle, from instructing how a Member State should conform its domestic legislation to the ECHR, leaving it to the state's discretion as to the consequences of relatively vaguely defined norms of conduct.⁴³

In the past, successful applicants have asked the Court to direct the respondent state to introduce necessary legislative amendments so as to bring into conformity with the ECHR national law found to have been at the source of a violation.⁴⁴ Each time the Court categorically replied that the ECHR did not empower it to order the responded state to alter its legislation.⁴⁵ In *Soering v United Kingdom*, the applicant submitted that "just satisfaction of his claims would be achieved by effective enforcement of the Court's ruling" inviting the Court to give directions to the states concerned. The Court declined as: "By virtue of Article 54 [now Article 46], the responsibility for supervising execution of the Court's judgments rests with the Committee of Ministers of the Council of Europe".⁴⁶

More recently in the case of *Khodorkovskiy v Russia*,⁴⁷ the Court, rejecting the applicant's request for specific measures to prevent similar future violations, reiterated that its judgments are declaratory in nature and that the indication of specific measures remains the exception to the rule.

³⁵ P. Leach, "Beyond the Bug River—A New Dawn for Redress Before the European Court of Human Rights" [2005] E.H.R.L.R. 148, 150.

³⁶ Article 68(2) of the American Convention on Human Rights confers immediate legal effect upon the judgments of the Court in domestic law.

³⁷ See Polakiewicz, "The Execution of Judgments of the European Court of Human Rights", in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe* (2001), p.56.

³⁸ See Leach, "No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies", in A. Follesdal,

B. Peters and G. Ulfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (2013), p.160.

³⁹ See Polakiewicz, "The Execution of Judgments of the European Court of Human Rights", in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe* (2001), p.56.

⁴⁰ *Sedjovic v Italy* (2006) 42 E.H.R.R. 17 at [127].

⁴¹ T. Barkhuysen, and M.L. Van Emmerik, "Improving the Implementation of Strasbourg and Geneva Decisions in the Dutch Legal Order: Reopening of Closed Cases or Claims of Damages Against the State", in T. Barkhuysen, M.L. Van Emmerik and P. Van Kempen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2005), p.7.

⁴² See Polakiewicz, "The Execution of Judgments of the European Court of Human Rights", in R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe* (2001), p.57.

⁴³ G. Ress, "The Effects of Judgments and Decisions in Domestic Law", in R. St. J. Macdonald, F. Matcher and H. Petzold (eds), *The European System for the Protection of Human Rights* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1993), p.803.

⁴⁴ See Ryssdal, "The Enforcement System Set Up Under the ECHR", in M. K. Bulterman and M. Kuijer (eds), *Compliance With Judgments of International Courts* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996), p.50.

⁴⁵ See, e.g. *Pelladoah v Netherlands* (App. No.16737/90), judgment of 22 September 1994.

⁴⁶ *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at [127].

⁴⁷ *Khodorkovskiy v Russia* (App. No.5829/04), judgment of 31 May 2011.

The perceived absence of a power to enforce judgments on the part of the Court has been criticised by academics⁴⁸ and by the PACE⁴⁹ as not being conducive to the proper and rapid execution of judgments.⁵⁰ The traditional approach, that the primary remedy in Strasbourg is the finding of a violation of the ECHR itself, has not infrequently attracted criticism from within the Court's ranks; most vehemently by Judge Bonello in his Partly Dissenting Opinion in *Aquilina v Malta*,⁵¹ who stated that it is "wholly inadequate and unacceptable that a court of justice should 'satisfy' the victim of a breach of fundamental rights with a mere handout of legal idiom".

Gradually and increasingly, the Court has thus itself assumed, at least in some cases, more responsibility for the proper execution of its judgments, by giving indications regarding general and/or individual measures, relying mostly on art.46,⁵² regarding the best remedy; or by clearly giving orders for reparation or issuing consequential orders included in the operative part of the judgment. Following the entry into force of Protocol No.11⁵³ and the establishment of the "new Court", the "division of work"⁵⁴ between the Court and the CoM has been changing; at the same time the enlargement of the Council of Europe (CoE) brought to light deep-seated structural problems⁵⁵ which could not be adequately addressed in the traditional declaratory manner.

An early indication of the Court's changing practice is evidenced in its judgment in *Iatridis v Greece*, concerning the withdrawal of a cinema licence, where the Court indicated that the best course of action would be to give the applicant a new cinema licence.⁵⁶ But it was in the case of *Papamichalopoulos v Greece*⁵⁷ (before the entry into force of Protocol No.11), that the Court, for the first time offered the state an alternative: either to make *restitutio in integrum* or to pay compensation for pecuniary damage within six months. Though the Court was deciding on claims of just satisfaction, this has been interpreted as constituting the "first serious assault on the doctrine that [the Court] has no power to issue directions to the states in respect of the execution of its judgments".⁵⁸

Subsequently, the Court has held in a number of property cases⁵⁹ that the respondent state was to return to the applicant, within a period from three to six months, the property concerned.⁶⁰ However, it almost always left open an alternative for the state in directing that, failing restitution, a fixed sum in respect of pecuniary damage⁶¹ was to be paid to the applicant by way of just satisfaction.

1. General measures

A review of the Court's evolving practice to indicate general and/or individual measures to respondent states under art.46 shows that, to date, it has already done so in over 150 cases.⁶² The main category of

⁴⁸ See A. Cassese, *International Law* (Oxford/New York: Oxford University Press, 2002), pp.366–367; R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford/New York: Oxford University Press, 2000), p.1554.

⁴⁹ On the involvement of PACE in the execution of the Court's judgments, see A. Drzemczewski, "The Parliamentary Assembly's Involvement in the Supervision of the Judgments of the Strasbourg Court" (2010) 28(2) *Netherlands Quarterly of Human Rights* 164.

⁵⁰ E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (2nd edn, Strasbourg: Council of Europe Publishing, 2008), p.7.

⁵¹ *Aquilina v Malta* (App. No.25642/94), judgment of 29 April 1999.

⁵² Referred to as "Article 46 judgments".

⁵³ Protocol No.11 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 1 November 1998.

⁵⁴ See Sicilianos, "The Role of the European Court of Human Rights in the Execution of its Own Judgments", in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights-Effects and Implementation* (2014), pp.285–315.

⁵⁵ See Laffranque, "Can't Get Just Satisfaction", in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights-Effects and Implementation* (2014), pp.75–114.

⁵⁶ *Iatridis v Greece* (App. No.31107/96), judgment of 19 October 2000 at [35].

⁵⁷ See *Papamichalopoulos* (App. No.14556/89) at [34].

⁵⁸ See Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (2008), p.27.

⁵⁹ See Leach, "No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies", in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (2013), p.149.

⁶⁰ See *Brumărescu v Romania* (1999) 33 E.H.R.R. 35.

⁶¹ See, e.g. *Raicu v Romania* (App. No.28104/03), judgment of 19 October 2006 at [38].

⁶² See Sicilianos, "The Role of the European Court of Human Rights in the Execution of its Own Judgments", in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights-Effects and Implementation* (2014), pp.285–315.

such judgments is that of pilot judgments⁶³ in which the Court identifies “structural or systemic problems” in the domestic legal order of the respondent state; typically, pilot judgments include a paragraph on their execution in their operative part and the Court may adjourn pending similar cases.⁶⁴ The object of pilot judgments is to assist both the states concerned and the CoM in the execution process whilst providing speedier relief to the many applicants and lessening the workload of the Court.⁶⁵

The pilot judgment procedure has highlighted the importance of the Court’s involvement in the implementation of its own judgments.⁶⁶ This development was welcomed in the CoM 2014 Annual Report where it was pointed out that the indications given by the Court enabled the CoM to focus on cases raising structural problems, while at the same time the respondent states received clear indications as to the required measures in the implementation of the Court’s judgments. Contrary to the traditional view, it can thus be said that the Court can and does facilitate the execution process.

The Court has made indications of general measures in judgments other than pilot ones,⁶⁷ thus implying⁶⁸ that it considers its role in the execution of its judgments not to be restricted to cases with structural issues. It has indicated general measures in a variety of cases concerning violations of different ECHR rights, setting out its views in language that ranges from merely recommendatory to mandatory and prescriptive. Thus, in some judgments the Court “invites” the respondent state to take all necessary measures,⁶⁹ “recommends that the respondent state envisage taking the necessary measures,”⁷⁰ or “expresses the view” that general measures should include amendments to domestic law.⁷¹ In other judgments the Court gives stronger indications for the adoption of certain general measures in the execution of its judgments such as legislative and administrative reforms⁷² and yet in others it indicates “the very essence of the execution measures”,⁷³ allowing a narrower margin of appreciation⁷⁴ than when its recommendations are cast in general terms.

In some judgments⁷⁵ the Court uses prescriptive language in the reasoning, to the effect that the respondent state “must take” the necessary measures, which allows for greater discretion in implementation by the respondent state. Whereas in a number of judgments respecting the introduction of an effective remedy for violations of the art.6(1) guarantee on length of proceedings,⁷⁶ and art.1 Protocol No.1,⁷⁷ the right to property, the Court has included the prescriptive direction in the operative part of the judgment⁷⁸ giving rise to a pressing need (if not quite a legal obligation) on the part of the offending state to comply with the Court’s direction.

⁶³ The pilot judgment procedure was put in place following the adoption of CoM, Resolution Res(2004)3 on judgments revealing an underlying systemic problem (adopted by the CoM on 12 May 2004, at its 114th Session).

⁶⁴ See, e.g. *Broniowski v Poland* (2004) 43 E.H.R.R. 1.

⁶⁵ See, e.g. C. Paraskeva, “Human Rights Protection Begins and Ends at Home: The ‘Pilot Judgment Procedure’ Developed by the European Court of Human Rights” (2007) 3 *Human Rights Law Commentary*.

⁶⁶ See Lambert-Abdelgawad, “The Execution of the Judgments of the European Court of Human Rights: Towards a Non-Coercive and Participatory Model of Accountability” (2009) 69(3) *Heidelberg Journal of International Law* 471, 475.

⁶⁷ See A. Mowbray, “An Examination of the European Court of Human Rights’ Indication of Remedial Measures” (2017) 17 (3) *Human Rights Law Review* 451–478.

⁶⁸ See Siciliano, “The Role of the European Court of Human Rights in the Execution of its Own Judgments”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights-Effects and Implementation* (2014), pp.285–315.

⁶⁹ *Scordino v Italy (No.1)* (2006) 45 E.H.R.R. 7 at [240] (length of proceedings).

⁷⁰ *MD v Malta* (App. No.64791/10), judgment of 17 July 2012 at [90].

⁷¹ See *M v Bulgaria* (App. No.41416/08), judgment of 26 July 2011 at [138]; *Vasilev v Bulgaria* (App. No.14966/04), judgment of 31 May 2012 at [69].

⁷² See *Sarica v Turkey* (App. No.11765/05), judgment of 27 May 2010 at [58].

⁷³ See Siciliano, “The Role of the European Court of Human Rights in the Execution of its Own Judgments”, in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights-Effects and Implementation* (2014), pp.285–315.

⁷⁴ See, e.g. *Pulatli v Turkey* (App. No.38665/07), judgment of 26 April 2011 at [39].

⁷⁵ See, e.g. *Kaverzin v Ukraine* (App. No.23893/03), judgment of 15 May 2012 at [182].

⁷⁶ E.g. *Vassilos Athanasiou v Greece* (App. No.50973/08), judgment of 21 December 2010, operative part at [5]; *Finger v Bulgaria* (App. No.37346/05), judgment of 10 May 2011, operative part at [5].

⁷⁷ See, e.g. *Grudic v Serbia* (App. No.31925/08), judgment of 17 April 2012, operative part at [3(d)].

⁷⁸ For a more detailed analysis of the development in the Court’s jurisprudence, see L.-A. Siciliano, “The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46” (2014) 32(3) *Netherlands Quarterly of Human Rights* 235.

2. Individual measures

In contrast to general measures, indications for individual measures by definition must narrow the margin of appreciation available to the respondent state. In numerous cases against Turkey⁷⁹ (in which the applicant had been convicted by a security court, in violation of art.6 of the ECHR),⁸⁰ the Court has indicated what the respondent state must do in order to comply with the judgment. In *Alfatli v Turkey*, it included in its reasoning under art.41, “in principle, the most appropriate form of relief would be to ensure the applicant in due course a retrial by an independent and impartial tribunal”.⁸¹ In its judgment in *Öcalan v Turkey*, the Grand Chamber, in its reasoning under art.46, endorsed the case-law of the Chambers in these judgments against Turkey and reiterated that “a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation”.⁸² The Court has indicated such measures to remedy procedural defects pointing out, in the reasons, that the reopening of proceedings⁸³ is in principle the only remedy available.

In some cases the Court goes beyond a recommendation and actually orders (in the operative part) the reopening of proceedings where it is possible under domestic law and civil procedure.⁸⁴ Similarly, indications of individual measures relating to violations of the right to property are more coercive⁸⁵ when included in the operative part of the judgment.⁸⁶ Finally, in some judgments the Court has indicated both individual and general measures, the first to provide a remedy for the applicant and the latter to prevent similar violations in the future.⁸⁷

More precise indications were first given in *Assanidze v Georgia* where the Grand Chamber ordered, for the first time, an applicant’s release at the earliest possible date, in addition to the payment of just satisfaction. The Court held that by its very nature, the violation found (continued deprivation of liberty despite the existence of a court order for release) did not leave any real choice as to the measures required to remedy it, in contrast to the usual discretion a state enjoys in these matters.⁸⁸ In its release order the Court refers clearly to art.46 of the ECHR.

In *Ilascu v Moldova and Russia*, the Court ordered the release of arbitrarily detained applicants and held that “any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent states’ obligation under Article 46(1) of the Convention to abide by the Court’s judgment”.⁸⁹ The Court added that “the respondent states are to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release”.⁹⁰ It thus appears that the Court is empowered to give precise orders where the respondent state cannot reasonably claim any discretion in the matter.⁹¹

The orders for the release of the applicants in *Assanidze* and *Ilascu*, both included in the operative part of the respective judgment, were approvingly mentioned in the CoM’s first Annual Report.⁹² In this first

⁷⁹ W. Vandenhole, “Execution of Judgments”, in P. Lemmens, and W. Vandenhole (eds), *Protocol No.14 and the Reform of the European Court of Human Rights* (Intersentia, 2005), p.109.

⁸⁰ *Gencel v Turkey* (App. No.53431/99), judgment of 23 October 2003.

⁸¹ See *Alfatli v Turkey* (App. No.32984/96), judgment of 30 October 2003 at [52].

⁸² *Öcalan v Turkey* (2005) 41 E.H.R.R. 45 at [210].

⁸³ See, e.g. *Majadallah v Italy* (App. No.62094/00), judgment of 19 October 2006; *Sejovic v Italy* (2006) 42 E.H.R.R. 17 at [126].

⁸⁴ *Lungoci v Romania* (App. No.62710/00), judgment of 26 January 2006 at [56] and operative part at [3(a)].

⁸⁵ See Lambert-Abdelgawad, “The Execution of the Judgments of the European Court of Human Rights: Towards a Non-Coercive and Participatory Model of Accountability” (2009) 69(3) *Heidelberg Journal of International Law* 471, 475.

⁸⁶ *Raicu v Romania* (App. No.28104/03), judgment of 19 October 2006 at [38].

⁸⁷ See, e.g. *MD v Malta* (App. No.64791/10), judgment of 17 July 2012 at [89]-[90]; *Savridin Dzhurayev v Russia* (App. No.71386/10), judgment of 25 April 2013 at [264].

⁸⁸ *Assanidze v Georgia* (2004) 39 E.H.R.R. 32 at [202]-[204] and operative part at [14(a)].

⁸⁹ *Ilascu v Moldova and Russia* (App. No.48787/99), judgment of 8 July 2004 at [490].

⁹⁰ *Ilascu* (App. No.48787/99), operative part at [22].

⁹¹ See, e.g. *Fatullayev v Azerbaizan* (2010) 52 E.H.R.R. 2 at [174]; *Karanović v Bosnia and Herzegovina* (App. No.39462/03), judgment of 20 November 2007.

⁹² *Supervision of the Execution of Judgments of the European Court of Human Rights*, 1st Annual Report 2007, Strasbourg, March 2008, p.17.

official response to the Court's precise indications of the remedial measures that the respondent states should take, the power of the Court to indicate non-monetary individual remedial measures was thus quietly acknowledged.

More recently, in *Del Rio Prada v Spain*, regarding violations of arts 5(1) and 7 of the Convention, the Grand Chamber, both in its reasoning under art.46 and in the operative part of the judgment, prescribed "that the respondent state is to ensure that the applicant is released at the earliest possible date",⁹³ an individual measure tantamount to an injunction, that left no room for manoeuvre to the respondent state.

There are also a number of Chamber judgments where the Court has indicated very specific individual measures regarding violations of various Convention rights. Thus, in the case of *Volkov v Ukraine*, the Court held in the operative part of its judgment, that the respondent state shall secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date.⁹⁴ In the context of a violation of the right to family life under art.8, the Court directed the respondent state to "secure effective contact between the applicant and his daughter at a time which is compatible with the applicant's work schedule and on suitable premises ...".⁹⁵ In the case of *Youth Initiative for Human Rights v Serbia* (violation of art.10) the Court issued a specific direction inclusive of a deadline, to the respondent state, to "ensure within three months from the date on which the judgment becomes final ... that the intelligence agency of Serbia provide the applicant with the information requested".⁹⁶

The issue of the competence of the Court to make recommendations to respondent states for the adoption of either general or specific remedial measures, that go beyond the classic monetary award for "just satisfaction", upon the finding of a violation of the ECHR, became the subject of dissenting opinions in the case of *Ferreira (No.2) v Portugal*.⁹⁷ The applicant had made a second application to the Court, relying on art.46 (as well as alleging new violation of art.6(1)) following a refusal by the Portuguese Supreme Court to order reopening of criminal proceedings as recommended in an earlier Chamber judgment⁹⁸ following a finding of a violation of art.6(1).

The majority of the Grand Chamber dismissed the allegation under art.46 as outside the Court's competence and found no violation of art.6(1). In examining the issue of the reopening of proceedings, the Court states that "it does not have jurisdiction to order the reopening of proceedings" which of course is not accurate,⁹⁹ as is pointed out in one of the dissenting opinions. The wide divergence of views as expressed in the dissenting opinions regarding the Court's competence to indicate individual remedial measures has created unnecessary confusion regarding the Court's willingness, as clearly demonstrated in certain categories of judgments, to be more directive in suggesting specific measures to remedy violations of the Convention by respondent states.

The judges in their dissenting opinions seem to adopt two extreme positions, with President Raimondi claiming on the one hand that the Court is invested with no competence, of any kind, in the field of the execution of judgments¹⁰⁰ and Judge Pinto de Albuquerque asserting on the other that "judgments of the Court are not merely declaratory"¹⁰¹ and "that obligations imposed in the operative part and those included only in the reasoning part of the judgment have the same legal force, in spite of the different formulation given to them".¹⁰²

⁹³ *Del Rio Prada v Spain* (App. No.42750/09), judgment of 21 October 2013 at [133] et seq. and operative part, at [3].

⁹⁴ *Volkov v Ukraine* (App. No.21722/11), judgment of 9 January 2013, operative part at [9]; see also *Fatullayev v Azerbaijan* (2010) 52 E.H.R.R. 2, operative part at [6].

⁹⁵ *Gluhakovic v Croatia* (App. No.21188/09), judgment of 12 April 2011 at [3].

⁹⁶ *Youth Initiative for Human Rights v Serbia* (App. No.48135/06), judgment of 25 June 2013, operative part at [4].

⁹⁷ *Ferreira (No.2) v Portugal* (App. No.19867/12), judgment of 11 July 2017.

⁹⁸ *Ferreira v Portugal* (App. No.19808/08), judgment of 5 July 2011.

⁹⁹ E.g. *Lungoci v Romania* (App. No.62710/00), judgment of 26 January 2006 at [56] and operative part at [3(a)]; *Maksimov v Azerbaijan* (App. No.38228/05), judgment of 8 October 2010 at [46] and operative part at [3].

¹⁰⁰ See *Ferreira (No.2)* (App. No.19867/12), Dissenting Opinion of judge G. Raimondi at [4].

¹⁰¹ *Ferreira (No.2)* (App. No.19867/12), Judge Pinto de Albuquerque, Dissenting Opinion at [57].

¹⁰² *Ferreira (No.2)* (App. No.19867/12), Judge Pinto de Albuquerque, Dissenting Opinion at [17].

The opinions aired in this latest case on the issue of the Court's competence to be more directly involved in the execution of its judgments do not reflect the Court's own practice as described in this article, but rather the judges' failure to appreciate the evolving role of the Court, from purely declaratory judgments in all cases, to indications of remedial measures in certain categories of judgments that lent themselves to such judicial intervention.

VI. Concluding remarks

Questions regarding the legal basis for the Court's increasingly proactive role have been raised and considered by academics and judges,¹⁰³ in an ongoing debate. It is generally pointed out by those who argue that the Court has the competence to indicate execution measures that a legal basis for such "judicial activism" is found within the Convention, and in particular arts 46, 19 and 32.¹⁰⁴ It is further pointed out that the Court is not acting alone in pursuing a more active role in the implementation of its judgments. The CoM has on a number of occasions adopted resolutions¹⁰⁵ and recommendations¹⁰⁶ relating to the effective implementation of judgments which clearly aim at enabling the Court's involvement in the execution process. In its latest report on the implementation of judgments of the Court,¹⁰⁷ the PACE Committee on Legal Affairs and Human Rights refers approvingly to the more proactive role of the Court in the implementation of its judgments and the "strengthened interaction" between the Court and the CoM.

On the other hand, whilst nodding approvingly towards the Court's more active role in the context of pilot judgments, the Steering Committee for Human Rights (CCDH) in its 2015 report¹⁰⁸ reiterates its position that the Court should restrict the practice of giving specific indications to the narrow category of those exceptional cases that "leave no real choice as to the measure(s), in particular individual ones, required to remedy it".

In *Khodorkovskiy v Russia*,¹⁰⁹ the Court proceeds to outline these "exceptional cases"¹¹⁰ and to distinguish them from the case at hand. A perusal of the different categories of "exceptional cases" demonstrate flexibility on the part of the Court to consider that the circumstances of a given case may require the indication of specific remedial measures. In such cases, the Court, which finds a violation of the ECHR, is undoubtedly the most suitable legal organ of the CoE to also prescribe the appropriate remedy.

There appears to be a consensus amongst commentators, judicial and academic, that the indication of specific execution measures by the Court, in the areas where it has done so to date (property restitution, unlawful detention, unfair trial, pilot and quasi pilot judgments) provides a degree of clarity that both facilitates the task of the CoM in supervising execution, and respondent states in implementing the judgment. As such, the directive approach is considered a positive development, whilst it is emphasised that the Court's interventionism occurs only in exceptional cases and adherence to the principle of

¹⁰³ See, e.g. Lambert-Abdelgawad, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-Coercive and Participatory Model of Accountability" (2009) 69(3) *Heidelberg Journal of International Law* 471, 475; Judge Malinverni's Dissenting Opinion in *Verein gegen Tierfabriken Schweiz (Vgt) v Switzerland (No.2)* (App. No.32772/02), judgment of 30 June 2009.

¹⁰⁴ Critics of the Court's proactive role consider the indication of measures as "judicial activism" referred to in L.-A. Siciliano, "The Role of the European Court of Human Rights in the Execution of its own Judgments", in A. Seibert-Fohr and M. Villiger (eds), *Judgments of the European Court of Human Rights—Effects and Implementation* (2014), p.303.

¹⁰⁵ Resolution Res(2004)3 on "judgments revealing an underlying systemic problem", invites the Court to identify systemic problems in order to better assist the States and the Committee of Ministers in the execution process".

¹⁰⁶ CoE, (CoM) Recommendation CM/Rec(2004)6 on the Improvement of Domestic Remedies; CoE, (CoM) Recommendation CM/Rec(2010)3 on Effective Remedies for Excessive Length of Proceedings.

¹⁰⁷ Doc.13864, Committee on Legal Affairs and Human Rights, PACE, CoE, Rapporteur: Mr Klaas de Vries, "Implementation of judgments of the European Court of Human Rights", 9 September 2015, para.40.

¹⁰⁸ DH-GDR(2015)R9 (Addendum), CDDH, "Draft CDDH report on the longer-term future of the system of the ECHR", Strasbourg, 20 November 2015, pp.58–59.

¹⁰⁹ *Khodorkovskiy v Russia* (App. No.5829/04).

¹¹⁰ *Khodorkovskiy* (App. No.5829/04) at [270].

subsidiarity does not waver. Similarly the role of the CoM in overseeing the execution of judgments remains paramount and the Court's prescriptive approach complements, rather than substitutes, that role.¹¹¹

The issue of the execution of judgments has remained central to the debate regarding the reform of the Court, highlighting the importance of introducing effective strategies towards better and more prompt implementation of judgments. A number of related issues have come to the foreground as a result of the Court's assumption of a more proactive role, as indicated in Concurring Opinions¹¹² by judges of the Court in the context of infringement of rights protected by art.6(1) of the Convention. These include the following: the operative provisions of the judgment are the only ones with binding effect and the Court should not hesitate from including specific directions, where appropriate, in that part of the judgment and not just in the reasoning; the application of the principle of *restitutio in integrum*, in cases where that is possible, should be pursued by the Court; and that since the aim of reparation is to restore the victim of the violation to the status quo ante, money awards under art.41 are of a subsidiary nature; the fact that supervision of the execution of judgments under art.46(2) is the responsibility of the CoM does not entail that the Court itself has no role in the matter and should not contribute to the fulfilment of this task by indicating, not only the source of the violation, but the remedy as well.

The Court has progressively abandoned the absolute adherence to the traditionalist stance regarding non-involvement in the execution of its judgments. This is a welcome development, especially where the circumstances of the case allow for indication of measures that provide *restitutio in integrum* to the wronged applicant. The question remains how far it is prepared to go in this direction in the face of possible opposition regarding the invasion of state sovereignty¹¹³ and the alleged undermining of the doctrine of subsidiarity.¹¹⁴

¹¹¹ *Liu v Russia* (No.2) (App. No.29157/09), judgment of 26 July 2011 at [65].

¹¹² *Romanov v Russia* (App. No.41461/02), judgment of 24 July 2008, Joint Concurring Opinion, judges Spielman and Malinveri; *Ilatovskiy v Russia* (App. No.6945/04), judgment of 9 July 2009, Joint Concurring Opinion of judges Spielman and Malinveri; *Salduz v Turkey* (App. No.36391/02), judgment of 27 November 2008, Joint Concurring Opinion Judges Rozakis, Spielman, Ziemele and Lazarova Trajkovska.

¹¹³ E.g. controversy over the issue of prisoner voting in the UK and negative response to the pilot judgment in *Greens and MT v United Kingdom* (App. Nos 60041/08 and 60054/08), judgment of 23 November 2010.

¹¹⁴ But see Leach, "No Longer Offering Fine Mantras to a Parched Child? The European Court's Developing Approach to Remedies", in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (2013), p.160.

Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain

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Franchise; Identification; Indirect discrimination; Local elections; Right to vote; United States

Abstract

This article examines the human rights implications of the British Government's proposals to reform the electoral process in Great Britain, with a particular focus upon the Conservative Party's 2017 manifesto pledge to introduce compulsory identification requirements in UK elections. Moreover, this article addresses the issue of voter identification laws in light of the recent announcement that voters in a pilot study will be required to produce some form of identification before voting in the May 2018 English local elections. Bearing in mind the experiences of compulsory voter identification laws in other countries, most notably the US, and the requirements of art.3 of the First Protocol to the ECHR, this article argues that the British Government must not impose requirements that may risk disenfranchising a large proportion of the electorate.

1. Introduction

In September 2017 the British Government announced that a pilot scheme to combat electoral fraud would be trialled in the May 2018 local elections in England which would require individuals in five areas to present some form of identification before voting in polling stations.¹ Whilst this requirement is now familiar practice in Northern Ireland,² voters in the rest of the UK have historically been able to cast their votes in person simply by confirming their name and address. Despite being routinely practised in many countries throughout the world, placing a legal obligation upon members of the electorate to produce identification before voting has often been criticised for dissuading voters as well as, more troublingly, disenfranchising poor, minority and elderly citizens due to the fact that procuring approved forms of identification can be costly and burdensome.³

This article will discuss the recent UK proposals from a human rights perspective, primarily the European Convention on Human Rights (ECHR) which guarantees a number of rights essential to political participation, not least of all art.3 of the First Protocol to the Convention,⁴ but also other international sources when relevant.⁵ Should the pilot scheme be deemed a success and compulsory voter identification

¹ Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017), <https://www.gov.uk/government/news/voter-id-pilot-to-launch-in-local-elections> [Accessed 22 January 2018].

² See the Electoral Office for Northern Ireland, www.eoni.org.uk/Home [Accessed 22 January 2018].

³ Although not addressed in this article, another criticism relates to the administration of vast quantities of personal data which raises concerns about the right to respect for privacy.

⁴ Article 3 of the First Protocol to the ECHR states: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

⁵ See, e.g. the EU Charter of Fundamental Rights arts 39–40 and the International Covenant on Civil and Political Rights 1966 art.25, which go further than the ECHR in several ways.

is implemented across the entire country, this article argues that the UK Government should be mindful of its human rights obligations and the experiences in other countries that impose similar identification requirements. At the same time, the article may be of interest to stakeholders in other European countries which have similar practices.

Following this introduction, Section 2 discusses the rationale and the logistics of the pilot scheme that will be trialled in the 2018 local elections in England, before analysing how compulsory voter identification has been received elsewhere, in particular the US, to identify what lessons could be learned and what mistakes could be avoided. In light of this discussion, Section 3 outlines and applies the human rights framework concerning the “right to vote” before Section 4 concludes and evaluates the UK proposals.

2. The introduction of compulsory voter identification and the dangers of disenfranchisement

In 2014 the Electoral Commission recommended that voters in Great Britain should be required to prove their identity when casting their vote, suggesting that voting in person “remains vulnerable to personation fraud” due to the “few checks” in place to prevent impersonation, which could be even more of a risk if electoral registration and other voting methods become more secure.⁶ The Electoral Commission followed up these suggestions in 2015 with a proposed proof of identity scheme that could be applied in elections in Great Britain, drawing upon the experiences of Northern Ireland and Canada, and taking into account concerns about compulsory identification.⁷ The Commission suggested that only the following forms of identification should be allowed when voting in person due to certain security features and the verification process when obtaining the document: a photographic driving licence, passport, Proof of Age Standards Scheme (PASS) card, military identification card, police identification card, a firearms licence, and certain photographic public transport passes.⁸

Proposals to reform electoral practice did not feature in the Conservative Party 2015 manifesto but, amongst other electoral reforms, the 2017 Conservative Party manifesto pledged to “legislate to ensure that a form of identification must be presented before voting”⁹. Following up on that pledge, the Cabinet Office revealed in September 2017 that a pilot study requiring eligible voters to present identification would be conducted in the next round of local elections in May 2018 in five areas of England: Woking, Gosport, Bromley, Watford and Slough.¹⁰ According to Chris Skidmore, the Minister for the Constitution:

“For people to have confidence in our democratic processes we need to ensure that our elections are safeguarded against any threat or perception of electoral fraud. The current situation of people simply pointing out their name without having to prove who they are feels out of date when considering other safeguards to protect people’s identity. It is harder to take out a library book or collect a parcel at a post office than it is to vote in someone’s name.”¹¹

According to the announcement, the pilot study will test a variety of means of identification which will be set by each respective council, but the trial will involve “both photo ID and non-photo ID to see what is most effective and efficient”.¹² The Electoral Commission has pledged to publish their own research

⁶ Electoral Commission, “Electoral Fraud in the UK: Final Report and Recommendations” (January 2014), p.5, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/164609/Electoral-fraud-review-final-report.pdf [Accessed 22 January 2018].

⁷ Electoral Commission, “Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain” (December 2015), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/194719/Proof-of-identity-scheme-updated-March-2016.pdf [Accessed 22 January 2018].

⁸ Electoral Commission, “Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain” (December 2015), para.4.7.

⁹ Conservative Party Manifesto 2017, p.43.

¹⁰ Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

¹¹ Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

¹² Cabinet Office, “Voter ID Pilot to Launch in Local Elections”, Press Release (16 September 2017).

on the issue of compulsory voter identification following the pilot scheme in the English local elections in May 2018.¹³

The proposals have attracted a great deal of media attention,¹⁴ some strong opposition from campaigning groups,¹⁵ and considerable political opposition, primarily from the Labour Party whose supporters argue that it will be their traditional voter demographic that will be most affected.¹⁶ To date, however, there has been little academic commentary on the proposals, or similar European practices, from a legal or human rights perspective.

One possible explanation for this is that compulsory voter identification is not a wholly novel concept to the UK, as voters in Northern Ireland have been required to submit some form of identification since 1985. At the same time, many European countries require (or can request) voters to produce some form of identification when voting in polling stations, for example, France,¹⁷ Germany,¹⁸ Norway,¹⁹ and Spain.²⁰ Whilst the issue has attracted considerable attention in some regions where discrimination has been a widespread problem in the past, in particular Africa and Latin America,²¹ and the US,²² there has been a considerable lack of scrutiny in Europe. This divergence is, to some extent, understandable, given the blatant racial discrimination that has shaped much of the political history of the US and the turbulent political climates that still exist in many parts of the world, but one must not forget that it took many centuries in the UK for the franchise to expand beyond the narrow circle of wealthy middle and upper-class men to also include women, the young, and the working class.²³

At this stage, the experiences in Northern Ireland and the US warrant closer examination; the first due to its obvious cultural, legal and political connection to England and the European human rights framework, and the latter due to the significant legal challenges that have played out in various US states which expose how controversial compulsory identification can be when fundamental rights are at stake. The legal challenges that have arisen in the US will provide some clues as to the possible rights-based complaints that may arise in England if the proposals are implemented across the country. Furthermore, in contrast to the experience in Northern Ireland, the fierce opposition to strict compulsory identification laws in some US states demonstrates how varied the political and legal responses to compulsory identification have been, which should provide the UK authorities with plenty of food for thought.

In Northern Ireland eligible voters have been required to present identification when voting in person in polling stations since 1985, with photographic identification being needed since 2003.²⁴ Voters are

¹³ The Chief Executive of the Electoral Commission confirmed that "an independent, statutory evaluation of the pilot schemes" will be published in summer 2018.

¹⁴ See, e.g. J. Elgot, "Voters to be Asked for ID in Trials of System to Combat Electoral Fraud" (16 September 2017), *The Guardian*, <https://www.theguardian.com/politics/2017/sep/16/voters-to-be-asked-for-id-in-trials-of-system-to-combat-electoral> [Accessed 22 January 2018]; T. Peck, "Government to Trial Photo ID at Polling Stations to Combat Voter Fraud" (15 September 2017), *The Independent*, <http://www.independent.co.uk/news/uk/politics/photo-id-identification-voter-fraud-picicles-review-a7949396.html> [Accessed 22 January 2018].

¹⁵ Electoral Reform Society, "Opposing Voter ID", <https://www.electoral-reform.org.uk/campaigns/upgrading-our-democracy/voter-id/> [Accessed 22 January 2018].

¹⁶ See, e.g. S. Bush, "Is the Government's Plan for Voter ID an Attack on Labour Voters?" (18 May 2017), *New Statesman*, <https://www.newstatesman.com/politics/staggers/2017/05/government-s-plan-voter-id-attack-labour-voters> [Accessed 22 January 2018]; B. Kentish, "Government Plans to Force Voters to Show ID Roundly Condemned" (27 December 2016), *The Independent*, <http://www.independent.co.uk/news/uk/politics/government-plans-voter-id-checks-condemned-eric-picicles-tower-hamlets-ken-livingstone-a7497501.html> [Accessed 22 January 2018].

¹⁷ Code Électoral (Electoral Code) art.L62.

¹⁸ Bundeswahlordnung (Federal Election Code) s.56.

¹⁹ Representation of the People Act (the Election Act) (Act No.57 of 28 June 2002 relating to parliamentary and local government elections) s.8(4).

²⁰ Ley Orgánica (Organic Law) 5/1985 (19 June) of the General Electoral Regime art.85.

²¹ The Carter Center, *Voter Identification Requirements and Public International Law: An Examination of Africa and Latin America* (2013), <https://www.cartercenter.org/resources/pdfs/peace/democracy/des/voter-identification-requirements.pdf> [Accessed 22 January 2018].

²² See, e.g. R.K. Scher, *The Politics of Disenfranchisement: Why is it so Hard to Vote in America?* (Routledge, 2011); D.J. Hopkins, M. Meredith, M. Morse, S. Smith and J. Yoder, "Voting but for the Law: Evidence from Virginia on Photo Identification Requirements" (2017) 14 *Journal of Empirical Legal Studies* 79; P. Aschenbrenner, "United States: Voter Identification 'ID' Cases" (2013) *Public Law* 184; C. Watts, "Road to the Poll: How the Wisconsin Voter ID Law of 2011 is Disenfranchising its Poor, Minority, and Elderly Citizens" (2013) 3(1) *Columbia Journal of Race and Law* 119.

²³ It was not until the Representation of the People Act 1928 when equal suffrage was finally established in the UK.

²⁴ The Electoral Fraud (Northern Ireland) Act 2002. The first election that took place with this new requirement in force was the November 2003 Northern Ireland Assembly elections.

required to produce one of seven forms of photographic identification when voting in person.²⁵ Specifically for this purpose the Electoral Office in Northern Ireland established the Electoral Identity Card (EIC) to serve as one of the acceptable forms of identification, which individuals can apply for by post or in person if they do not hold one of the other forms of identification. If applying for an EIC in person, the individual merely has to be on the electoral register and provide their National Insurance Number.²⁶ Crucially, no direct cost is incurred when registering for the EIC in this way.

In contrast to the relatively smooth and uncontentious practice of compulsory voter identification in Northern Ireland, similar requirements in some US states have proven much more controversial due to the perceived detrimental impact upon the ability of black and other minorities to vote,²⁷ as well as the burdens imposed on elderly or disabled members of the electorate. Between 1965 and 2013, several states in the US had to seek Federal approval before amending their electoral rules, due to the historic racial discrimination in those states.²⁸ However, following the US Supreme Court decision in *Shelby County v Holder* in 2013 which determined that the formula used to identify which states were to be subject to federal oversight was unconstitutional,²⁹ states are now able to amend their electoral rules more freely.

In that regard, 34 US states currently impose or will soon impose voter identification laws of some kind.³⁰ There have been many significant legal challenges to some of these laws which have generally been dealt with by the respective state's own judicial system, but the US Supreme Court has occasionally intervened, demonstrating how seriously the issue of compulsory voter identification is treated. In recent years, some of the strictest voter identification laws have been challenged in several states, for example Pennsylvania,³¹ South Carolina,³² North Carolina,³³ Georgia,³⁴ Missouri,³⁵ and perhaps most importantly due to the intervention of the US Supreme Court, Indiana.³⁶

Of these states, the changes to the electoral rules in Georgia in 2005 imposed arguably the strictest compulsory identification rules of all. Following these reforms, voters were required to present photographic identification.³⁷ No state-issued photographic identification was available free of charge, and provisional voting (i.e. allowing an elector to vote subject to a later identification check) was not allowed. Following a civil action complaint, the District Court found that these requirements placed an undue burden on citizens, mostly due to the inconvenience of having to travel to registrar offices to acquire a voter identification card, which was particularly problematic for elderly and disabled electors due to the long queuing periods.³⁸ In response, the Georgian legislature reformed these requirements and now provide free photographic identification, allow other non-photographic forms of identification in polling stations, and provide provisional ballots.³⁹

²⁵ Voters may use a UK, Irish or EEA driving licence; a UK, Irish or EU passport; a Translink Senior SmartPass; a Translink 60+ SmartPass; a Translink War Disabled SmartPass; or a Translink Blind Person's SmartPass.

²⁶ Electoral Office for Northern Ireland, Electoral Identity Card: How to apply, <http://www.eoni.org.uk/Electoral-Identity-Card/How-to-apply> [Accessed 22 January 2018].

²⁷ In addition to the literature already cited, see American Civil Liberties Union, *Oppose Voter ID Legislation: Fact Sheet*, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (last updated May 2017) [Accessed 22 January 2018].

²⁸ The Voting Rights Act 1965.

²⁹ *Shelby County v Holder* 570 US 2 (2013).

³⁰ W. Underhill, *Voter Identification Requirements: Voter ID Laws (National Conference of State Legislatures)*, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last updated 5 June 2017) [Accessed 22 January 2018].

³¹ *Viviette Applewhite v The Commonwealth of Pennsylvania; Thomas W. Corbett (Governor); Carole Aichele (Secretary of the Commonwealth)* 330 MD (2012).

³² *South Carolina v United States of America and Eric Hampton Holder (Attorney General of the United States) and James Dubose* 898 F.Supp. 2d 30 (DDC, 2012).

³³ *North Carolina State Conference of the NAACP v McCrory* , 831 F.3d 204 (4th Cir. 2016).

³⁴ *Common Cause/Georgia League of Women v Billups* 439 F.Supp. 2d 1294 (N.D. Ga. 2006).

³⁵ *Weinschenk v State of Missouri* 203 S.W. 3d 201 (Mo. banc 2006).

³⁶ *Crawford v Marion County* 553 US 181 (2008).

³⁷ *Common Cause/Georgia League of Women* 439 F.Supp. 2d 1294 (N.D. Ga. 2006). Individuals challenged the 2005 Amendment to the Official Code of Georgia (OCGA) (Act No.53) (The 2005 Photo ID Act).

³⁸ *Common Cause/Georgia League of Women* 439 F.Supp. 2d 1294 (N.D. Ga. 2006).

³⁹ OCGA § 21-2-417, § 21-2-417.1 and § 21-2-418 (2016).

In Missouri, which also implemented strict identification requirements in 2006, a free form of photographic identification was provided by the state but the Missouri Supreme Court struck down the law due to the unreasonable hidden costs incurred when individuals applied for this document.⁴⁰ The law was subsequently reformed and voters can now cast their vote if they have photographic identification, a non-photographic form of identification such as a utility bill, or if they possess no form of identification, a provisional ballot may be issued subject to verification.⁴¹

Lastly, in Indiana, which was the first state to have its compulsory voter identification laws challenged before the US Supreme Court, voters are required to present a form of photographic identification issued by the US government or the state itself, which may be provided for free if necessary.⁴² Voters without identification can be provided with a provisional ballot, but they must present valid identification afterwards. The US Supreme Court upheld the Indianan identification law, finding that the Indianan legislature had legitimate reasons to require identification and the burdens imposed on the electorate affected a minimal amount of people.⁴³

Demonstrating how current the issue of compulsory identification still is in the US, a recent bid by the North Carolina state legislature to have its strict identification law reinstated was considered by the US Supreme Court, but ultimately rejected.⁴⁴ Clearly, the response to compulsory voter identification laws in some US states in recent years paints a considerably different picture to the experience in Northern Ireland. In contrast to the relatively smooth practice of voter identification laws in Northern Ireland, the legal challenges raised in some US states provides the UK, and Europe in general, with some stark warning signs about what kinds of requirements can engage fundamental civil rights and, if unreasonably burdensome, violate them.

3. Compulsory voter identification and the European Convention on Human Rights

(a) The human rights framework

In matters of democracy and political rights, the most significant international obligations that bind almost all European states stem from (or are complemented by) the ECHR. The European Court of Human Rights has repeatedly stressed how fundamental democracy is to the ECHR despite the fact that no universal legal definition of democracy exists.⁴⁵ On a general level, the broad concept of “democracy” and a “democratic society” underpins much of the content of the ECHR.⁴⁶ Most significantly, the Court has stated that democracy “is the only political model contemplated in the Convention and the only one compatible with it”.⁴⁷

The ability of individuals to participate in the political life of the community is guaranteed in a number of ways, not least of all the freedom of thought conscience and religion under art.9, the freedom of

⁴⁰ Weinschenk 203 S.W. 3d 201 (Mo. banc 2006). Individuals challenged Senate Bill 1014, which was subsequently enacted as Mo Rev. Stat. §115.427, 2006 Mo. Laws 728–732.

⁴¹ Mo Rev. Stat. § 115.427 (2016).

⁴² Crawford 553 US 181 (2008).

⁴³ Crawford 553 US 181 (2008).

⁴⁴ C. Mindock, “Supreme Court Thwarts Voter ID Law that Targeted Black Voters with ‘Almost Surgical Precision’” (15 May 2017), *The Independent*, <http://www.independent.co.uk/news/world/americas/us-politics/north-carolina-voter-id-law-black-voters-supreme-courts-struck-down-dismissed-a7737036.html> [Accessed 22 January 2018].

⁴⁵ J. Vidmar, “Judicial Interpretations of Democracy in Human Rights Treaties” (2014) 3(2) *Cambridge Journal of International and Comparative Law* 532.

⁴⁶ The Preamble of the ECHR states that signatories are “Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”. Certain rights may be restricted when, *inter alia*, a restriction is “necessary in a democratic society”. See also arts 6(1), 8(2), 9(2), 10(2), 11(2), Protocol 4 arts 2(2)–(3) to the ECHR.

⁴⁷ See, e.g. *Alekseyev v Russia* (App. Nos 4916/07, 25924/08 and 14599/09), judgment of 21 October 2010 at [70]; *Church of Scientology Moscow v Russia* (2008) 46 E.H.R.R. 16 at [74]; *Christian Democrat People's Party v Moldova* (2007) 45 E.H.R.R. 13 at [63]. For analysis see H.-M.T. Napel, “The European Court of Human Rights and Political Rights: The Need for More Guidance” (2009) 5(3) *European Constitutional Law Review* 464.

expression under art.10 and the freedom of assembly and association under art.11. However, for the purposes of this article, art.3 of the First Protocol to the ECHR requires contracting parties 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”.⁴⁸

Despite the fact that art.3 of the First Protocol is phrased in general terms, which requires states to “hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom”,⁴⁹ the Court has confirmed that art.3 includes the implied rights to vote and to stand for election,⁵⁰ and to sit as a member of the legislature if elected.⁵¹ Such is the importance of these rights that the Court has stressed that they are “crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”.⁵²

The European Court has had to deal with a whole variety of issues concerning art.3 of the First Protocol and disenfranchisement. For example, the Court has found a violation of art.3 of the First Protocol in the following circumstances: the banning of all individuals placed under protection on psychiatric grounds from voting without taking into account the actual mental faculties of individuals⁵³; the barring of individuals facing bankruptcy proceedings from voting when the ban served no purpose other than to belittle them⁵⁴; and, in the context of Cyprus, the banning of Turkish Cypriots from voting in national elections.⁵⁵ On the other hand, the Court has accepted that placing restrictions upon who can vote may be necessary, for example, when imposing a minimum age in order to ensure the maturity of the electorate,⁵⁶ or when restricting voter eligibility to individuals with continuous or close links to the country concerned.⁵⁷

In the UK, the most contentious issue that raises persistent moral and legal questions about disenfranchisement stems from the blanket ban on prisoners being able to vote. In this respect the UK is one of the few countries in Europe to operate a blanket ban and completely prohibit prisoners from casting their vote in elections, drawing repeated criticism from the European Court of Human Rights.⁵⁸ However, it appears that the UK’s hard-line approach may be eased somewhat in the near future, following the announcement that a limited number of prisoners may be able to vote, namely, those sentenced to less than one year of imprisonment and who are on day release on the day of an election.⁵⁹

When dealing with the issue of disenfranchisement the Court has noted that the right to vote is not a privilege,⁶⁰ and that the presumption in democratic states “must be in favour of inclusion” which has been illustrated by European history where the franchise has been gradually extended well beyond narrow circles defined by wealth and gender.⁶¹ Inherent to the ECHR, but also stressed in other sources of international law, the basic principle in democracies is one of universal suffrage.⁶²

⁴⁸ See also ICCPR art.25(b).

⁴⁹ See, e.g. *Yumak v Turkey* (2009) 48 E.H.R.R. 4 at [109]; *Hirst v United Kingdom* (No.2) (2006) 42 E.H.R.R. 41 at [56]; *Grosaru v Romania* (2015) 61 E.H.R.R. 1 at [42].

⁵⁰ *Mathieu-Mohin v Belgium* (1988) 10 E.H.R.R. 1 at [46]–[51]; *Sitaropoulos v Greece* (2013) 56 E.H.R.R. 9 at [63]; *Scoppola v Italy* (No.3) (2013) 56 E.H.R.R. 19 at [81]; *Hirst* (2006) 42 E.H.R.R. 41 at [57]. See also EU Charter of Fundamental Rights arts 39–40; ICCPR art.25(b).

⁵¹ *Yumak* (2009) 48 E.H.R.R. 4 at [33].

⁵² *Hirst* (2006) 42 E.H.R.R. 41 at [58]; *Scoppola* (2013) 56 E.H.R.R. 19 at [82].

⁵³ *Alajos Kiss v Hungary* (2013) 56 E.H.R.R. 38.

⁵⁴ *Albanese v Italy* (App. No.77924/01), judgment of 23 March 2006.

⁵⁵ *Aziz v Cyprus* (2005) 41 E.H.R.R. 11.

⁵⁶ *Melnichenko v Ukraine* (2006) 42 E.H.R.R. 39; *Luksch v Germany* (App. No.35385/97), decision of 21 May 1997.

⁵⁷ *Pv France* (2006) 42 E.H.R.R. 26; *Luksch* (App. No.35385/97), decision of 21 May 1997; *Hilbe v Liechtenstein* (App. No.31981/96), decision of 7 September 1996. See also R. Lappin, “The Right to Vote for Non-Resident Citizens in Europe” (2016) 65(4) *International and Comparative Law Quarterly* 859.

⁵⁸ See, e.g. *Hirst* (2006) 42 E.H.R.R. 41; *Greens v United Kingdom* (2011) 53 E.H.R.R. 21; *McHugh v United Kingdom* (App. Nos 51987/08 and 1014 others), judgment of 10 February 2015. The issue has also arisen in the context of the European Charter of Fundamental Rights and the European Court of Justice has dealt with the issue in respect of elections to the European Parliament. See H. v. Eijken and J.W. v. Rossem, “Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?” (2016) 12(1) *European Constitutional Law Review* 114.

⁵⁹ S. Foster, “Prisoner Voting: The Right to Vote: But is it Enough?” (2017) 181(41) *Criminal Law & Justice Weekly* 736.

⁶⁰ *Hirst* (2006) 42 E.H.R.R. 41 at [59].

⁶¹ *Hirst* (2006) 42 E.H.R.R. 41 at [59].

⁶² *Hirst* (2006) 42 E.H.R.R. 41 at [59]. See also EU Charter of Fundamental Rights art.39(2); ICCPR art.25(b).

Nevertheless, as with many other human rights, the European Court of Human Rights has made it clear that the right to vote is not absolute, but rather that it contains implied limitations.⁶³ States are granted a wide margin of appreciation when it comes to organising and running electoral systems which reflects the historical development, cultural diversity and varied political thought that exists throughout Europe.⁶⁴ Even so, the Court has stressed that it determines whether states have met the requirements of art.3 of the First Protocol.⁶⁵ Crucially, the Court has emphasised that the conditions imposed by a state must not curtail the rights in question in a way that impairs their very essence and effectiveness, and that the conditions must be proportionate and pursue a legitimate aim.⁶⁶

Moreover, the Court has stressed that the free expression of the people must not be thwarted by the conditions imposed by a state, in the sense that the conditions “must reflect, or not run counter to, the concern to maintain the integrity and effectiveness” of the election process.⁶⁷ Lastly, the Court has stressed that the exclusion of any group of the public must be reconcilable with the purpose of art.3 of the First Protocol.⁶⁸

At this stage it may also be pertinent to consider the impact of art.14 of the ECHR and the prohibition of non-discrimination when it comes to the right to the right to vote.⁶⁹ Whilst compulsory voter identification laws that impact *all* members of the electorate obviously do not demonstrate direct discrimination against any particular group or groups of the electorate, the next section argues that strict identification laws which impose considerable burdens upon some groups may inadvertently verge upon indirect discrimination. In that regard the European Court of Human Rights has made it clear that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group”.⁷⁰ Thus, if a neutral rule or practice is significantly more negative in its effects upon a protected group, as compulsory identification laws have proven to be in some US states, there may be a credible complaint of indirect discrimination against the authorities.

(b) The English local elections 2018 and electoral reform in Great Britain

In light of the legal framework just outlined and the experience in other countries discussed earlier, this section assesses the UK’s proposals and attempts to identify what issues concerning the right to vote under art.3 of the First Protocol to the ECHR are likely to arise. Clearly, for compulsory voter identification to comply with the requirements of the ECHR, a number of issues need to be carefully considered. Crucially, such a requirement must not curtail the right to vote in a way that impairs its essence and effectiveness; the conditions imposed must be proportionate and pursue a legitimate aim; the free expression of the people must not be thwarted; the requirement must be concerned with the integrity and effectiveness of the election process; and, if relevant, the exclusion of any group of the public must be reconcilable with the purpose of art.3 of the First Protocol.

When considering voter identification laws several of these important principles can be considered together. First, requiring voters to produce some form of identification when voting in person undoubtedly pursues a legitimate aim. As already discussed, the Cabinet Office has justified the pilot scheme and the

⁶³ *Hirst* (2006) 42 E.H.R.R. 41 at [60]; *Sitaropoulos* (2013) 56 E.H.R.R. 9 at [64].

⁶⁴ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Labita v Italy* (2008) 46 E.H.R.R. 50 at [201]; *Hirst* (2006) 42 E.H.R.R. 41 at [60]–[61].

⁶⁵ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos* (2013) 56 E.H.R.R. 9 at [64].

⁶⁶ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos* (2013) 56 E.H.R.R. 9 at [64].

⁶⁷ *Yumak* (2009) 48 E.H.R.R. 4 at [109]; *Hirst* (2006) 42 E.H.R.R. 41 at [62]; *Scoppola* (2013) 56 E.H.R.R. 19 at [84].

⁶⁸ *Aziz* (2005) 41 E.H.R.R. 11 at [28]. See also EU Charter of Fundamental Rights arts 39–40 which requires EU Member States to allow European citizens to vote and stand as candidates in European and municipal elections under the same conditions as nationals of that state.

⁶⁹ Article 14 of the ECHR provides that the enjoyment of human rights must be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. The ICCPR also prohibits any restrictions upon the right to vote which are discriminatory and any restrictions that are “unreasonable”. See ICCPR art.25.

⁷⁰ *Biao v Denmark* (2017) 64 E.H.R.R. 1 at [103]; *D.H. v Czech Republic* (2008) 47 E.H.R.R. 3 at [184]; *Adami v Malta* (2007) 44 E.H.R.R. 3 at [80].

overarching proposals for reform on the grounds of combatting electoral fraud,⁷¹ which is essential to the task of maintaining the integrity and effectiveness of the electoral process in Great Britain. Even if conducted on a relatively low scale with little or no bearing upon the results of elections, electoral fraud unquestionably has the potential to reduce the confidence that the general public will place in the democratic process. In this regard, evidence has suggested that voters in Northern Ireland, where photographic identification is required, are generally more confident that the election process is better-run than the rest of the UK.⁷²

However, a much more challenging question concerns the proportionality of compulsory voter identification and, consequently, the need to determine whether such a requirement will impair the essence and effectiveness of the right to vote. Ultimately, as the European Court of Human Rights has made clear, the free expression of the people must not be thwarted by the imposition of any conditions.

Dealing with these issues together, a number of general observations can be made. First, of the 51.4 million votes cast in the various elections in 2015 in the entire UK, there were 481 allegations of electoral fraud, of which only 123 concerned the actual voting process, which includes not just personification but also breaches of secrecy requirements, tampering with ballot papers, bribery, and treating or undue influence.⁷³ Second, whilst there are obviously a variety of factors to consider when analysing voter turnout, the turnout in Northern Ireland has been the lowest of the four UK regions in the three most recent General Elections (2010, 2015, 2017) that have taken place since the introduction of compulsory photographic identification in Northern Ireland in 2003.⁷⁴ As such, it might be immediately questioned whether personification is sufficiently serious to justify such a considerable overhaul of the voting process that will place a burden, however minimal that may be, upon the entire electorate.

Bearing this in mind, according to the Electoral Commission's own estimates of the electorate in 2013, approximately 3.5 million electors (7.5% of the electorate) in Great Britain do not own one of the forms of photographic identification that the Commission recommended should be required to vote in polling stations.⁷⁵ In other words, only 92.5% of electors in Great Britain would already have at least one form of acceptable photo identification. If only passports, photographic driving licences and Oyster Photocards were to be accepted this would leave 6 million electors (13% of the electorate) unable to vote.⁷⁶ Even more troubling, if this was limited to just passports and photographic driving licences, the Commission estimated that 11 million electors (24% of the electorate) would be unable to vote.

However, in light of the experience in some US states, a much more complex and problematic issue from the perspective of art.3 of the First Protocol and art.14 of the ECHR concerns the impact of compulsory voter identification laws upon certain communities, especially poor, minority and elderly citizens. In this regard, the Electoral Commission has revealed that, according to the 2011 Census, only 66% of individuals who identify as White (Gypsy or Irish Travellers) hold eligible passports, compared to 83% of White (English/Welsh/Scottish/Northern Irish/British) and just under 85% of Mixed/Multiple Ethnic Groups (White and Black Caribbean).⁷⁷ Compulsory identification may also have a detrimental impact upon women, the young and the elderly, who are far less likely to possess a driving licence than middle-aged

⁷¹ Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017).

⁷² Electoral Commission, "Voting in 2017: Understanding Public Attitudes Towards Elections and Voting" (October 2017), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/234893/Voting-in-2017-Final.pdf Chart 4.1 [Accessed 22 January 2018].

⁷³ Electoral Commission, "Analysis of Cases of Alleged Electoral Fraud in the UK in 2015" (March 2016), http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/198533/Fraud-allegations-data-report-2015.pdf, pp.3-5 [Accessed 22 January 2018].

⁷⁴ In the 2005 General Election, voter turnout in Northern Ireland was the highest of the UK's four regions. This might be explained, to some extent, by the considerable publicity drive which followed the introduction of compulsory photographic identification in 2003. See Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.2.18. For the statistics see Electoral Commission, "Voting in 2017: Understanding Public Attitudes Towards Elections and Voting", Table 2.1.

⁷⁵ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.4.10. As noted above, these are: a photographic driving licence, passport, Proof of Age Standards Scheme (PASS) card, military identification card, police identification card, a firearms licence, and certain photographic public transport passes.

⁷⁶ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.4.10.

⁷⁷ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.4.12.

males. Recent statistics compiled by the Department of Transport in 2016 reveal that in England, 91% of males aged 50–59 own driving licences in comparison to just 29% of females aged 17–20.⁷⁸ Lastly, whilst being a distinct issue in itself, there is also a significant difference in the proportion of certain ethnicities being registered to vote. In 2014, approximately 85.9% people identifying as White were registered to vote, in comparison to 83.7% of the Asian community, 76% of the Black community, 73.4% who identified as Mixed, and just 62.9% who identified as Other.⁷⁹

Although these statistics only paint part of the picture, they reveal that millions of citizens could potentially be disenfranchised if the UK Government decides to implement strict identification laws in the UK. If the Government envisaged a new voting process whereby only passports or driving licences would be deemed acceptable forms of identification, there would be a genuine risk of indirect discrimination against ethnic minorities, women, the young and the elderly. Equally, if a freely available form of photographic identification was established but the individual had to provide expensive forms of Government-issued identification to prove their identity and acquire such a document, the problem would not dissipate.

Acknowledging these issues to some extent, Chris Skidmore, Minister for the Constitution, has confirmed that whilst participating councils will trial different forms of identification in the pilot scheme in May 2018, no one will have to purchase identification.⁸⁰ Looking further ahead, the Electoral Commission has already recommended that a photographic identity card similar to that offered in Northern Ireland should be made freely available to voters in Great Britain, should photographic identification become compulsory in elections, so as to not disenfranchise the estimated 7.5% of the electorate in Great Britain who do not already possess one of the proposed forms of acceptable identification.⁸¹ Nevertheless, experience in the US has shown that there can be considerable hidden costs when it comes to attaining freely provided photographic identification, not least of all travel expenditure and the costs incurred when acquiring the necessary evidentiary documents. In contrast, and arguably demonstrating the best solution to this problem, to attain the EIC in Northern Ireland voters can either apply by post by providing a form of photographic identification or a form signed by an elected official, or if applying in person, they must present a national insurance number and be registered on the Electoral Register.⁸²

4. Conclusions

This article has examined the human rights implications of the British Government's proposals to reform the electoral process in Great Britain and, in particular, the announcement that a pilot study will be carried out in the May 2018 local elections in England, which will require eligible voters to produce some form of identification when voting in polling stations. Whilst the European Court of Human Rights has granted a wide margin of appreciation to states when it comes to the organising and running of electoral systems,⁸³ the Court has made it clear that any conditions that restrict the right to vote must satisfy a number of requirements, not least that the free expression of the people to choose the legislature must not be thwarted.⁸⁴ In contrast to compulsory identification laws in Northern Ireland which have been received relatively well, recent disputes in several US states indicate to some extent what complaints in respect of civil rights may arise in England and the UK as a whole if the proposals are implemented. These issues should be

⁷⁸ Department for Transport, *Full Car Driving Licence Holders by Age and Gender: England, 1975/1976 to 2016* (Table NTS0201).

⁷⁹ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.4.13.

⁸⁰ C. Skidmore, *Minister for the Constitution* (26 October 2017) Written Answer No.108103.

⁸¹ Electoral Commission, "Delivering and Costing a Proof of Identity Scheme for Polling Station Voters in Great Britain", para.4.17.

⁸² Electoral Office for Northern Ireland, *Electoral Identity Card: How to Apply*, <http://www.eoni.org.uk/Electoral-Identity-Card/How-to-apply> [Accessed 22 January 2018].

⁸³ Mathieu-Mohin (1988) 10 E.H.R.R. 1 at [52]; Labita (2008) 46 E.H.R.R. 50 at [201]; Hirst (2006) 42 E.H.R.R. 41 at [60]–[61].

⁸⁴ Yumak (2009) 48 E.H.R.R. 4 at [109]; Hirst (2006) 42 E.H.R.R. 41 at [62]; Scoppola (2013) 56 E.H.R.R. 19 at [84].

taken into consideration when the pilot study is carried out, and when assessing whether the UK proposals for electoral reform will comply with the requirements of art.3 of the First Protocol to the ECHR.

For example, should photographic identification be required in polling stations, it is crucial that the British Government provides a freely available form of photographic identification for voters who do not already possess an acceptable form of identification. Furthermore, the process of applying for this document should not impose any unreasonable burdens, for example, by requiring voters to produce expensive forms of Government-issued identification such as a passport or a driving licence. It is also important that voters in Great Britain should be allowed to cast a provisional vote, subject to verification, should they forget to bring an acceptable form of identification on the day of the election. Ultimately, at a time when voter apathy amongst the electorate is consistently highlighted as a real cause for concern, it might be argued that the Government should not be considering such fundamental reforms, however well-intentioned the rationale may be, in response to what is a relatively insignificant problem and in a way that may in fact discourage or even thwart the free expression of the people to choose the legislature.

Case Analysis

Sweet Taste with Bitter Roots—Forced Labour and *Chowdury v Greece*

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✉ Duty to undertake effective investigation; Forced labour; Greece; Human trafficking; Positive obligations; Seasonal workers

Abstract

*Chowdury v Greece*¹ reveals the exploitation that migrant workers suffer at agricultural farms for production of strawberries whose sweet taste many of us enjoy. Greece was found in violation of art.4 of the ECHR (the right not to be subjected to forced labour and human trafficking) for its failure to protect the migrants from the exploitation and to conduct effective investigation. The judgment will be laurelled as an important achievement in favour of the rights of undocumented migrant workers to fair working conditions. It sheds light on the application of the definition of forced labour to labour performed by undocumented migrants. It also contributes to the enhancement of states' positive obligations under art.4 of the ECHR. It suggests that the obligations imposed by the Council of Europe Convention on Action against Trafficking in Human Beings are of relevance not only to factual circumstances qualified as human trafficking, but to the whole gamut of abuses intended to be captured by art.4 of the ECHR.

1. Introduction

Chowdury v Greece revealed the human cost that migrants pay so that many of us enjoy the sweet taste of strawberries grown at farms. The judgment will be laurelled as an important achievement in favour of the rights of undocumented migrant workers to fair working conditions. The applicants were 42 Bangladeshi nationals in Greece with undocumented status. They were recruited to work on a strawberry farm in Manolada, Greece, and were promised wages of €22 for seven hours' labour and €3 for each overtime hour. They worked in plastic greenhouses picking strawberries every day from 07.00 until 19.00 in scorching heat under the supervision of armed guards. They lived in makeshifts tents of cardboard boxes and nylon without running water and toilets. The workers were never paid their wages for which they went on strike a couple of times. Despite not being paid, they continued to work since they were afraid that if they were to leave, they would be never paid. After the recruitment of other migrants by the same employer, the Bangladeshi nationals went on strike again to demand their wages. At this point, one of the armed guards opened fire and seriously injured many of them. After this incident, the employer and the guards were convicted for grievous bodily harm and unlawful use of firearms (sentences that were subsequently commuted to a minimum financial penalty), but acquitted of the charge of trafficking in human beings. The 42 Bangladeshi migrants argued before the European Court of Human Rights (the Court) that they were subjected to forced labour and human trafficking and that Greece failed to fulfil its

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¹ *Chowdury and others v Greece* (App. No.21884/15), judgment of 30 March 2017 (currently available only in French).

positive obligation under art.4 to protect them against these abuses, to conduct effective investigation and to punish the perpetrators. The Court agreed with these claims and ordered Greece to pay each applicant between €12,000 and €16,000. This order can be regarded as an achievement given the stark reality that exploited migrants rarely, if ever, receive any compensation.²

This article assesses the contribution of *Chowdury* in two respects. First, the judgment contributes to the resolution of some of the definitional challenges raised by art.4 of the ECHR, a provision that has produced relatively limited judicial output.³ The definitional clarifications offered in the judgment are of importance not only for the future case-law in this area, but also for the national legislation of the Council of Europe (CoE) states. For example, the UK Modern Slavery Act does not define the elements of slavery, servitude and forced labour; instead, it refers to art.4 of the ECHR. Despite this positive contribution of the judgment, some definitional complications under art.4 have still remain unresolved. Second, the significance of *Chowdury* also lies in the further integration of the Council of Europe Convention on Action against Human Trafficking CETS No.197 (the CoE Anti-Trafficking Convention) within the positive obligations generated by art.4 of the ECHR.

2. The definitional challenges raised by art.4 of the ECHR

In terms of definitional challenges, *Chowdury* has three distinctive features that need to be highlighted from the outset. It is the first case in which the European Court determined that the conditions under which undocumented migrant workers had to labour amounted to forced labour. The previous two cases, i.e. *Siliadin v France*⁴ and *CN v France*,⁵ involved migrant children who had to provide domestic services in the home of their abusers, which signified specificities potentially preventing the extrapolation of the reasoning to wider circumstances. A second feature that denotes distinctiveness to the *Chowdury* case is that, in contrast to *Siliadin* and *CN v France* where the applicants were determined to be *both* victims of forced labour and servitude,⁶ in *Chowdury* the level of severity of the abuses was found not to have reached the threshold of servitude. This gave the Court the possibility to introduce further clarity as to the distinction between forced labour and servitude under art.4 of the ECHR. Against the background of the existing case-law under art.4, a third distinctive feature of *Chowdury* is that the Court applied both concepts, i.e. human trafficking and forced labour, to the factual circumstances. In its previous judgments, the Court used either human trafficking (see *Rantsev v Cyprus*,⁷ *LE v Greece*⁸ and *J v Austria*⁹) or the concepts explicitly enshrined in the text of art.4 (see *Siliadin*, *CN v France* and *CN v United Kingdom*).¹⁰ In fact, in *CN v France* the Court explicitly noted its preference to the legal concepts specifically provided for in the Convention. More specifically, it held:

“It is true that in the case of *Rantsev v Cyprus and Russia* the Court affirmed that human trafficking itself falls within the scope of Article 4 of the Convention in so far as it is without doubt a phenomenon that runs counter to the spirit and purpose of that provision. However, it considers that, above all, the facts of the present case concern activities related to ‘forced labour’ and ‘servitude’, legal concepts specifically provided for in the Convention.”¹¹

² *Severe Labour Exploitation: Workers Moving within or into the European Union* (EU Agency of Fundamental Rights, 2015), p.21.

³ V. Stoyanova, “L.E. v Greece: Human Trafficking and the Scope of States’ Positive Obligations under the ECHR” [2016] 3 E.H.R.L.R. 290.

⁴ *Siliadin v France* (2006) 43 E.H.R.R. 16.

⁵ *CN and V v France* (App. No.67724/09), judgment of 11 October 2012.

⁶ In *CN* only the bigger sister was determined to be such a victim.

⁷ *Rantsev v Cyprus and Russia* (2010) 43 E.H.R.R. 16.

⁸ *LE v Greece* (App. No.71545/12), judgment of 21 January 2016.

⁹ *J and Others v Austria* (App. No.58216/12), judgment of 17 January 2017.

¹⁰ *CN v United Kingdom* (App. No.4239/08) (2013) 56 E.H.R.R. 24. In *M and Others v Italy* (App. No.40020/03), judgment of 31 July 2012 at [146]–[170], the Court did refer to all four concepts; however, none of them was found applicable and the complaint under art.4 was found inadmissible.

¹¹ *CN and V* (App. No.67724/09) at [88].

No elucidation was offered as to why a preference was given to the “legal concepts specifically provided for in the Convention”. As I will show below, *Chowdury* has not resolved the obscurity surrounding the case-law as to when and why the Court will prefer to take “human trafficking” on board and as to how this concept actually relates to those explicit in the text of art.4 of the ECHR.

Before assessing the significance of these innovations and persisting ambiguities, it is worthwhile to remind ourselves that art.4 contains three concepts, i.e. slavery, servitude and forced labour. With *Rantsev* (at [286]) the Court has added “human trafficking”, as defined in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons¹² and the CoE Trafficking Convention, to the conceptual apparatus of art.4.¹³ In sum, art.4 captures four concepts for qualifying abuses and the Court needs to find some sensible way of distinguishing them and of denoting some distinctiveness to each one of them.

2.1 Undocumented migrants and the definition of forced labour

The Court has addressed the distinctive definitional contours of forced labour in its previous judgments. In *Van der Mussele v Belgium* and in *Siliadin*, the Court took into account the definition of forced labour in the ILO Forced Labour Convention No.29, where the term is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.¹⁴ Pursuant to this definition, involuntariness is one of the necessary definitional elements together with menace of penalty. In this sense, it can be argued that “forced labour” is not intended to capture exploitative and abusive working conditions per se; one can labour in acceptable working conditions, but still involuntarily and thus be subjected to forced labour.¹⁵ This creates two problems in two different kinds of situations. First, a person might work in severely exploitative working conditions to which she/he consents, which might potentially render the concept of forced labour inoperative. The situation of the 42 Bangladeshi migrant workers in the *Chowdury* could potentially fall into this category. However, this pitfall was avoided; below, I will show how. Second, a person might be required to do some labour under acceptable conditions, to which he objects and is threatened with a penalty,¹⁶ which arguably renders the circumstances forced labour.

As early as 1983 when *Van der Mussele* was delivered, a case about a lawyer required to provide pro bono legal services to indigent clients, the Court realised the problem with the simplistic and unhelpful dichotomy between voluntary versus involuntary labour. One of the implications from this problem would be rendering the concept of forced labour impotent to capture exploitative working conditions. Another adverse implication would be preventing states from requiring certain services from individuals since the imposition of this requirement might potentially amount to forced labour. In *Van der Mussele* the Court thus held that:

“... relative weight is to be attached to the argument regarding the applicant’s ‘prior consent’, the Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 of the European Convention in order to determine whether the service required of Mr. Van der Mussele falls within the prohibition of compulsory labour. This could be so in the case of a

¹² 2237 UNTS 319, entered into force 25 December 2003.

¹³ For a critique of this addition, see V. Stoyanova, “Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the *Rantsev Case*” (2012) 30(2) *Netherlands Quarterly of Human Rights* 163.

¹⁴ *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163 at [32]; *Siliadin* (2006) 43 E.H.R.R. 16 at [116].

¹⁵ For an analysis how the two elements of the definition, i.e. involuntariness and menace of penalty, collapse into each other, see V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press, 2017), p.267.

¹⁶ The “menace of penalty” has been interpreted widely and it does not pose a serious definitional challenge. “Menace of any penalty should be understood in a very broad sense. ... The penalty here in question might also take the form of a loss of rights or privileges.” International Labour Conference, *General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for Fair Globalization*, Report III (Part 1B) (ILO, 2013), p.111. The European Court has also followed this wide approach to the definition of “menace of penalty”. For example, in *Van der Mussele* the threat of being deregistered from the list of lawyers was found to suffice.

service required in order to gain access to a given profession, if the service imposed a burden which was *so excessive or disproportionate to the advantages attached* to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand [emphasis added].”¹⁷

Crucially, the Court invoked the disproportionate burden test. After assessing the situation of the applicant, the Court concluded that he did not have to bear such a burden and, therefore, he was not subjected to forced or compulsory labour.

The circumstances in *Van der Mussele* involved labour demanded by the state. *Siliadin* was the first judgment involving interpersonal harm (a child migrant required to labour in deplorable conditions in private households). *Siliadin* does not contain very sophisticated analysis as to whether the girl was subjected to forced labour. The Court simply determined that she was “an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police” and that “it is clear from the facts of the case that it cannot seriously be maintained” “that she performed the work of her own free will” ([118]–[119]). In contrast, *CN v France* did offer a more elaborate analysis. The applicants were two girls required to provide domestic services at home. They were arguably treated as family members from whom it was expected to help with the household chores. Here the Court invoked the disproportionate burden test for the first time in the circumstances of interpersonal harm and observed that:

“... the first applicant was forced to work so hard that without her aid Mr and Mrs M. would have had to employ and pay a professional housemaid. The second applicant, on the other hand, has not adduced sufficient proof that she contributed *in any excessive measure* to the upkeep of Mr and Mrs M.’s household [emphasis added].”¹⁸

Chowdury is the second judgment involving interpersonal harm where the disproportionate burden test was invoked.¹⁹ It was acknowledged that the migrants did initially consent to work; however, the Court also observed that “[t]he validity of the consent must be assessed in the light of all the circumstances of the case”. This implied taking into consideration “the nature and volume of the activity in question”. The nature and the volume of the work performed, including the nature of the working conditions that might manifest excessiveness, are ultimately determinative. In this respect the Court observed: “The workers laboured in extreme physical conditions, had an exhausting schedule and were subjected to constant humiliation”.²⁰ As a consequence, severely exploitative working conditions can be captured by the definitional scope of forced labour even if the person has consented:

“By promising them rudimentary shelter and a daily wage of EUR 22, which was the only solution for the victims to ensure a means of subsistence, the employer had been able to obtain their consent at the time of hiring in order to exploit them later.”²¹

What is particularly important in the assessment of these conditions is the strong emphasis on the applicants’ vulnerability that originated from their irregular migration status. This is one of the most important contributions of *Chowdury*:

“... the applicants did not have a residence permit or a work permit. The applicants were aware that their irregular situation put them at risk of being arrested and detained with a view of deportation from Greek territory. An attempt to leave their work would no doubt have increased this prospect

¹⁷ *Van der Mussele* (1984) 6 E.H.R.R. 163 at [37].

¹⁸ *CN and V* (App. No.67724/09) at [75].

¹⁹ *Chowdury* (App. No.21884/15) at [90]–[91]; see also [96].

²⁰ *Chowdury* (App. No.21884/15) at [98].

²¹ *Chowdury* (App. No.21884/15) at [98].

and would have meant loss of any hope of receiving their salaries or at least part of them. Given that they had not received any salary, they could not leave Greece.”²²

The Court also added that:

“... the applicants began working in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported. They probably realized that if they stopped working, they would never collect the arrears of their wages, the amount of which was constantly increasing as the days passed. Even assuming that, at the time of hiring, the applicant volunteered their work and believed in good faith that they would receive their wages, the situation subsequently changed as a result of their employers.”²³

In sum, “forced labour” captures severely exploitative working conditions and the element of consent has been reduced to an assessment of the excessiveness of these conditions.

2.2 The distinction between forced labour and servitude

One of the challenging definitional issues in *Chowdury* was caused by the fact that the migrant workers could freely leave the strawberry farm and go to the nearby city, including to do their shopping. In fact, at certain point their employer told them to leave the farm. They refused, since they believed that the continuation of the employment relationship was essential for them to recover their salaries. Given the freedom that the migrants had, the Court was confronted for the first time with the question whether deprivation of liberty or some form of restriction on freedom of movement are necessary or relevant elements for the qualification of the situation as forced labour.²⁴ This question prompted the Court to further clarify the distinction between forced labour and servitude. Importantly, it excluded restrictions on freedom of movement as a necessary element for defining forced labour; however, it preserved the relevance of this element for the purpose of qualifying situations as servitude:

“The Court observes that the Patras Assize Court acquitted the defendants of the count of trafficking in human beings, in particular by noting that the workers were not absolutely unable to protect themselves and that their freedom of movement was not compromised, on the grounds that they were free to leave their work (see paragraphs 26–27 above). However, the Court considers that the restriction on freedom of movement is not a *sine qua non* condition for qualifying a situation as forced labour or even as trafficking in human beings. This form of restriction does not refer to the provision of the work itself, but rather to certain aspects of the life of the victim of a situation contrary to Article 4 of the Convention, and in particular to a situation of servitude. On this point the Court reiterates its finding that Patras Assize Court had a narrow interpretation of the concept of trafficking, which relied on elements specific to servitude in order not to qualify the applicants’ situation as trafficking (see paragraph 100 above). However, a situation of trafficking can exist despite the freedom of movement of the victim.”²⁵

It follows that restrictions upon freedom of movement might be a relevant element for defining abuses as servitude. A question that still needs to be unequivocally resolved is whether such restrictions are a necessary element for qualifying circumstances as servitude. There are persuasive arguments to the

²² *Chowdury* (App. No.21884/15) at [95].

²³ *Chowdury* (App. No.21884/15) at [97].

²⁴ The ECHR draws the distinction between deprivation of liberty (art.5) and restriction on freedom of movement (art.2(3), Protocol 4). The European Court has clarified that the difference between the two is “one of degree or intensity, and not of nature or substance”. *August v United Kingdom* [GC] (App. No.39692/09, 40713/09 and 41008/09), judgment of 15 March 2012 at [57]. A context specific assessment needs to be applied for determining whether restrictions on freedom of movement amount to deprivation of liberty (i.e. detention).

²⁵ *Chowdury* (App. No.21884/15) at [123]. In section 2.3 below I explain the conflation of forced labour and human trafficking in the judgment.

contrary. The starting point for advancing these arguments is the following pronouncement from *CN v France and Chowdury*:

“... servitude corresponds to a special type of forced or compulsory labour or, in other words, ‘aggravated’ forced or compulsory labour. As a matter of fact, the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim’s feeling that their condition is permanent and that the situation is unlikely to change. It is sufficient that this feeling be based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation [emphasis added].”²⁶

Deprivation of liberty and restrictions upon freedom of movement might indeed be one of these objective criteria that the Court has invoked for demonstrating the victims’ feeling that their condition is permanent and not likely to change. However, other objective circumstances might also provoke such feelings. An example to this effect could be exercising subtle forms of control over various aspects of victims’ lives. The required level of control and the aspects of life upon which control is exerted (the place where the victim lives, the persons that he/she is allowed to meet and talk to etc), remain to be tested in future cases. Here it is pertinent to note that in *CN v United Kingdom*, the Court observed that:

“... domestic servitude is a specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another.”[emphasis added]²⁷

This is a strong indication that it is not necessary to prove restrictions upon freedom of movement. It will suffice to demonstrate that the victim was under control, including by the application of subtle forms of coercion, for reaching the definition threshold of servitude.

2.3 The insertion of human trafficking within the conceptual limits of art.4

In *Chowdury*, the Court concluded that the migrant workers were subjected to both human trafficking and forced labour, in this way confirming that in some respects these forms of abuses can occur at the same time or one might happen after the other. More specifically, the judgment says that “... exploitation of labour is one of the forms of exploitation in the definition of trafficking in human beings, which highlights the intrinsic relationship between forced and compulsory labour and trafficking in human beings”.²⁸ Yet, this intrinsic relationship is not one of overlap.²⁹ It is regrettable that the Court did not explain this intrinsic relationship; rather the judgment seems to suggest that these two forms of abuses overlap.

It is also worthwhile to remind the reader that in *Rantsev* the Court conflates human trafficking and slavery by defining the former through the definition of slavery in international law,³⁰ which has caused further confusion. Just as confusing, in some paragraphs in the reasoning in *Chowdury* the Court talks only about human trafficking (see, e.g. [86], [87], [89]) without mentioning forced labour. Even more puzzlingly, in other paragraphs the Court refers not only to human trafficking, but also to the concept of exploitation ([88] and [93]). “Exploitation” is not only left undefined, but as the international law definition

²⁶ *CN and V*(App. No.67724/09) at [91]; *Chowdury* (App. No.21884/15) at [99]. For a critique of the addition of the element related to permanence and immutability of the situation, see Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (2017), p.255.

²⁷ *CN* (App. No.4239/08), judgment of 13 November 2012 at [80].

²⁸ *Chowdury* (App. No.21884/15) at [83].

²⁹ Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (2017), p.292.

³⁰ *Rantsev* (2010) 43 E.H.R.R. 16 at [281]; J. Allain, “Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery” (2010) 10(3) H.R.L.R. 546; Stoyanova, “Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the Rantsev Case” (2012) 30(2) *Netherlands Quarterly of Human Rights* 163.

of human trafficking suggests (a definition that the Court has endorsed) it is much more broad and capacious than forced labour. No explanation has been offered as to the required threshold for defining exploitation and how it might relate to forced labour and servitude in the context of art.4, which has left the minimum threshold of severity under art.4 uncertain. Equally confusingly, in [99], the Court refers not to forced labour per se, but only to forced labour as a form of exploitation within the definition of human trafficking. In sum, the European Court seems to be still struggling with the conceptual apparatus of art.4. The source of this confusion is ultimately the insertion of human trafficking within the limits of art.4 and not clarifying how this concept differs and relates to those that are explicit in the text of the provision.

3. The positive obligations triggered by art.4

In addition to these three distinctive features concerning the definitional scope of art.4 of the ECHR that I elaborated on above, *Chowdury* is also important from the perspective of the positive obligations that this provision generates. Three types of positive obligations were under review: the obligation to adopt effective regulatory framework, to take protective operational measures and to conduct effective investigation. In what follows, the first two will be examined. Although important in the context of the specific case, the third one is excluded from the ambit of this article because this part of the judgment does not contain innovative aspects or contentious issues.

3.1 The obligation to criminalise

Greece was found *not* to be in violation of its obligation under art.4 to put in place an appropriate legal and regulatory framework. As the Court emphasised, Greece had criminalised human trafficking at national level and had incorporated the relevant EU law in this area.³¹ This finding is puzzling given the fact that, while Greece has indeed criminalised human trafficking, the Greek legislation does not contain a specific criminalisation of forced labour and servitude. In *Siliadin* and *CN v France*, the Court is adamant to the effect that states need to incorporate specific criminalisation of forced labour and servitude at domestic level.³² *CN v United Kingdom* is also supportive in this respect since the Court stated that domestic servitude was a specific offence distinct from human trafficking.³³ If the same logic is followed, forced labour is also a specific offence distinct from human trafficking, which necessitates its specific criminalisation at national level.

The omission by the Court to challenge this gap in the national criminal legislation further exacerbates the definitional confusion at the level of art.4 and that, as mentioned in section 2.3, has its origins in the insertion of the concept of human trafficking. Another implication from this omission is that states are not encouraged to specifically criminalise forced labour; instead, they can use the label of human trafficking to investigate and prosecute exploitation of migrant workers. This might lead to failures in the criminal proceedings since, for example, no elements of recruitment or transportation might be present and thus the definition of human trafficking might be inapplicable. This problem became evident in *CN*.³⁴

Just as importantly, when human trafficking and forced labour are conflated, it might be impossible to gain a clear understanding of the nature and the forms of abuses to which migrants are subjected. This in turn might hamper the adoption of measures for effective response. More specifically, human trafficking is an abusive and deceptive process that might or might not result in exploitation.³⁵ As opposed to forced

³¹ *Chowdury* (App. No.21884/15) at [107]–[108].

³² V. Stoyanova, “Article 4 of the ECHR and the Obligation of Criminalizing Slavery, Servitude, Forced Labour and Human Trafficking” (2014)

3(2) *Cambridge Journal of International and Comparative Law* 407.

³³ *CN* (App. No.4239/08) (2013) 56 E.H.R.R. 24 at [80].

³⁴ *CN* (App. No.4239/08) (2013) 56 E.H.R.R. 24 at [80].

³⁵ J. Allian, *Slavery in International Law* (Brill, 2013), p.355; Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (2017), p.292.

labour, it is not a type of exploitation. Different measures might be appropriate for addressing exploitation as opposed to addressing the preceding process.

There is one feature that distinguishes *Chowdury* from *CN v United Kingdom*, which can explain why the Court took different approaches. In particular, *CN v United Kingdom* is distinctive in the following way. Due to the gap in the domestic criminal law at the material time (absence of a specific offence of servitude) and the exclusive focus on the crime of human trafficking, the investigating authorities did not give due weight to “overt and more subtle forms of coercion” to which migrants were vulnerable. Consequently, the national investigating authorities conducted a dismissive investigation. In this sense, there was a causal link between the absence of a specific national offence of servitude and the dismissive investigation into the alleged abuses at national level.³⁶ In contrast, in *Chowdury* no such link was present and the national investigation was in general deficient even under the count of human trafficking.³⁷ This led to the Court to find a violation of the procedural limb of art.4.

3.2 The obligation to take protective operational measures

Another type of positive obligation under review in the judgment was the obligation to adopt protective operational measures. The Court emphasised that the authorities were well aware of the situation of the migrant workers in the Manolada region and of the abuses to which they were exposed, including the refusals by the employers to pay their wages.³⁸ Despite this awareness, the authorities’ response was limited.³⁹ Importantly, the assessment of the positive obligation to protect by the Court was done in light of the positive obligations imposed by the CoE Anti-Trafficking Convention.⁴⁰ This approach has been applied in previous judgments and the Court has thus drawn from this Convention to strengthen states’ positive obligations under art.4.⁴¹ Still, *Chowdury* manifests one innovative feature. More specifically, the Court referred to the work of the CoE Anti-Trafficking Conventions’ monitoring body, GRETA (Group of Experts on Actions against Trafficking in Human Beings): “The Court draws its inspiration from this Convention and from the manner in which it is interpreted by GRETA”.⁴² This will increase the importance of the interpretations offered by GRETA in its reports.

The more pioneering aspect of *Chowdury* is the suggestion that regardless of the legal qualification of the circumstances as human trafficking or forced labour, the positive obligations generated by art.4 of the ECHR must in principle be interpreted in light of the CoE Anti-Trafficking Convention. This is important for two reasons. First, the latter convention imposes a number of positive obligations upon states (identification of victims, suspension of deportation proceedings, social assistance, non-punishment etc.).⁴³ Their personal scope is limited to victims of human trafficking and, as a consequence, victims of forced labour, servitude and slavery fall in a protection gap. This has been highlighted by the EU Fundamental Rights Agency:

“While trafficking has attracted much attention, the severe exploitation of workers in employment relationships—which may or may not occur in a context of trafficking—has not. This difference in the level of attention is reflected by an institutional setting in which specialized actors are available to deal with trafficking cases but not with cases of severe labour exploitation.”⁴⁴

³⁶ On the issue of causation under the ECHR more generally see V. Stoyanova, “Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR” (2018) 18(2) H.R.L.R..

³⁷ *Chowdury* (App. No.21884/15) at [121] and [127].

³⁸ *Chowdury* (App. No.21884/15) at [110]–[115].

³⁹ *Chowdury* (App. No.21884/15) at [113].

⁴⁰ *Chowdury* (App. No.21884/15) at [104].

⁴¹ *Rantsev* (2010) 43 E.H.R.R. 16 at [285], [287] and [296]; *LE v Greece* at [71].

⁴² *Chowdury* (App. No.21884/15) at [104].

⁴³ Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (2017), pp.74–181.

⁴⁴ Severe Labour Exploitation: Workers Moving within or into the European Union (EU Agency of Fundamental Rights, 2015), p.40.

It would be illogical for art.4 of the ECHR to generate more demanding positive obligations when the case is defined as human trafficking as opposed to forced labour, servitude or slavery.⁴⁵ By extending the relevance of the CoE Anti-Trafficking Convention to all cases falling within the definitional contours of art.4 of the ECHR, the gap can be bridged.

Second and related to the above, once this extension is endorsed, applicants will not be urged to formulate their cases as human trafficking to invoke the positive obligations under the CoE Anti-Trafficking Convention. Limitations upon the usage of the concept of human trafficking can be welcomed given that the elements of this concept are yet to be specifically clarified by the Court and that it has an uncertain severity threshold (see section 2.3 above).

4. Conclusion

Against the background of the relative scarcity of judicial engagement at international law level with the right not to be subjected to slavery, servitude, forced labour and human trafficking,⁴⁶ *Chowdury* is an important addition. It will help art.4 of the ECHR to gain further traction by instigating more applications. The judgment sheds light on the definition of forced labour. It clarifies that the concept captures severely exploitative working conditions. It also clarifies that consent to perform the labour can be reduced to an assessment of the excessiveness of these conditions. Crucially, any vulnerabilities stemming from irregular migration status are an inherent part of this assessment. As importantly, a migrant might be held in forced labour even if not subjected to any form deprivation of freedom of movement. *Chowdury* also contributes to the enhancement of states' positive obligations under art.4. Its reasoning suggests that the positive obligations imposed by the CoE Anti-Trafficking Convention are of relevance not only to factual circumstances qualified as human trafficking, but to the whole gamut of abuses intended to be captured by art.4. This can trigger a change in these CoE states that have limited their identification and assistance efforts to victims of human trafficking and have ignored victims of severe forms of labour exploitation (i.e. slavery, servitude and forced labour).

⁴⁵ This will be contrary to the interpretative principles of effectiveness and internal consistency developed by the Court.

⁴⁶ V. Stoyanova, "United Nations against Slavery: Unravelling Concepts, Institutions and Obligations" (2017) 38(3) *Michigan Journal of International Law*.

Case and Comment

Selected decisions from the European Court of Human Rights from September and October 2017

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Pilot judgments and follow-up cases

Pilot judgments—non-enforcement—delayed enforcement—repetitive cases—Ukraine—structural problems—principle of subsidiarity—division of tasks—Committee of Ministers

☞ Access to justice; Enforcement; European Court of Human Rights; Friendly settlement procedure; Right to effective remedy; Subsidiarity; Ukraine

Burmych v Ukraine (Applications No.46852/13)

European Court of Human Rights (Grand Chamber): Judgment of 12 October 2017 (striking out)

Facts

The present case concerns the phenomenon of repetitive cases, the practice of pilot judgments and the role played by different incumbents regarding compliance with the European Human Rights Convention. The disputed issue regards concern prolonged non-enforcement of domestic final judicial decisions.

In a previous pilot judgment, the *Ivanov v Ukraine* (App. No.40450/04, judgment of 15 October 2009), the Court had diagnosed that the prolonged non-enforcement of domestic decisions was a structural problem affecting Ukraine. This problem became evident after a decade of cases settled or decided against Ukraine. The main reason for lack of enforcement relates to lack of funds from so-called state debtors as well as other shortcomings in the national legislation. When the *Ivanov* case was decided, there were 1,400 cases pending before the Court on similar grounds. At the time the Court decided that the respondent state had to “set up without delay, and at the least within one year from the date on which the judgment becomes final” an effective domestic remedy or remedies to secure adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions. The Court ordered that Ukraine should

grant this redress to the claimants of the *Ivanov* case and to all pending applicants complaining solely about prolonged non-enforcement and lack of effective remedies in respect to such non-enforcement. The Court adjourned all pending cases for one year, and agreed to resume the examination of all similar applications in case Ukraine failed to adopt these remedial measures. The government asked for further extensions, submitted friendly settlement proposals and unilateral declarations, which in response the Court granted the extension and struck out some of these cases off its list. However, after Ukraine requested a new extension, the Court rejected resuming

the examination of *Ivanov*-type cases.

In 2012 the Parliament of Ukraine passed new legislation on execution of judicial decisions, where the State Treasury was expected to pay the debts due under the domestic court judgments. Despite this new remedy, the influx of cases increased. In the meantime, the Court awarded fixed-rate amounts to cover damages and expenses in most *Ivanov*-type cases. The Court acknowledged in *Burmych* that whilst the case involved five applicants arguing a violation of arts 6(1) (right to a fair trial) and 13 (right to an effective remedy) and art.1 of the Protocol No.1 (right to peaceful enjoyment of property), they were similar to other 12,143 pending applications against the same national jurisdiction. The government argued that the non-enforcement of domestic judgments was a problem that continued to exist because of the size of debt accumulated and the limited funding allocated for enforcing outstanding judgments. It also contended that there was no additional legal issue to be considered that the *Ivanov* case had not already decided. It also defended itself by acknowledging different reform attempts that would show Ukraine's commitment to resolve the situation.

Held

- (1) The Court decided to join the five applications with 12,143 pending applications given their similar factual and legal background (by 10 votes to seven).
- (2) The Court declared all five applications admissible (by majority).
- (3) The five applications and the 12,143 joined applications were held to be dealt with in compliance with the obligation deriving from the *Ivanov* pilot judgment (by 13 votes to four).
In *Ivanov*, the Court considered the prolonged non-enforcement of domestic decisions in Ukraine, identifying the systemic shortcomings, the subsequent violation of the Convention due to those shortcomings, and it provided guidance to the respondent state about general measures it needed to introduce for relieving all victims. These measures include the provision of redress for the non-enforcement or delayed enforcement of domestic decisions and payment of the judgment debt.
- (4) The Court decided to strike all the aforementioned applications out of the Court's list of cases and transmit them to the Committee of Ministers to be dealt with by the latter in accordance with the execution measures of the *Ivanov* pilot judgment. The Court considered that it was in the best interests of applicants and victims to protect them in the execution process rather than continuing examining post-*Ivanov* cases. This conclusion is without prejudice of the residual power vested in the Court to restore any present or similar application to the list of cases if justified by the circumstances.

Cases considered

Airey v Ireland (1979–80) 2 E.H.R.R. 305

Ananyev v Russia (2012) 55 E.H.R.R. 18

Anastasov v Slovenia (App. No.65020/13), judgment of 18 October 2016

- Belanova v Ukraine* (App. No.1093/02), judgment of 29 November 2005
Bouyid v Belgium (2016) 62 E.H.R.R. 32
Broniowski v Poland (2006) 43 E.H.R.R. 1
EG v Poland and 175 Other Bug River applications v Poland (App. No.50425/99), judgment of 23 September 2008
Finger v Bulgaria (2017) 64 E.H.R.R. 9
Greens and MT v United Kingdom (2011) 53 E.H.R.R. 21
Hutten-Czapska v Poland (2006) 42 E.H.R.R. 15
Ivanov v Ukraine (App. No.40450/04), judgment of 15 October 2009
Kudla v Poland (2000) 35 E.H.R.R. 198
Kucherenko v Ukraine (App. No.27347/02), judgment 15 December 2005
Oneryildiz v Turkey (2005) 41 E.H.R.R. 20
Poltorachenko v Ukraine (App. No.77317/01), judgment 18 January 2005
Romashov v Ukraine (App. No.67534/01), judgment of 27 July 2004
Scoppola v Italy (2010) 51 E.H.R.R. 12
Shmalko v Ukraine (App. No.60750/00), judgment of 20 July 2004
Varga v Hungary (2015) 61 E.H.R.R. 30
Voytenko v Ukraine (App. No. 18966/02), judgment of 29 June 2004
Zubko v Ukraine (2009) 48 E.H.R.R. 28

Commentary

The case of *Burmych* is a watershed ruling for pilot judgments and follow-up cases as it reshapes the jurisdictional role of the Court and empowers the Committee of Ministers to address issues of implementation of pilot rulings.

According to the Court, the rationale of pilot judgments consists of requiring the respondent state to eliminate the source of the violation for the future and to provide remedy for any past prejudice, which includes all victims of the same type of violation. When a respondent state introduces amending legislation that provides the said relief, the Court usually strikes out of its list those cases that would be resolved through the new domestic legislation. Nonetheless, the “wholesale delivery of rulings” that has happened in the interval between *Ivanov* and *Burmych* has not had a relevant impact on the overall systemic problem nor shown any progress regarding the execution process. It has only increased the Court workload as applicants pursue obtaining financial relief from the Court’s application of art.41. The Court redefines its role in follow-up cases of pilot judgments by arguing that it is incompatible for it to deliver case-by-case decisions “where there was no longer any live Convention issue”. For the Court, there is no new legal issue to be discussed and adjudicated regarding Ukraine’s structural problem of non-enforcement of judicial rulings. The responsibility for affording reparation with respect to pilot judgments lies on domestic jurisdictions, whereas for the Court it is only an accessory function. Instead, what follow-up cases to the *Ivanov* judgment keep showing up is a problem of enforcement, a matter where the Committee of Ministers seems to be better prepared for dealing with. The Court, then, went on to consider that to keep admitting similar applications will go against the Court’s role as a guarantor of human rights in other cases as its workload to judge these cases is impeding it from resolving new and pending applications.

The Court retorts to a consequentialist argument for changing the current approach to pilot judgments, as it perceives that claimants turn to the Court for redress which could make the Court part of the Ukrainian legal enforcement system, substituting itself for the domestic authorities. According to the subsidiarity principle, findings of facts or calculation of monetary compensation in these cases should be the domain of domestic jurisdictions in principle. To continue with the existing approach to follow-up cases would become incompatible with the subsidiarity role of the Court as defined by the Convention. Within this

new interpretation, the Court delineates the system's shared responsibilities with other authorities. The Court may assist the respondent state in fulfilling its obligations by seeking to indicate the type of measure needed to end a systemic problem. The Committee of Ministers, on the other hand, supervises the execution and ensures that the state has discharged its obligation. The execution of the *Ivanov* case and follow-up cases is a problem that must be solved by the respondent state and the Committee of Ministers. The overall functioning of the Convention system favours this new approach. The purposes of granting relief within the framework of execution proceedings would be to place all victims of the systemic violation of non-enforcement on an equal footing.

However, the judgment was not without strong dissent, announced by the tight voting. Indeed, Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc had strong words against this new approach. The dissenting opinion argues that the decision had nothing to do with protecting human rights but rather was a matter of judicial policy, aimed towards reducing the Court's case load. Between *Ivanov* and *Burmych* the Court has examined and disposed 14,403 *Ivanov*-type cases, a practice which questions the soundness of the current decision to strike out a similar number of cases without assessing their individual features. This decision would be also dangerous for the future because what the Court has stated in this case is that individuals affected by these situations must be treated as victims even before submitting their applications, which could be admissible, ill-founded or constitute abusive litigation. Thus, the dissenters consider that the Court still needed to undertake an individual and autonomous legal determination to decide whether the pilot judgment should be followed regarding future applications. With respect to the division of responsibilities between the Court, the Committee of Ministers and the respondent state, the dissenters contend that the latter two (as well as the applicants) were not consulted nor informed about the transfer of cases and undecided applications. This would contradict previous practice when adopting judicial policies, consisting of inviting stakeholders to discuss them. For dissenters the main issue surrounding the Convention's division of competence of empowering the Committee of Ministers would be a retrograde decision, as the latter incumbent becomes the sole authority to decide if there is a violation and if there proceeds just satisfaction, conflicting with the changes introduced in 1998 which suppressed the Committee's intervention from judicial functions. Finally, the disagreement extends to the absorption of victims' individual claims into the process of execution. For the dissenting opinion this is a threat to individual fundamental rights, as the Court would deal only with novel claims while similar applications would have to "enjoy" the judgment given in favour of their precursors". An example of this problem relates to the issue of inflation affecting the fixed amount for compensation decided in *Ivanov*, against which applicants have argued it does not cover long-term losses.

In sum, this case reflects rival conceptions of the roles of the judicial function in the context of mass litigation within the Convention's system. While the decision assumes a minimalist role for the court, drawing a clear line between execution, adjudication and reinterpreting the principle of subsidiarity to limit its intervention, the dissenters' opinion can be read as advocating for a more active role for judicial intervention for the Court.

Monitoring workplace communications

Workplace correspondence—monitoring—internet usage—private life—privacy—art.8

✉ Electronic communications; Employee monitoring; Employees' rights; Employers' powers and duties; Right to respect for private and family life; Romania; Unfair dismissal

Bărbulescu v Romania (Application No.61496/08)

European Court of Human Rights (Grand Chamber): Judgment of 5 September 2017

Facts

The present case concerns the extent to and circumstances under which an employer is able to monitor their employee's communications in the workplace. Mr Bărbulescu (the applicant) was a Romanian national, who was employed by a private company (the employer) from 1 August 2004 until 6 August 2007. As part of his employment the applicant was asked to set up a Yahoo messenger account to communicate with the company's clients. On 3 July 2007 the Bucharest office received and circulated amongst the staff a notification highlighting the prohibition on the personal use of company equipment. The notice informed employees that their usage of the internet would be monitored, however, it did not inform employees that the content of messages sent from company computers could be monitored. On 13 July 2007 the applicant was asked to attend a meeting by his employer. At this meeting the applicant was questioned as to why his usage of the Yahoo messenger service was higher than that of the other employees and whether the increased usage was due to using the service for personal purposes. The applicant contended that he had only ever used the service for company business. Later that day the applicant was summoned to another meeting and provided with a transcript of messages sent from his company account. These contained correspondence between him, his brother and his fiancée.

As a result, the applicant's employment was terminated on the basis that the personal correspondence breached the company's internal regulations. The applicant brought the matter before Bucharest County Court, relying on *Copland v United Kingdom* (2007) 45 E.H.R.R. 37, and he contended that his right to "private life" and "correspondence" under art.8 of the European Convention of Human Rights had been violated. On 7 December 2007 the court found the employer had complied with the Romanian Labour Code and dismissed the claim. The applicant appealed to the Bucharest Court of Appeal arguing the same grounds. Citing EU Directive 95/46/EC, the Court of Appeal rejected the appeal opining that the employer's actions were reasonable and were needed in order to ascertain whether the applicant had been using company software for personal purposes. Consequentially, the claimant filed a complaint with the European Court of Human Rights claiming, inter alia, that the termination of his contract combined with the dismissal of the matter before the domestic courts had breached his art.8 rights to respect for his private life and correspondence.

Held

- (1) The Grand Chamber agreed with the Chamber (*Bărbulescu v Romania* (App. No.61496/08), judgment of 12 January 2016) noting that art.8 was applicable in the present case. They opined that "private life" is a broad term under the Convention, not capable of exhaustive definition, and that it should not be confined to a restrictive interpretation. Further the Court reasoned that the notion of "private life" may also include elements of professional conduct and the mere fact an activity is carried out in the workplace does not preclude it from being included within the remit of art.8. Turning to the issue of correspondence the Court noted that "correspondence" is not qualified by any adjective within the Convention, as in the case of "private life". Accordingly, any form of correspondence had the ability to fall with the art.8 criteria and explicit note was made of the Court's previous jurisprudence which had dealt with a variety of communication forms carried out in the workplace, all of which were held to concern art.8 of the Convention.
- (2) There had been a violation of art.8 (11 votes to six).

The Court agreed with the domestic courts in that the present case was essentially concerned with a balancing exercise between the applicant's art.8 right and the employer's right to engage in the monitoring of electronic communication so as to ensure the smooth running of the company. The Court began by discussing whether, given that the complaint related to a private company, there was a negative or positive obligation upon the state to prevent breaches of art.8 arising out of the monitoring of electronic communications. The Court held that as the decision was accepted by the national authorities in accordance with the Romanian Labour Code, the case should be assessed from the standpoint of the Member State's positive obligations. However, the Court recognised that in the context of labour law there was little to no consensus amongst Member States or indeed amongst comparative organisations, such as the EU, as to whether a state should enact specific legislation to deal with matters of the sort concerned. Accordingly, the Court afforded Romania a wide, although not unlimited, margin of appreciation, emphasising the need for adequate safeguards against abuse of electronic communication in the workplace. The Court then listed factors which it considered to be relevant to the question of effective implementation of adequate safeguards. Found in full at [121] these factors included:

- Whether the employee had been notified as to the possibility of their communications being monitored.
- The extent to which the communications were being monitored and the degree of correlating intrusion upon the employee's private life. In this factor the Court drew a distinction between monitoring the quantity and monitoring the content of communication as the latter would entail a larger intrusion into the employee's privacy.
- Whether the employer had provided legitimate reasons for monitoring the employee's correspondence and whether a less intrusive method could have been used.
- Whether the employee was aware of the consequences of using company equipment for personal purposes
- Whether adequate safeguards had been put in place for monitoring communications. Again, highlighting that the monitoring of the content of communications was more intrusive in nature and the Court expressed a preference that any safeguards should prevent the monitoring of the content of the messages.
- Finally, that an employee who had been subject to such monitoring should have a remedy before the domestic courts who should be in a position to determine how the above criteria had been observed in practice.

In assessing the extent to which the national courts applied the above criteria the Court accepted that the applicant had been made aware that the employer had the capability to monitor electronic communication. However, the Court also noted that the domestic courts had failed in their duty to ascertain whether the applicant was aware of the scope and nature of the monitoring measures and, in particular, whether the applicant was aware that the message content could be monitored. Further, the Court observed that the domestic court had failed to identify whether there were legitimate reasons for monitoring the applicant's message content and whether a less intrusive method could have been utilised. Accordingly, the Court found that reading the facts of the case in light of the above-mentioned criteria the domestic courts had failed to adequately balance the two sets of rights thus leading to a breach of the applicant's art.8 right.

Cases considered

- Amann v Switzerland* (2000) 29 E.H.R.R. 843
Axel Springer AG v Germany (App. No.39954/08), judgment of 7 February 2012
Bigaeva v Greece (App. No.26713/05), judgment of 28 May 2009
Goodwin v United Kingdom (2002) 35 E.H.R.R. 447
Copland v United Kingdom (2007) 45 E.H.R.R. 37
Fernández Martínez v Spain (2015) 60 E.H.R.R. 3
Hämäläinen v Finland (App. No.37359/09), judgment of 16 July 2014
Köpke v Germany (App. No.420/07), judgment of 5 October 2010
Niemietz v Germany (1993) 16 E.H.R.R. 97
Volkov v Ukraine (2013) 57 E.H.R.R. 1
Özpýnar v Turkey (App. No.20999/04), judgment of 19 October 2010
Palomo Sánchez v Spain (2012) 54 E.H.R.R. 24
Pretty v United Kingdom (2002) 35 E.H.R.R. 1
Sidabras v Lithuania (2006) 42 E.H.R.R. 104
Söderman v Sweden (2014) 58 E.H.R.R. 36
Von Hannover v Germany (No.2) (App. Nos 40660/08 and 60641/08), judgment of 7 February 2012
X v Netherlands (1986) 8 E.H.R.R. 235
Zakharov v Russia (App. No.47143/06), judgment of 4 December 2015

Commentary

The case should be heralded as a resounding victory for an employee's right to privacy within the workplace owing to the overturning of the Chamber's decision. The judgment provides a helpful base from which clarity of the law may be achieved. Whilst it is true that, as a result of the Grand Chamber's judgment, an employee can expect to be afforded more privacy in a workplace environment, the Court was very clear in that monitoring of correspondence is a two-way balancing exercise which naturally entails a loss and a gain on both sides. The relevant factors for consideration provided by the Court at [121] form the substantive basis of what must be considered in order to for an employer, or in the alternative a domestic court, to adequately balance these competing interests.

Through a close case reading, the primary concern of the Court is the degree of knowledge which the employee is afforded. This is evidenced by the Court repeatedly mentioning that the applicant was not aware that the content of his communications could be monitored. Accordingly, an employer is still able to monitor their employee's correspondence, provided they have a reason to do so, if they have informed the employee beforehand and ensured that employees are made aware of the consequences of using company services for personal purposes. Unfortunately, combined with the inherently unequal power dynamic between employers and employees it is questionable how much protection this judgment will actually afford employees in practice and whether employees will simply be forced to accept intrusive monitoring methods by mere virtue of being aware of them.

Of interest are the two grounds of dissent expressed in the joint opinion of Judges Raimondi, Dedov, Kjølbro, Mits, Mouro-Vikström and Eicke. First, issue was drawn with the majority opinion that the domestic employment court had erred with regard to its application of the law. The dissenting opinion contended that in the context of positive rights, Contracting States are only required to provide an adequate "legal framework" which allows for protection of the Convention rights and held that Romania provided such a framework yet it was simply not utilised by the applicant. Accordingly, they expressed concern with the majority view focusing solely on the application of the law by the domestic court as opposed to the failure, on the part of the applicant, to exhaust all the domestic remedies available to him, thereby

making it appear as though an adequate legal framework was absent. Second, the dissenting judges disagreed with how the majority assessed the analysis carried out by the domestic court. Primarily, they felt that the domestic courts were right in giving precedence to the employer's right to the smooth running of a company. Through emphasising the wide margin of appreciation enjoyed by Contracting States in this field, which is enhanced by lack of a European consensus on the matter, they felt that the domestic courts did strike a fair balance between the two competing rights. Crucial in this regard was their opinion that without the ability to monitor communications of employees such a right would be unattainable. Finally, the dissenting judges felt that provided the employee was aware that at least one aspect of his communications could be monitored it was immaterial whether he was expressly made aware that the content of those communications could be monitored as well.

Ultimately, the judgment will require companies to reconsider their monitoring procedures but will not drastically inhibit their implementation provided the employee is kept apprised of the situation and extent of the procedure.

National security and the right to a fair trial

Security clearance—withholding of information—national security—defence—right to a fair trial—art.6

☞ Czech Republic; Margin of appreciation; National security; National security certificates; Non-disclosure; Right to fair and public hearing

Regner v Czech Republic (Application No.35289/11)

European Court of Human Rights (Grand Chamber): Judgment of 19 September 2017

Facts

Mr Václav Regner (the applicant), born in 1962, is a Czech national living in Prague. He was employed by the Ministry of Defence following a contract signed on 2 November 2004. In order to grant access to "secret" classified information, which would allow him to fulfil the duties in his role, security clearance was required, which the Ministry of Defence requested on 27 December 2004. Clearance was approved on 19 July 2005 and was valid for five years. However, this was retracted on 5 September 2006. It came to light that, when applying for security clearance, Mr Regner had failed to disclose information regarding his foreign bank accounts and the company directorships he held. The second reason for withdrawal of security clearance was that on 7 October 2005, the National Security Authority (NSA) received confidential intelligence, classified in the "restricted" category, that the applicant was perceived as a threat to national security. In order to verify the information they had received, NSA began an investigation, which prompted further intelligence, dated 21 March 2006, also classified as "restricted". The reasons behind deeming Mr Regner as untrustworthy were confidential and therefore, legally, it was not information that could be shared with the applicant. Following the applicant's request owing to health reasons, he was removed from office on 4 October 2006 and, on 20 October 2006, signed a mutual agreement to end his contract, with termination taking effect on 31 January 2007.

In January 2007, Mr Regner sought judicial review for the withdrawal of his security clearance. Prague Municipal Court dismissed his application on the basis that in cases of national security, reasons could only be disclosed if they related to non-classified documents; thus, it was illegal to disclose the details pertaining to the applicant's case. In July 2010, the Supreme Administrative Court also dismissed Mr Regner's appeal because they found that revealing the classified information to the applicant would result

in an exposure of the NSA's methods. The applicant then filed a complaint to the Constitutional Court, with the view that the proceedings were unfair. In March 2011, the prosecution charged Mr Regner with influencing the awarding of public contracts at the Ministry between 2005 and 2007. The Regional Court sentenced him to three years' imprisonment; the Prague High Court upheld this judgment, but with a suspended sentence of two years.

Held

- (1) The application was considered to be admissible because the case discussed a civil right within art.6, and whether this right was violated.
- (2) The Court found there was no violation of art.6 (10 votes to seven).
Mr Regner's right to a fair trial had not been infringed upon in the refusal to disclose confidential NSA intelligence as to why he was viewed as no longer able to keep secrets. The judgment considers that the security clearance required for Mr Regner to act in his role was a prerequisite for accessing sensitive state information, but also needed for performing certain roles in civil service. The Court found that access to such information is therefore not a civil right for the purpose of art.6. In reference to previous case law, the Court concluded that in cases such as this, where conflicting interests are involved, public interest is what should surpass procedural rights of the individual. Despite "restricted" information being withheld from the applicant, all information was made available to Czech courts, and domestic decisions and proceedings were believed to have been conducted fairly. The constraints placed on Mr Regner's rights were compensated by the courts' powers to view all documents associated with the case. His right to a fair trial was not lessened.

Cases considered

- Al-Adsani v United Kingdom* (2002) 34 E.H.R.R. 11
- Al-Dulimi and Montana Management Inc v Switzerland* (App. No.5809/08), judgment of 21 June 2016
- Ankarcrona v Sweden* (App. No.35178/97), judgment of 27 June 2000
- Avotiņš v Latvia* (2017) 64 E.H.R.R. 2
- Blečić v Croatia* (2006) 43 E.H.R.R. 48
- Boulois v Luxembourg* (2012) 55 E.H.R.R. 32
- Chahal v United Kingdom* (1997) 23 E.H.R.R. 413
- Cudak v Lithuania* (2010) 51 E.H.R.R. 15
- Devenney v United Kingdom* (2002) 35 E.H.R.R. 24
- Ellès v Switzerland* (App. No.12573/06), judgment of 16 December 2010
- Fayed v United Kingdom* (1994) 18 E.H.R.R. 393
- Fitt v United Kingdom* (2000) 30 E.H.R.R. 480
- Masson v Netherlands* (1996) 22 E.H.R.R. 491
- Mats Jacobsson v Sweden* (1990) 13 E.H.R.R. 79
- Obermeier v Austria* (1990) 13 E.H.R.R. 290
- Ohneberg v Austria* (App. No.10781/08), judgment of 18 September 2012
- Olujić v Croatia* (App. No. 22330/05), judgment of 5 February 2009
- Pocius v Lithuania* (App. No.35601/04), judgment of 6 July 2010
- Prince Hans-Adam II of Liechtenstein v Germany* (App. No.42527/98), judgment of 12 July 2001
- Pudas v Sweden* (1987) 10 E.H.R.R. 380
- Roche v United Kingdom* (2005) 42 E.H.R.R. 600

Tinnelly & Sons Ltd v United Kingdom (1999) 27 E.H.R.R. 249
Van Marle v Netherlands (1986) 8 E.H.R.R. 483
Vilho Eskelinen v Finland (2007) 45 E.H.R.R. 43
Vučković v Serbia (2014) 59 E.H.R.R. 19

Commentary

The difficulty of this case rests within the laws that govern the administrative decision to revoke security clearance. Clearance was required to perform the applicant's particular duties, but this access to classified information is not a civil right. Of course, the judgment relies on the argument that the Czech courts were privy to the confidential documents containing the "restricted" information regarding the applicant. The case clearly created a significant divide in the Grand Chamber, seen in the sheer volume of opinions annexed to the judgment. Of particular interest, the joint partly dissenting opinion of Judges Raimondi, Cicilanos, Spano, Ravarani and Pastor Vilanova expressed that art.6 had actually been breached. They voiced how inconceivable it was for NSA to withhold information on the grounds that it would expose their methods. Perhaps, however, the intelligence they received was the result of an informant or somebody Mr Regner may have trusted and unveiling this would have caused detrimental consequences. But, more substantially, they were troubled that, from a legal point of view, failure to disclose on why the applicant was a risk to security, guaranteed that the process of building a defence would be impossible. It is, of course, problematic to speculate why Mr Regner wished to terminate his employment, and indeed the courts did not study this fact in much depth. It was the applicant's specific role, as deputy to the Vice-Minister of Defence, which was affected by the revoking of security clearance, not his employment as a whole. As Judge Wojtyczek's concurring opinion and Judges Guerra's and Trajkovska's joint partly dissenting opinion both emphasise, it is important to note it was the applicant's mutual decision to resign. The controversy of the case can be further explored in Judge Sajó's dissenting opinion, which highlights the significance of the applicant's lack of knowledge on himself concerning the case against him. As a result of this denial of details about information, which was classified as "restricted", Mr Regner and his lawyer were also deprived of the possibility of constructing a full defence. The question of equality of arms is raised here—a fundamental principle the right to a fair trial encompasses. With this principle denied to him through a failure to completely disclose elements of information brought against him, Mr Regner was placed in a disadvantaged position, where he categorically could not raise an effective defence. So, for the Court it may seem that threats to national security can limit, to some extent, the right to a fair trial.

Corrective reply articles and freedom of expression

Journalist—editorial—corrective reply—no hearing—art.6—right of others—freedom of expression—art.10—Turkey

Defamatory statements; Freedom of expression; Journalists; Right of reply; Right to fair and public hearing; Right to fair trial; Turkey

Eker v Turkey (Application No.24016/05)

European Court of Human Rights (Second Section): Judgment of 24 October 2017

Facts

The applicant, Mustafa Eker, resides in Sinop, Turkey, and was, at the material time, editor of *Bizim Karadeniz*, a local newspaper. On 23 February 2005, Mr Eker published an editorial entitled “May your route be smooth” in which he sharply criticised the journalists’ association of Sinop, accusing them of acting in contradiction with their main objective and of not serving their intended purpose. On 25 February 2005, the president of the association, considering that Eker’s editorial had undermined his and his associates’ dignity and honour sent Mr Eker a corrective reply for publication. The latter refused to publish the reply in the local newspaper.

At the beginning of March 2005, the president of the journalists’ association applied to the Sinop Magistrate’s Court aiming to obtain an order of publication for his corrective reply. The court ordered the publication without holding a hearing and ruled only on the basis of the case file. Mr Eker appealed the order before the Sinop Criminal Court which, also on the basis of the case file, dismissed the appeal. The criminal court’s decision was the final ruling, and the reply was consequently printed in the concerned local newspaper.

Mr Eker complained that his right to a fair trial (art.6), his right to respect for private and family life (art.8), and his right to an effective remedy (art.13) had been breached because there had been no hearings either before the magistrate or the criminal courts, because the examination of the case by the latter had been insufficient, and because he had had no opportunity to refer his case to a higher jurisdiction. Moreover, the applicant considered that his freedom of expression (art.10) had been undermined since he had been obliged to publish the reply.

Held

- (1) The Court declared the application admissible concerning art.6(1) in relation to the lack of a hearing before the domestic courts and art.10 of the Convention, and declared the remainder of the application inadmissible (unanimous).
- (2) There had been no violation of art.6(1) in relation to the lack of a hearing before the domestic courts (unanimous).

First, concerning the lack of a hearing before the two domestic courts, the Court reiterated that the obligation to hold a hearing is not absolute. Exceptional circumstances might justify the lack of a hearing. Under art.6(1), all procedures do not necessarily require an oral hearing. This is notably the case for issues that do not raise questions of credibility or do not cause controversy over the facts of the case. Other considerations, such as the right to a judgment within a reasonable period, are considered to determine whether a hearing is necessary. In the present case, the Court noted that the questions at stake required a textual and technical analysis on the corrective reply and that no hearing was necessary for the domestic courts to decide on the issue. Moreover, the “right to reply” procedure, as provided for by Turkish law, constitutes an exceptional and urgent procedure. The promptness of the decision is consequently essential for the effectiveness of the procedure. As a result, the Court considered that art.6(1) had not been breached in the present case.

Concerning the remaining claims made by the applicant in relation to an insufficient examination of the case by the domestic courts and the absence of a possibility to appeal to a higher court, the Court considered they were manifestly ill-founded.

- (3) There had been no violation of art.10 (unanimous).
- The Court considered that the publication of the corrective reply was related to the exercise by the journalists’ association of their freedom of expression. However, the Court also agreed that the obligation the applicant had to publish the reply could be considered as an interference

with his freedom of expression. The Court firstly noted that the interference was provided for by the Turkish law, namely in art.32 of the Constitution and art.14 of the Press Act, and that the latter pursued the legitimate aim of protecting the reputation and rights of others. Secondly, the interference, according to the Court, was necessary in a democratic society. Indeed, the right of reply guarantees the pluralism of information. Thirdly, in the present case, the Court noted that the domestic courts had struck a fair balance between the applicant's freedom of expression and the association's right to protect their reputation. Finally, the Court observed that the obligation to publish the corrective reply was proportionate to the aim pursued since the applicant had not been compelled to modify the content of his editorial, but only to publish a reply to the latter. Moreover, the applicant was completely free to publish a new editorial to re-explain his version of the facts.

Cases considered

Diennet v France (1996) 21 E.H.R.R. 554

Döry v Sweden (App. No.28394/95), judgment of 12 November 2002

Göç v Turkey (2002) 35 E.H.R.R. 6

Håkansson v Sweden (1990) 13 E.H.R.R. 1

Jurisic and Collegium Mehrerau v Austria (App. No.62539/00), judgment of 27 July 2006

Kaperzyński v Poland (App. No.43206/07), judgment of 3 April 2012

Martinie v France [GC] (App. No.58675/00), judgment of 12 April 2006

Melnitchouk v Ukraine (App. No.28743/03), judgment of 5 July 2005

Morice v France (2016) 62 E.H.R.R. 1

Varela Assalino v Portugal (App. No.43369/01), judgment of 25 April 2002

Commentary

In the present case, the Court had to render a decision on two major rights of the Convention, namely the right to a fair trial and the freedom of expression. Concerning art.6(1), the Court reiterated that, while the Convention states that everyone is entitled to a fair and public hearing, the obligation to hold a public hearing is not absolute. Here, the domestic courts had first to decide whether the honour and dignity of the association had been undermined by the editorial which, if it was the case, would give rise to a right of reply. Once this right had been recognised, the domestic courts had to proceed to a textual analysis of the reply's content to make sure the latter did not itself undermine the right of others. The Court considered that these questions did not necessitate a debate on evidence or the cross-examination of witnesses. Moreover, the procedure was an exceptional urgent procedure that did not prevent the eventual initiation of a defamation action where adversarial debates would take place. In relation to art.10, the Court made clear that, while the applicant shall have his freedom of expression protected, so did the leaders of the association. The right of reply is an important element of the freedom of expression: it ensures the plurality of opinion and enables the contestation of false information. As a result, while the obligation for the applicant to publish the corrective reply constituted an interference with his freedom of expression, the latter was necessary to guarantee the pluralism of information which is fundamental in a democratic society. The judgment of the Court is a notable effort to uphold the right to freedom of expression in Turkey, at a time that journalists' rights have been severely restricted by the Erdogan government.

Conscientious objection to compulsory military service

Conscientious objector—compulsory military service—alternatives—civilian nature—deterrent or punitive character—art.9—freedom of thought, conscience and religion

☞ Armenia; Conscientious objection; Conscription; Freedom of thought conscience and religion; Margin of appreciation

Adyan v Armenia (Application No.75604/11)

European Court of Human Rights (First section): Judgment of 12 October 2017

Facts

The four applicants, Mr Adyan, Mr Avetisyan, Mr Khachatryan and Mr Margaryan, are Armenian nationals and Jehovah's Witnesses who refused to participate in state-mandated military or alternative service on the grounds that it conflicted with their religious beliefs. The applicants argued that the alternative service offered in Armenia was not genuinely civilian in nature because it remained under the control and supervision of the military authorities. All of the applicants had criminal proceedings brought against them for the evasion of conscription to military or alternative service in accordance with the Armenian Criminal Code. The first, third and fourth applicants were further detained and had appeals against their detention orders dismissed by the Criminal Court of Appeal in 2011, which cited the probability of them committing a new offence or evading punishment if they were released.

Lodging a complaint before the Court, the applicants alleged a violation of their art.9 right to freedom of thought, conscience and religion on the grounds that the alternative service was not civilian in nature and it was against their conscience to participate. In support of their argument, the applicants cited the reforms implemented in Armenia in 2013 to remove the alternative service scheme from military control and provide for the release of conscientious objectors detained in accordance with Council of Europe recommendations. The first, third and fourth applicants brought a further complaint in accordance with their art.5 right to liberty alleging that the domestic courts had not provided relevant and sufficient reasons for their detention.

Held

- (1) The respondent government's objection based upon the non-exhaustion of domestic remedies was joined to the merits and rejected (unanimous).
It was argued by the Armenian government that the legal amendments applied to the Criminal Code Implementation Act in May 2013 providing for the release of persons serving sentences for evasion of military service, the expunging of their criminal records, and the corresponding reduction of their terms of service, provided the applicants with an opportunity to obtain redress at the domestic level of which they did not avail themselves. The applicants in turn argued that these amendments failed to adequately provide for rehabilitation or compensation. The Court held that this question was closely linked to the substance of the complaint and should therefore be joined to the merits.
- (2) The art.9 and art.5 claims of the applicants were declared admissible (unanimous).

The Court of its own motion addressed the question of admissibility of the art.9 claim and noted that art.9 is applicable where opposition to military service is founded upon “a serious and insurmountable conflict” between the conscience or genuinely held religious beliefs of the person obliged to serve and the service. It was noted that the Court had no reason to doubt this was the case on the facts presented. The claim was held not to be manifestly ill-founded and was declared admissible.

- (3) There had been a violation of the applicants’ art.9 right to freedom of thought, conscience and religion (unanimous).

The Court underlined the contradictory nature of the respondent government’s claims in relation to the existence of a legitimate interference with art.9 and held that there had clearly been an interference with the applicants’ right in their conviction for refusing to perform military service on religious grounds in accordance with its decision in *Bayatyan v Armenia* (App. No.23459/03, judgment of 7 July 2011).

The simple fact of offering an alternative in the form of “alternative labour service” provided for by the Armenian Alternative Service Act, in and of itself, was insufficient to satisfy the state’s art. 9 obligations. The margin of appreciation enjoyed by the States Parties in the organisation of alternatives to military service was held to find its limit in the requirement that any alternative offered must, both in law and in practice, be a service of a genuinely civilian nature and not have a deterrent or punitive character. On the current facts, the Court held that it was not in dispute that the work itself was civilian in nature, however, the other factors to be taken into account, namely those of authority, control, applicable rules and appearances, pointed to the Armenian labour service being insufficiently separate from the military system. In particular, the Court pointed out that the relevant military authorities were involved in supervising the alternative labour service, that they held the power to order the transfer of the serviceman, and that the Internal Rules of Service in the Armed Forces were applied.

On the question of the deterrent or punitive nature of the alternative service, the Court examined the duration of the service which was sufficiently longer than one-and-a-half times the length of the military service limit provided by Council of Europe recommendations, leading to a deterrent and punitive effect. In light of these findings and in combination with the acknowledgement by the respondent government of the shortcomings of the alternative service scheme, which had given rise to reports and reforms, the Court concluded that the appropriate allowances had not been made for the conscience and beliefs of the applicants. The non-exhaustion of domestic remedies objection was rejected on the grounds that the domestic reforms implemented, along with the corresponding case-law of the Court of Cassation, had not been presented as offering an exploration of the potential violation of the applicants’ art.9 rights or any resulting non-pecuniary damages. It was concluded, further underlining the requirement the applicants perform alternative service in the place of the remainder of their sentences, that no adequate remedy had been offered at the domestic level and that there had been a clear violation of art.9.

- (4) The alleged violation of art.5 based upon the failure of the domestic courts to provide relevant and sufficient reasons for the detention of three of the applicants was held not to require a separate ruling in light of the Court’s findings on art.9 (unanimous).

- (5) The respondent state was ordered to pay the applicants €12,000 each in non-pecuniary damages within three months, with simple interest payable thereafter (unanimous).

- (6) The Court rejected the remainder of the applicants’ claim for just satisfaction and legal costs (unanimous).

Cases considered

Bayatyan v Armenia (2012) 54 E.H.R.R. 15

Buscarini v San Marino (2000) 30 E.H.R.R. 208

Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania (App. No.47848/08), judgment of 17 July 2014

Erçep v Turkey (App. No.43965/04), judgment of 22 November 2011

Hasan v Bulgaria (2002) 34 E.H.R.R. 55

Dogan v Turkey (2017) 64 E.H.R.R. 5

Kamil Uzun v Turkey (App. No.37410/97), judgment of 10 May 2007

Sahin v Turkey (2007) 44 E.H.R.R. 5

Papavasilakis v Greece (App. No.66899/14), judgment of 15 September 2015

Savda v Turkey (App. No.42730/05), judgment of 12 June 2012

Commentary

The Court in the present case took the opportunity to decisively reaffirm and clarify the principles laid down in its previous case-law, notably in the *Bayatyan v Armenia* (2011) case, in which the right to conscientious objection to military service was held to be guaranteed under art.9. Making an impassioned defence of the freedoms protected under art.9 as a “precious asset” for both individuals who are religious believers and non-believers, the Court noted that they remain essential in safeguarding the pluralism of a democratic society. The broad scope of art.9 freedom of religion based upon the line of cases delineating the freedom to hold, practise or manifest beliefs was recalled, before examining the conditions under which an interference with the art.9 right may be justified, namely where it is prescribed by law, pursues one or more legitimate aims, and is necessary in a democratic society.

The Court laid down a number of limitations on the margin of appreciation applying to States Parties’ decision-making in relation to interferences with art.9 in the context of compulsory military service. First, it was recalled that where no alternative service is offered, a higher bar applies, requiring the state to demonstrate a “pressing social need” for any interference. Second, the margin of appreciation applied in relation to the organisation of any alternative service offered was held to be limited by the requirement that it be, in both law and practice, a service of a genuinely civilian nature, without any deterrent or punitive effect. Four additional factors to be taken into account by the Court in its determination on the civilian in nature of an alternative service were laid down; namely, authority, control, applicable rules, and appearances. The duration of the period of service was additionally shown to be an important factor to consider in determining whether an alternative service has a deterrent or punitive character.

In this unanimous decision the Court can be seen to be taking a strong stance in defence of the rights of conscientious objectors under art.9, restricting the margin of appreciation available to the States Parties and calling for a clear separation between the military and civilian service options for individuals. In striking the “fair balance” between individual conscience and the interests of society as a whole, the scales were reset in favour of the individuals in this case.

Different-sex couples and registered partnerships

Legal recognition of relationship—same-sex couples—different-sex-couples—no European consensus—right to privacy—art.8—non-discrimination—art.14

☛ Austria; Civil partnerships; Discrimination; Marriage; Right to respect for private and family life; Same sex partners

Ratzenböck and Seydl v Austria (Application No. 28475/12)

European Court of Human Rights (Fifth Section): Judgment of 26 October 2017

Facts

The applicants, two Austrian nationals Ms H Ratzenböck and Mr M Seydl, lodged an application to enter into a registered partnership in February 2010, after living in a stable relationship for many years. The local authority (the Mayor of Linz) rejected their application as it did not fulfil the legal requirements under the Austrian Registered Partnership Act (Eintragene Partnerschaft-Gesetz), being that ss.2 and 5(1)(1) reserved registered partnerships exclusively for same-sex couples.

They appealed the decision to the Regional Governor, and then the Constitutional and Administrative Courts, arguing that, *inter alia*, their arts 8 and 14 rights under the European Convention of Human Rights had been violated by discrimination based on sex and sexual orientation. They noted that were some substantial differences between registered partnership and marriage which made registered partnership more appropriate for them, and argued that the principle set by the European Court of Human Rights in *Schalk v Austria* (App. No.30141/04, judgment of 22 November 2010) (that states are allowed to restrict access to marriage for same-sex couples) should not be applied to registered partnerships, as a modern institution not based in long-standing tradition of discrimination.

All appeals by the applicants were dismissed. The Constitutional Court expressed that, in its view, different-sex couples do not have a right to enter into registered partnership under art.12 of the Convention, and that in accordance with *Schalk*, art.14 cannot impose an obligation to grant this right to different-sex couples. The Constitutional Court noted that registered partnerships were introduced to counter discrimination against same-sex couples by providing them with an alternative framework for recognition and legal rights traditionally associated with marriage. Their analysis of art.14 noted a margin of appreciation afforded to states in granting access to the different institutions, given the lack of European consensus on the matter. The Constitutional Court did not examine whether the substantive differences were in compliance with the principle of equality.

Held

- (1) The Court held the application admissible (unanimous).

The Austrian government contested the victim status on the basis that the differences in legal consequences of registered partnership and marriage were purely hypothetical future effects on the applicants. The Court dismissed this argument, agreeing with the applicants that the situation with which they were concerned was access to a registered partnership, and that the applicants had a legitimate personal interest in addressing this situation.

- (2) The Court held that there was no violation of art.14 taken in conjunction with art.8 (five votes to two).

The Court held that the legal nature of a “familial” relationship, even where the couple are outside of wedlock, clearly falls within the ambit of art.8, so it was applicable to analysis of art.14 in this instance. It was also confirmed that it is well established that sexual orientation is a ground for discrimination to fall under art.14.

The Court noted that it had not yet had the opportunity to examine the difference in treatment relating to exclusion of a different-sex couple into a legal institution. They considered that different-sex couples and same-sex couples are in an analogous situation with respect to their need for legal recognition of their relationship, and protections and benefits stemming therefrom. The Court held that the difference in treatment with respect to entry into registered partnership is, however, justifiable, given that different-sex couples are not in a similar or comparable situation to same-sex couples, given that the former have access to marriage whereas the latter do not.

They noted that registered partnership was introduced to provide legal recognition for same-sex couples as an alternative to marriage, from which they are still excluded in Austria. Confirming the principle from *Schalk* that a margin of appreciation is afforded to states in their provision of these institutions to different-sex and same-sex couples, the Court found that the two institutions in Austria are complementary, and there are no significant substantive differences between them. The result of this is that a different-sex couple have their need for legal recognition satisfied by access to the institution of marriage, and therefore are not in a comparable situation to same-sex couples who require registered partnership as an alternative legal recognition of their relationship.

Cases considered

- EBv France* (2008) 47 E.H.R.R. 21
- Elsholz v Germany* (2002) 34 E.H.R.R. 58
- Fábián v Hungary* (App. No.78117/13), judgment of 15 December 2015
- Karner v Austria* (2003) 38 E.H.R.R. 528
- Kozak v Poland* (2010) 51 E.H.R.R. 16
- Oliari v Italy* (2017) 65 E.H.R.R. 26
- Petrovic v Austria* (2001) 33 E.H.R.R. 14
- Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47
- Schalk v Austria* (2011) 53 E.H.R.R. 20
- Vallianatos v Greece* (2014) 59 E.H.R.R. 12
- X v Austria* (2013) 57 E.H.R.R. 14

Commentary

There has been a growing movement towards the legalisation of gay marriage across Europe, however, the decision of the Court in *Schalk* made it clear that this is not yet a norm. The margin of appreciation of states to regulate entry to that institution is reaffirmed in the present case. If the Court had chosen to follow the arguments of the applicants, finding that there was a discrimination based on same-sex and different-sex couples being in a comparable situation, then this could logically lead to a finding that marriage could not be reserved for different-sex couples. As Judge Mits notes in his concurring opinion, despite a growing trend, there is no European consensus on this sensitive issue, and it appears that the Court is not ready to take this step.

Judges Tsotsoria and Grozev dissented on the finding that different-sex and same-sex couples are not in a comparable situation, arguing that analysis of the legal regulation of their relationships ignores their social realities. They do not believe that this would invalidate *Schalk*, where an analogous situation for the couples was found and that distinction in entry to marriage was a justifiable difference in treatment on the basis of tradition. However, the majority in the present case appear to prefer, by not finding an analogous situation, to avoid justifying a discrimination, instead attributing the difference in treatment to a difference in situation.

It is noteworthy that the Court justifies its decision on the substantive legal similarities of the institutions, and that, in Austria, marriage is not open to same-sex couples. Applying this reasoning in a similar case brought against a state, where same-sex couples are allowed to marry but different-sex couples are not permitted civil partnership, would not hold, and therefore it is imaginable that against such a state a violation could be found.

Parental rights and temporary placement of children in care

Best interests of the child—parental rights—parental obligations—care proceedings—right to respect for family life—art.8

☞ Care orders; Children's welfare; Parental rights; Right to respect for private and family life; Romania

Achim v Romania (Application No.45959/11)

European Court of Human Rights (Fourth Section): Judgment of 24 October 2017

Facts

The present case concerns two applicants of Roma ethnicity who had seven children. In September 2010, the General Directorate of Social Security and Child Protection (GDSSCP) asked the Public Service of Social Assistance (PSSA) to investigate the situation of the applicants' children. The PSSA found that the family lived in an unsanitary house and that the applicants were not concerned with the education or the state of health of their children. Furthermore, the family income exclusively came from a disability pension received by the second applicant and allowances for the children. The investigation revealed that the applicants refused to enrol their children in school or register them with a general practitioner. After establishing a regular follow-up programme of the family, the social services reported that the house in which the family lived was poorly maintained and that the situation of the children did not improve. Moreover, the applicants showed reluctance to cooperate with the social services and did not comply with their parental obligations.

In April 2011, the County Court of Călărași ordered the emergency placement of the children. A psychological examination revealed that the applicants' children suffered from several deficiencies and minor mental backwardness as a result of the applicants' negligence. The youngest child, I, had to be hospitalised. The applicants did not appeal the judgment of the County Court. In August 2011, the GDSSCP requested before the County Court the replacement of the emergency placement by a temporary placement. The Court held that, considering that the applicants did not meet the conditions necessary for the good development of their children, it was in the best interest of the latter to be under a temporary placement measure. The applicants' appeal against the decisions was dismissed by the Court of Appeal of Bucharest, which considered that the precariousness of the living conditions of the applicants and their behaviour in

respect of their children justified the temporary placement. Six of the children were placed in a care centre for children and I was placed with a childminder.

The applicants started to improve their living conditions by doing some works in the house, and obtaining electricity and drinking water. They made efforts to keep in contact with their children and even started to cooperate with the social services. However, they refused to take a psychological evaluation. In February 2012, the PSSA conducted a new investigation and concluded that the material living conditions of the applicants had improved, that the parents had made the commitment to enrol the children in school and register them with a general practitioner. Meanwhile, the applicants brought an action before the county court to ask for the end of the emergency placement measure of the seven children and their reintegration into the family. With the advice of the GDSSCP, the county court dismissed the claim. In March 2012, the Court of Appeal of Bucharest upheld the decision, considering that the improvement of the living conditions was not the only criterion that had to be met for the children to come back home, but that other conditions had to be satisfied to guarantee the respect for the best interest of the children.

The applicants visited the children more often, called them and agreed to take an interview with a psychologist to evaluate their parental skills. In May 2012, the county court held that the conditions to ensure I's development were met and put an end to the temporary placement measure. However, the court dismissed the action regarding the reintegration of the other children. The applicants and the GDSSCP appealed. The Court of Appeal overturned the judgment of the county court, taking into account the improvement of the living conditions of the applicants and the change in their behaviour in respect of their children.

The applicants brought a claim before the European Court of Human Rights against the placement of the children and the dismissal of their action by the judgment of the Court of Appeal of Bucharest on 20 March 2012, which prevented them from reintegrating the children within their family. They argued that their right to respect for family life, as guaranteed by art.8 of the Convention, had been infringed.

Held

- (1) The Court declared that the applicants did not appeal the decision ordering the emergency placement of the children. Thus, the first part of the complaint had to be regarded as inadmissible on the ground that the applicants had not exhausted all the domestic remedies. The second part of the complaint was held admissible.
- (2) There had been no violation of art.8 (unanimous).
On the substance of the case, the Court recalled that the fact, for a child and a parent, to be together constitutes a fundamental element of family life. Internal measures, such as the temporary placement of the applicants' children, are an interference with the right to respect for family life. However, such an interference does not infringe art.8, if it is provided for in the law, it pursues a legitimate aim, and it is necessary in a democratic society. The Court insisted on the fact that keeping a family apart is a very serious interference with the right to respect for family life that must be based on the interest of the child. Moreover, the removal of a child from his parents must only be used as a measure of last resort. The state has a positive obligation to take every necessary step to ensure the reunification of the child and the parent concerned. It must strike a fair balance between the competing interests of the child, the parent, and the public order, although the best interest of the child remains a determining consideration.

In the present case, the objective of the temporary placement measure was the safeguarding of the interests of the children. The Court observed that, as soon as the social services started to evaluate the situation of the applicants' children, they noted material deficiencies and parental failures. The social services tried to advise the applicants regarding the measures

they should take to improve the situation of the children, but the applicants showed reluctance to cooperate. Furthermore, the reports revealed that the children suffered from mental retardation and language disorders and anxiety. The state of health of the youngest child was particularly worrying. Therefore, the measure of temporary placement was not only based on material deficiencies, but was taken in line with the interests of the children. The Court of Appeal ordered the maintenance of the measure by looking at all the facts of the case, i.e. the material living conditions of the applicants, the evolution of the relationships between the applicants and their children and the collaboration of the former with the social services. The Court of Appeal recognised that the material living conditions had improved, but considered that the behaviour of the applicants did not guarantee that the children would be safe upon return in their family. Thus, the motives on the ground of which the temporary placement measure was adopted were relevant and sufficient. The Court reminded that the measure was temporary and that the ultimate goal was to facilitate the reunification with the parents, while respecting the best interests of the children. The social services were particularly concerned with the necessity to maintain the contact between the applicants and the children. The Court considered that the local authorities had taken all the measures that were reasonably expected from them so that the children could be reunited with their parents.

Cases considered

- Couillard Maugery v France* (App. No.64796/01), judgment of 1 July 2004
- Gherghina v Romania* [GC] (App. No.42219/07), judgment of 9 July 2015
- Gnahoré v France* (2000) 34 E.H.R.R. 38
- K v Finland* (2001) 31 E.H.R.R. 18
- Kutzner v Germany* (2002) 35 E.H.R.R. 25
- Maumousseau v France* (2010) 51 E.H.R.R. 35
- Neulinger v Switzerland* [GC] (2010) 54 E.H.R.R. 31
- RMS v Spain* (App. No.28775/12), judgment of 18 June 2013
- Sahin v Germany* [GC] (App. No.30943/96), judgment of 8 July 2003
- Saviny v Ukraine* (2010) 51 E.H.R.R. 33
- Scozzari v Italy* [GC] (2002) 35 E.H.R.R. 12
- Soares de Melo v Portugal* (App. No.72850/14), judgment of 16 February 2016

Commentary

The Court upheld its case-law on the right to respect for family life and reasserted the general principles applicable to the separation of a child from a parent. The main issue in this case was to find a fair balance between the competing interests of the welfare of the child and the applicants' right to exercise their parental obligations. The reasoning was guided by the prime consideration of the best interests of a child. Nevertheless, the Court highlighted the "extreme" character of a measure of placement, and the necessity to reunify the family as soon as the conditions favourable to the good development of the child would be met.

This case is particularly interesting in the light of the observations produced by the Committee on the Rights of the Child in 2009, regarding the situation of the protection of the rights of children in Romania. The Committee expressed concern regarding the high child mortality rate, which is a consequence of parental negligence and the poor quality of social services. However, in the present case, the social services carried out a thorough investigation whose sole purpose was to guarantee the best interests of the children

while trying to strike a balance between the competing interests at stake, in compliance with the right to respect for family life.

Prosecuting torturers

Prisoners—detention—torture—prohibition of torture—substantive and procedural violation—criminalisation—criminal prosecution—art.3

☞ Deterrence; Disciplinary procedures; Inhuman or degrading treatment or punishment; Italy; Prison officers; Prisoners; Prosecutions; Torture

Cirino and Renne v Italy (Application Nos 2539/13 and 4705/13)

European Court of Human Rights (First Section): Judgment of 26 October 2017

Facts

The background of the case concerned the applicants' complaint of having suffered violence and ill-treatment which was considered tantamount to torture during their detention. The incident took place on 10 December 2004 when, following an altercation with a prison officer, both applicants were taken to solitary confinement within the Asti Correctional Facility. Both applicants were stripped and put in cells which had a bed with no mattress, bed linen or covers. The cells had rudimentary toilets but no sinks or panes on the windows; with one applicant having plastic covering the window and the other a malfunctioning radiator to protect against the December weather. During the course of their solitary confinement both applicants were given limited food, often none at all or sometimes only bread and water, and both were beaten on a daily basis. The first applicant noted being repeatedly "punched, kicked and hit in the head by prison officers, who assaulted him in groups of varying sizes", while the second applicant was similarly repeatedly "punched, kicked, slapped and at one point had his head pinned to the ground by one of the prison officer's boots."

A criminal investigation into the treatment commenced in 2005 after the treatment was uncovered through covert surveillance employed in an operation to investigate drug smuggling in the correctional facility. On 7 July 2011 five prison officers, CB, DB, MS, AD, and GS, were brought to trial, with the Asti District Court delivering its judgment on 30 January 2012. The Court established the facts with the evidence showing that the events had occurred in the manner described by the victims in their submissions. The Court found ample evidence that the prison officers had operated in a climate of impunity. In assessing the officers' responsibility, the Court acquitted GS, AD and DB of their charges of ill-treatment under art.572 of the Criminal Code. AD and DB, however, were found to have inflicted bodily harm on the applicants, contrary to art.582 of the Criminal Code. However, the proceedings were discontinued due to the expiration of the applicable time-limit as laid down in the statute of limitations. Officers CB and MS were found to have committed acts amounting to torture as defined under the United Nations Convention against Torture, though the Court noted that Italy had failed to incorporate the offence of torture into its domestic legislation as required, and that there existed no legal provision that would allow it to classify the impugned conduct as acts of torture. The Court then relied on art.608 of the Criminal Code, which deals with abuse of authority against arrested or detained persons, to continue the proceedings though, as seen previously, the statutory limitation period for the offence in question had elapsed and the proceedings were discontinued. Disciplinary decisions were issued against four of the officers on 29 January 2013, with CB and MS dismissed from their functions and AD and DB suspended from duty for four and six

months respectively. CB was, however, reinstated on 26 November 2013 following an appeal to the Court of Cassation who, in their judgment of 11 July 2013, suspended the binding nature of the Asti District Court's judgment delivered on 30 January 2012.

The applicants submitted their application to the Court on 14 and 21 December 2012 respectively, claiming a violation of art.3. The Court considered that the applications should be joined, given their related factual and legal background.

Held

- (1) The Court analysed the case with respects to both a substantive and procedural violation of art.3. They found both aspects of the complaint admissible within the meaning of art.35(3)(a). Having done so the Court delivered a unanimous judgment with respects to the case.
- (2) There had been a violation of the substantive limb of art.3 (unanimous). Concerning the substantive violation of art.3, the Court established the facts of this part of the complaint on the uncontested factual submissions by the two applicants. Their analysis began by reiterating the general principles of the substantive limb of art.3. In doing so, they highlighted that finding a form of ill-treatment tantamount to torture requires a distinction between torture and inhuman or degrading treatment as embodied under art.3. Two core elements were established for finding conduct which amounts to torture. First, the severity of the treatment and particularly whether it was deliberate inhuman treatment causing very serious and cruel suffering. Second, the purposive element of the treatment and whether it was committed with the aim of obtaining information, inflicting punishment or intimidating. The Court found the treatment of the applicants attained the threshold of deliberate inhuman treatment causing very serious and cruel suffering. The decision was made having considered the physical suffering of the applicants, their extremely serious "material" deprivations, the considerable fear, anguish and mental suffering such treatment would have caused and their situations of vulnerability as a result of being in custody. The Court subsequently went on to assess whether there was a purposive element to the treatment. They viewed the treatment of the applicants was deliberate and carried out in a premeditated and organised manner, with this decision influenced by the repeated and systematic nature of the treatment endured by the applicants. This systematic element was further analysed, with the Court finding that it indicated "the existence of a purposive element underlying the impugned treatment, namely to punish the detainees, to enforce discipline and to deter future disorderly behaviour in the correctional facility".
- (3) There had been a violation of the procedural limb of art.3 (unanimous). The procedural complaint was based on the violation of art.3 that had occurred because of the time-limit applied in the domestic prosecution and the failure to introduce an offence of torture domestically. This part of the application initially relied on art.3 in conjunction with art. 13, though the Court decided to solely consider it under the procedural limb of art.3. Italy contested the submissions regarding this complaint and argued that the disciplinary proceedings that had occurred within the proceedings had procedural guarantees that are comparable to those applied in criminal proceedings. The Court noted that reading art. 3 with art.1 meant that there is a general duty to conduct an effective official investigation. The Court noted that the domestic proceedings had been conducted within a reasonable time and that the domestic proceedings themselves could not be criticised. However, the Court found that in having to rely on existing offences to classify the impugned conduct, they were forced to apply offences which were "incapable of addressing the full range of issues ensuing from the acts of torture which the applicants suffered". Equally, the Court considered that

the fact the prosecutions were subject to a statutory limitation period “sits uneasily with the Court’s case-law concerning torture or ill-treatment inflicted by state agents”. The Court concluded that the problem rested not with the domestic judicial authorities but rather with the Italian criminal law framework, “and in particular the absence of provisions penalising the practices referred to in art.3”. Citing *Cestaro v Italy* (App. No.6884/11, judgment of 7 April 2015), the Court found that the domestic legislation was “both inadequate in terms of its capacity to punish the acts of torture in issue and devoid of any deterrent effect capable of preventing similar future violations of art.3”. The Court then assessed the state’s claims concerning the adequacy of the domestic disciplinary procedures. Though they admitted the prison officers were subject to serious scrutiny and were disciplined as a result, the Court reiterated that such procedures by themselves cannot be considered sufficient and that failing to suspend the officers once charged contravened established case-law. The Court asserted that “only a criminal prosecution is capable of providing the preventive effect and dissuasive force required to fulfil the requirements of Art. 3”.

Cases considered

Abdülsamet Yaman v Turkey (App. No.32446/96), judgment of 2 November 2004

Al Nashiri v Poland (2015) 60 E.H.R.R. 16

Bartesaghi Gallo v Italy (App. Nos 12131/13 and 43390/13), judgment of 22 June 2017

Bouyid v Belgium [GC] (2016) 62 E.H.R.R. 32

Cestaro v Italy (App. No.6884/11), judgment of 7 April 2015

El-Masri v Macedonia [GC] (2013) 57 E.H.R.R. 25

Gäfgen v Germany [GC] (2011) 52 E.H.R.R. 1

Hellig v Germany (2012) 55 E.H.R.R. 3

Myumyun v Bulgaria (App. No.67258/13), judgment of 3 November 2015

Saba v Italy (App. No.36629/10), judgment of 1 July 2014

Zeynep Özcan v Turkey (App. No.45906/99), judgment of 20 February 2007

Commentary

This judgment contains an important reiteration of a state’s obligation to criminalise torture domestically, an obligation that Italy has consistently failed to comply with, giving rise to numerous cases brought before the Court on the same ground. It clearly shows the importance the Court places on having domestic legislation in place to aid the realisation of the human rights obligations of states. However, this is clearly only one component necessary to realise an “effective investigation” and it further requires a close examination of the time period in which the investigation takes place and the willingness of the domestic judiciary to apply the legislation appropriately. In many respects the most interesting assertion within the judgment is the Court’s willingness to find that criminal prosecution is a necessary component of art.3. In stating that “only a criminal prosecution is capable of providing the preventive effect and dissuasive force required to fulfil the requirements of art.3”, the Court has seemingly adopted an approach akin to art.7 of the UN Convention against Torture. Equally important was their continued statements that domestic disciplinary proceedings, though an accepted part of such procedures, are not in themselves sufficient to hold state agents to account for violations of art.3. Though this approach has been seen within the cited *Gäfgen* judgment, among others, it is one of the most explicit statements by the Court that states are under an obligation to prosecute those who violate art.3. In this case, the Court stressed the deterrent effect of incorporating domestic legislation defining and criminalising acts of torture and ill-treatment and the prosecuting of those who commit such acts.

Book Reviews

Tax Havens and International Human Rights, by Paul Beckett, (Routledge, 2017), 220 pages, hardback, £115, ISBN: 978-1138668874.

Paul Beckett's book on tax havens and international human rights seeks to shine a human rights light on the workings of tax havens and provides a useful resource for human rights advocates working in the fields of tax justice, accountability and transparency. He argues that campaigns that focus on the taxation elements of offshore finance alone are missing the real issue that impacts on human rights—the development of legislation and structures that create a brick wall for international accountability.

This book provides an insight into the technical details of some of those structures. Separate chapters describe the specific legislative frameworks and structures that help to create international accountability gaps, including an analysis of offshore company and trust structures, the facilitation of beneficial ownership avoidance and the characteristics of tax avoidance and tax evasion, before highlighting these in country examples.

Beckett explores the problem of defining a “tax-haven” and looks at the rather blurred line between how a jurisdiction is given the negative label of a “tax haven” or the more neutral categorisation as an “international finance centre.” By studying and comparing the jurisdictions of the Isle of Man and Switzerland Paul Beckett explains the differentiation in terms of the reasons behind the creation of legislation and structures that favour the financial sector and the scale of accountability. He concludes that, while the Isle of Man is more properly described as an international financial centre, Switzerland is the “grandfather of all tax havens.” His analysis sidesteps the popular image of a tax haven as a palm-fringed atoll and concludes that countries like Switzerland and the United States are as problematic from a human rights perspective as the traditional targets of the tax haven label.

While it does not offer direct answers to the human rights issues created by tax havens, it does raise a number of questions and recommendations for future work in this area. The recommendations at the end of the book highlight a number of different areas where work needs to be done, including analysis of the international human rights law applicable to different jurisdictions, shifts in reporting responsibilities for dependent territories, statistical analyses of tax haven structures and calls on the international community to revive existing instruments like the Ruggie Principles and the UN Global Compact to make them more effective in addressing the global accountability gap in international finance. In that sense, the book is an invitation to further research and a call to action rather than a definitive assessment of the implications on human rights internationally of offshore financial centres.

Against the backdrop of the Panama and Paradise papers, Paul Beckett has produced a careful analysis of some of the challenges that the international financial system poses to international human rights. This is a relatively new area and is often dealt with in headline grabbing general terms that blur the distinctions between what is illegal and what is immoral. Paul Beckett sidesteps the headlines to open up a practical and technical debate about how to address the accountability gaps. This book should be a useful primer for human rights advocates seeking a more detailed assessment of the structures and frameworks in which international finance operates so as to target their arguments about accountability and human rights more effectively in this sphere.

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Opinion

“Human Dignity is Inviolable. It must be Respected and Protected”: Retaining the EU Charter of Fundamental Rights after Brexit

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✉ Brexit; Codification; Fundamental rights; Human dignity; Human rights

Abstract

As Parliament continues its discussion of the EU Withdrawal Bill, this article reflects on the significance of the EU Charter of Fundamental Rights for the UK in the post-Brexit context. Emphasising the importance of the Charter due to the unique range of rights that it protects, and focusing on its most emblematic provision, namely the commitment to protect and respect inviolable human dignity under art. I, the article explores the Charter’s contribution to rights protection and the possible implications of its loss post-Brexit. The article outlines three principal arguments: the importance of codification in the field of human rights law, the need to retain clear awareness of the Charter’s politico-legal foundations and objectives, and the need for special legislation to guarantee Charter rights in the UK for the future.

We will never know whether those who voted in favour of leaving the EU in the June 2016 referendum also voted in favour of losing all the rights codified in the EU Charter of Fundamental Rights (EU Charter). Adopted in 2000 and in force under the Lisbon Treaty since 2009, it is the latest European bill of rights and, with its unique range of rights, it represents a remarkably innovative approach to human rights protection,¹ beyond the (almost exclusive) focus on civil and political rights of the European Convention on Human Rights (ECHR) adopted in 1950, and beyond the specialist human rights treaties that have been developed at the international level, but remain outside the UK dualist constitutional order. Yet the Government has so far been quite forceful in its endeavour to exclude the EU Charter from the EU (Withdrawal) Bill, which is otherwise intended to retain most EU legislation.² The Government’s core argument for excluding the EU Charter is that it merely codifies existing rights that are already retained by the EU (Withdrawal) Bill, and does not add any new rights. So, the argument goes on, people in the UK will not lose out after Brexit.³ Admittedly, the common law is resourceful and human dignity has been increasingly protected in the wake of the Human Rights Act 1998 (HRA 1998),⁴ but UK law contains no

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¹ S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: H Beck-Hart-Nomos, 2014).

² EU (Withdrawal) Bill cl.5(4).

³ Cracks in this argument have begun to appear: “Minister contradicted vow that rights would not be lost after Brexit”, *The Guardian*, 15 January 2018, <https://www.theguardian.com/politics/2018/jan/15/suella-fernandes-new-brexit-minister-eu-charter-human-rights> [Accessed 9 March 2018].

⁴ D. Feldman, “Human Dignity as a Legal Value—Part II” [2000] *Public Law* 61; C. Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004), pp.84–114; B. Hale, “‘Dignity’, Ethel Benjamin Commemorative Address 2010”, UK Supreme Court, https://www.supremecourt.uk/docs/speech_100507.pdf [Accessed 9 March 2018]; Munby, LJ, “What Price Dignity?” (2012) 15 *Community Care Law Report* 5; B. Douglas, “Undignified Rights: The Importance of a Basis in Dignity for the Possession of Human Rights in the United Kingdom” [2015] *Public Law* 241; D. Friedman, “A Common Law of Human Rights: History, Humanity and Dignity” [2016] E.H.R.L.R. 378; D. Bedford, “Human Dignity in Great Britain and Northern Ireland” in P. Becchi and K. Mathis (eds), *Handbook of Human Dignity in Europe* (Berlin: Springer, 2018, forthcoming).

formal commitment to protect and respect inviolable human dignity equivalent to that enshrined and visible to all under art.1 of the EU Charter.

As the discussion of the Bill continues in Parliament, this article proposes to reflect on the EU Charter's contribution to human rights protection through the lens of its most emblematic provision, art.1, which codifies human dignity as "inviolable", committing the EU and its Member States to "protect and respect" it. Three points are discussed. First, it is well-known that the distinction between codification and creation of new rights can sometimes be very thin, as making rights visible to all in one single and consistently drafted document is the first step in effective use and protection of these rights. In this respect the *Charter of Fundamental Rights of the EU: Right by Right Analysis* (the Analysis) produced by the Government on 5 December 2017 is a striking illustration of the benefits of codification for greater visibility and effective protection of rights, and this is nowhere clearer than in relation to art.1. Secondly, what would be lost with the EU Charter is much more than a set of rights (even assuming along the Government's line that UK judges could easily reconstruct them as the need arises on a case-by-case basis out of the tangled mass of retained EU law and existing common law). The UK would lose the post-totalitarian foundation for human rights and the overall purpose of their protection. Thirdly, and on this basis, the article argues that to honour the UK's "long tradition of commitment to human rights" emphasised by the Government,⁵ retaining the Charter in a standalone Act of Parliament with elevated political importance similar to that of constitutional statutes, would be a timely precaution in a state where human rights protection is not formally guaranteed beyond the current parliament.⁶

1. Codification: visibility and effective protection of human dignity and rights

The distinction between codification and creation of new rights has come back into the UK discussion,⁷ with the government claiming the EU Charter is only a codification⁸ and the Labour party that it also creates new rights.⁹ It might be useful to remember that at the start of their historical developments, what we now call human rights were not codified, and Enlightenment philosophers conceived them as natural rights, namely rights that human beings have because of their humanity. This very bold assertion at the time was part of a vision of, or longing for, emancipation from absolute power with its abuses and injustice. Yet this vision could only fully materialise after momentous events that shook the world, namely the French and American revolutions, and the Second World War and the Holocaust, which were immediately followed by codification of those rights labelled human in the 1948 UN Universal Declaration of Human Rights (UN UDHR).¹⁰ If rights can exist in the absence of codification, "in the state of nature" as Enlightenment philosophers would say, to be effectively protected, rights must be properly codified. To be sure, the UK in 2018 is not France in 1788 or America in 1775; the UK is a constitutional monarchy with a rich body of human rights legislation and case-law, to which the EU law corpus would be added as a result of the coming into force of the EU (Withdrawal) Bill. However, protecting human rights remains an evolving challenge in the twenty-first century, and one of the key reasons for adopting the EU Charter in the first place, as indicated in its preamble, was the necessity "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter".¹¹ In the post-Brexit context, to these reasons, which have

⁵ *The Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017) ("Analysis"), p.5.

⁶ Conservative Manifesto of 2017: "We will not repeal or replace the HRA while the process of Brexit is underway, but we will consider our human rights legal framework when the process of leaving the EU completes. We will remain signatories to the European Convention on Human Rights for the next parliament." The 2015 Conservative Manifesto promised that they would seek to "scrap the Human Rights Act".

⁷ J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd edn (Stanford: Stanford University Press, 2007).

⁸ Analysis, p.4.

⁹ Paul Blomsfeld, Shadow Minister for Exiting the EU, HC Hansard, 21 November 2017, col.889.

¹⁰ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

¹¹ EU Charter, Preamble, emphasis added.

lost none of their relevance since 2000 when the Charter was adopted, one has to add the complexity of the retained EU law as intertwined with domestic law.¹² However, without retaining the EU Charter, the rights codified in it will arguably become invisible to the lay person—that is most likely victims of breaches of such rights—and barely visible to the specialist, namely the lawyers and judges in charge of applying them. Invisible rights are quite difficult to use and easy to misuse.

The importance of codified rights in a single document is nowhere clearer than with reference to the EU Charter provision on human dignity as presented by the Government's Analysis, aiming to “set out how the Government considers that fundamental rights that are currently protected by EU law will be protected after exit from the EU”.¹³ The Analysis dedicates a few paragraphs to each of the Charter rights and focuses on art.1 of the EU Charter on p.17. If we ignore the text of this provision that the Government wants to take out of UK law, what would be left of human dignity would encompass two substantive dimensions: (i) a reference to the European Court of Justice case of *Netherlands v Parliament and Council* (Case C-3777/98) using this concept in relation to the legal protection of biotechnological inventions;¹⁴ and (ii) a reference to the *SW v United Kingdom* 1995 ruling delivered by the European Court of Human Rights. In addition, the significance of human dignity is highlighted in the following ways: (i) a mention of human dignity as being “the real basis of fundamental rights” with reference to the 1948 UN UDHR, which has no binding force; (ii) a note that “respect of human dignity is at the core of the UK’s international human rights obligations and the domestic human rights framework”, and a quotation from the European Court of Human Rights case above according to which “the very essence [of the ECHR] is respect for human dignity and human freedom”. Finally, in relation to the legal nature of human dignity, the Analysis states that it is a “general principle of EU law”. This re-construction of human dignity under art.1 of the EU Charter is not inaccurate.

It is, however, so incomplete and so oversimplified that it comes close to either sheer ignorance or intellectual dishonesty, with both being equally problematic for a document designed to convince Parliament that there is no need to retain the EU Charter after Brexit. Admittedly, human dignity is an immensely rich and complex legal concept that does not lend itself to short summaries.¹⁵ It is also a relatively new legal concept at the EU level with limited case-law so far.¹⁶ Nevertheless, and allowing for the brevity of the Analysis, the following key points ought to have been made clear in relation to human dignity’s development in European case-law: one regarding the extent of EU law on human dignity, and the other relating to ECHR law.

First, there is far more EU case-law on human dignity and the ruling singled out by the Analysis is an isolated instance pre-dating the EU Charter,¹⁷ which is therefore not representative of the post-Charter case-law developments that have tended to focus on the protection of asylum seekers.¹⁸ The very first of such cases is arguably difficult to ignore for the UK government as it was a ruling against the UK clarifying the status of Protocol 30.¹⁹ Moreover, EU law has used human dignity in far more areas than the Analysis makes out, notably in relation to protection against discrimination in a wide range of situations, including

¹² House of Lords Select Committee on the Constitution, *Report on the European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69.

¹³ Analysis, Introduction, point 2.

¹⁴ *Netherlands v Parliament and Council* (C-377/98) [2001] E.C.R. 7079.

¹⁵ C. McCrudden (ed.), *Understanding Human Dignity* (Oxford: Oxford University Press, 2012); M. Düwell, J Braarvig, R. Brownsword and D. Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014).

¹⁶ C. Dupré, “Article 1: Human Dignity” in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: H. Beck-Hart-Nomos, 2014), pp.3–24; see also the *EU Commission Annual Reports on the Implementation of the EU Charter of Fundamental Rights*, 2010–2016.

¹⁷ J. Jones, “Human Dignity in the EU Charter of Fundamental Rights and before the European Court of Justice” (2012) 33 *Liverpool Law Review* 281.

¹⁸ See, e.g. *Federal agentschap voor opvang asielzoekers v Selver Saciri et al* (C-79/13), 27 February 2014; and *A,B,C. v Staatssecretaris van Veiligheid en Justitie* (C-148/13 to C-150/13), 2 December 2014.

¹⁹ *NS v Secretary of State for the Home Department* (C-411/10) joined with *ME, ASM, MT, KP, EH v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (C-493/10), 21 December 2011, [2011] E.C.R. I-0000.

work.²⁰ Omitting these examples is problematic because in addition to providing a fuller picture of EU law, they offer useful illustrations of how human dignity may be deployed in concrete situations to protect people in their day-to-day-life.

Secondly, the Analysis draws an incomplete picture of human dignity's core substance under ECHR case-law. For a start, the neutrally—and accurately—cited *SW v United Kingdom* 1995 case, is known as the marital rape case, a case that on its own demonstrates not only the need to acknowledge human dignity in a civilised legal order, but to do so in a codified provision visible to all. Until that case, the common law and UK Parliament saw no overwhelming reason to lift the immunity against rapist husbands.²¹ The confirmation that this was fundamentally “unacceptable” came from the ECHR that, in *SW v United Kingdom*, sealed its reasoning with its reference to the protection of human dignity and human freedom as the essence of the ECHR, making it (as the Analysis notes) the *leitmotiv* of its human dignity case-law development.²² It is because neither judges nor the government can ever be fully trusted to protect people's dignity, especially perhaps that of so-called unpopular minorities, that a codified bill of rights is needed. Moreover, the European Court of Human Rights has explicitly protected human dignity (since the 1995 infamous marital rape ruling) in a very diffuse and pervasive manner, and there is far more ECHR case-law on human dignity than the Analysis suggests.²³ The difficulty with this case-law, however, is not the lack of protection, but the lack of visibility and perhaps also consistency in approaching this uncodified right. As things stand, there is very little academic analysis of ECHR case-law on human dignity to help make more sense of it.²⁴ As a result, this lack of visibility and systematic knowledge of ECHR case-law on human dignity may lead to uneven and weak protection. This is well illustrated in the Analysis itself, which fails to mention that ECHR case-law on human dignity tends to protect people against torture, inhuman and degrading treatment or punishment (art.3 of the ECHR) and against slavery, servitude and forced or compulsory labour (art.4 of the ECHR). Finally, the Analysis makes no mention of the fact that human dignity in the ECHR case-law has so far played a unique role in protecting some of the most vulnerable members of society against the worst possible types of mistreatments. Among this vast body of case-law, well-known in the UK (and presumably to the Government and their advisers) are art.3 ECHR cases on corporal punishment of school boys,²⁵ treatment of mentally ill prisoners,²⁶ and of mentally ill people in police custody,²⁷ life-long sentences,²⁸ and domestic servitude under art.4 of the ECHR.²⁹ The Analysis also omits to note that all these rights are encompassed in Ch.1 of the EU Charter entitled “human dignity”, which has further and explicitly extended the ECHR protection in at least three explicit directions: (i) the absolute prohibition of the death penalty (art.2); (ii) the protection of physical and mental integrity, including the absolute prohibition of eugenic practices, the “prohibition on making the human body and its parts as such a source of financial gain”, and the prohibition of the reproductive cloning of human beings (art.3); and (iii) the prohibition of human trafficking (art.5). This omission is significant as it illustrates the benefit of codification over having to analyse and reconstruct a vast body of case-law in order to identify relevant rights. As is discussed below, visibility of rights is not the only benefit of retaining the EU Charter.

²⁰ See also art.25 (the rights of the elderly to lead a life of dignity and independence) and art.31 (the right to “working conditions which respect [workers'] health, safety and dignity”).

²¹ House of Lords, *R. v R.* [1991] 4 All E.R. 481.

²² *SW v United Kingdom* (1996) 21 E.H.R.R. 363 at [44].

²³ D. Feldman, “Human Dignity as a Legal Value—Part I” [1999] *Public Law* 682, 690–696.

²⁴ J.P. Costa, “Human Dignity in the Jurisprudence of the European Court of Human Rights” in C. McCrudden (ed.), *Understanding Human Dignity* (Oxford: Oxford University Press, 2012), pp.393–403.

²⁵ *Tyler v United Kingdom* (1979–80) 2 E.H.R.R. 1.

²⁶ *Keenan v United Kingdom* (2001) 33 E.H.R.R. 38.

²⁷ *MS v United Kingdom* (2012) 55 E.H.R.R. 23; D. Bedford, “MS v UK: Article 3 ECHR, Detention and Mental Health” [2013] E.H.R.L.R. 72.

²⁸ *Hutchinson v United Kingdom* (2015) 61 E.H.R.R. 13.

²⁹ *CN v United Kingdom* (2013) 56 E.H.R.R. 24.

2. Inviolable human dignity: the foundational promise of human rights and democracy

If the coverage of human dignity's substantive dimensions and scope of protection in the Analysis is problematically selective, it becomes inaccurate in a further glaring omission, namely the resounding declaration of human dignity's inviolability under art.1 of the EU Charter. The Analysis's statement that "there is no hierarchy of rights in the Charter; no one right is more important than another"³⁰ is inaccurate. On the contrary, the EU Charter is characterised by hierarchies of human rights: at the very top is inviolable human dignity, followed by a set of absolute prohibitions (all in Ch.1), with the remaining majority of rights subject to restrictions under the specific conditions outlined in the EU Charter and the ECHR together with its case-law. In addition, the Analysis describes human dignity as "a general principle of EU law",³¹ a qualification that it tends to use to dismiss the importance of specific provisions of the EU Charter as being not enforceable.³² Finally, despite acknowledging that "the right to human dignity constitutes the real basis of human rights",³³ the Analysis minimises the unique feature of human dignity as the foundation of the human rights protection paradigm since 1948 (to use the UN UDHR as the point of reference).³⁴ The significance of the commitment to protect and respect inviolable human dignity can be unravelled as follows.

First, the term "inviolability" associated with human dignity under art.1 of the EU Charter connotes an even greater normative force than "absolute" (which is the ECHR approach to human dignity under its arts 3 and 4) and which will disappear if the Charter is not retained. Inviolability arguably indicates that the commitment to respect and protect human dignity is so fundamental that it needs to be explicitly distinguished from absolute rights. The protection of human dignity is not just a matter of enhanced degree (e.g. more than absolute), it is also qualitatively different, namely it is about protecting the core attribute of humanity.³⁵ This is why it is positioned at the very start of the EU Charter, not only above the law (normative hierarchy), but also outside the law, so that no law may undermine it. In other words, the commitment to respect and protect inviolable human dignity is a precondition to human rights and the axiomatic basis of democracy. While rights were almost from the start (e.g. 1776 and 1789 declarations) described as inalienable, the reference to "inviolability" emerged after 1945, together with the codification of human dignity in the UN UDHR in 1948 and in the constitutions of (what were to become) EU Member States.³⁶ This contextual awareness is crucial to understand the significance of inviolable human dignity. It is suggested that the dignity commitment under the EU Charter captures the memory—very fresh in drafters' minds at the time—of "barbarous acts which outraged the conscience of mankind".³⁷ This deliberate and explicit commitment not to forget can be traced back to the origins of human rights codification,³⁸ but in the post-totalitarian context—and this is a key innovation—it is buttressed with a set of absolute and quasi-absolute prohibitions under arts 2, 3 and 4 of the ECHR, which were endorsed and enhanced by the EU Charter under its first chapter. Seen in this light, the commitment to inviolable human dignity demarcates the past of inhumanity, barbarism and totalitarianism from the present that is willed as a time free of these negative features, i.e. as a time of humanity, civilisation and democracy.³⁹ The commitment to respect and

³⁰ Analysis, p.4.

³¹ Analysis, p.17. The Joint Committee on Human Rights accurately describes human dignity as "an enforceable right": *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*, First Report of Session 2017–19, HL Paper 70, HC 774, published on 26 January 2018, p.5.

³² "Many articles of the Charter set out principles, which are different from rights. Principles cannot be relied upon directly by individuals, in the way that rights can." Analysis, p.5. For a fuller perspective on principles of EU law, see A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford: Hart Publishing, 2010).

³³ Analysis, p.17.

³⁴ C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Bloomsbury/Hart, 2015).

³⁵ C. Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Bloomsbury/Hart, 2015), pp.74–80.

³⁶ They are brought together under art.1 of German Basic Law in 1949, a text that was inspirational for drafting the EU Charter.

³⁷ UN UDHR 1948, Preamble.

³⁸ 1789 Declaration of the Rights of Man and Citizen, preamble: "the ignorance, forgetfulness, or contempt of human rights are the sole causes of public misfortune and government depravity".

³⁹ C. Dupré, "Dignity, Democracy, Civilisation" (2013) 33 *Liverpool Law Review* 263.

protect inviolable human dignity, together with its set of absolute prohibitions, arguably make it possible to keep the unwanted past at bay, a condition sine qua non for the present to unfold. This year, as it happens, Holocaust Memorial Day almost coincided with the vote against the EU Charter in the House of Commons. It is difficult to understand why the UK, which played a key role in the fight against Nazism and fascism, would want explicitly to exclude this foundational memory of the fallibility of democracy, and would not want to renew its commitment to protect humanity as it leaves the EU. To be clear, the risk of fascist and Nazi regimes returning to power in an EU Member State is—let us hope—low, even despite the disquieting rise to government of xenophobic parties with a troubled heritage elsewhere in Europe. Nevertheless, the threats to and the vulnerability of humanity are here for all to see,⁴⁰ and the UK is no exception.⁴¹

Secondly, as the inviolable foundation of rights, human dignity protects the core attributes of humanity as enshrined under Ch.1 of the EU Charter, namely those without which humanity is no longer possible, whether because humanity is physically annihilated (through the death penalty), because humanity is taken out of human beings (e.g. through torture or slavery) or because the genetic make-up of humanity is deliberately interfered with (e.g. eugenics practices, reproductive human cloning). As will be recalled from above, the Charter extends the protection of humanity beyond ECHR law, and, therefore, not retaining the Charter might set the principled level of humanity protection back to what it was when the ECHR was adopted in 1950. The genetic dimensions of humanity protected under art.3(2) of the EU Charter reflect typical twenty-first century efforts to protect “humanity as it is” against transformations that are (or will soon be) scientifically and technically possible. What is at stake here is the preservation of the very essence of humanity and the use of “inviolable human dignity” as a compass to help make difficult decisions at times of uncertainty.⁴² The risk entailed, however, is not merely about alterations to the genetic make-up of humanity. What the commitment to protect and respect inviolable dignity arguably also involves is preventing dehumanisation processes, i.e. of the exclusive reduction of human beings to a source of profit, be it a convenient pool of organs, cells and genes to be traded like any other type of commodity, or the degradation of workers to a mere source of revenue for their “employers”. In this sense the absolute prohibitions “on making the human body and its parts as such a source of financial gain” (art.3(2)) and on “trafficking in human beings” (art.5(3)) are both about the same danger. In other words, in these two practices, human beings are reduced to mere numbers, and thus deprived of their humanity, they become the objects of the economic logic of maximum profit.⁴³ It is not a coincidence that the other two mentions of dignity in the EU Charter involved people whose lives are directly affected by free-market economy: either as workers (art.31) who are at the heart of economic activity, or as elderly people (art.25) who are no longer economically active, and nevertheless have a right “to lead a life of dignity and independence and to participate in social and cultural life”. In the post-Brexit context without this explicit commitment to respect and protect inviolable human dignity, the risk of dehumanisation will be heightened by the disappearance of this shield against the worst side-effects of market-based systems.

Thirdly, what will be lost if the commitment to inviolable human dignity under the EU Charter is not retained is also the ultimate purpose of human rights protection. Taking away that commitment will not only make human dignity invisible, but it would also flatten the human rights framework of protection and remove from sight—and from law—the overall priority of humanity’s protection that is encapsulated by that commitment. The absolute prohibitions under the ECHR would remain for a while, but the Government also intends to revisit this when Brexit is completed, as they explicitly indicated in their 2017 Manifesto.⁴⁴ So, at worst, these would not be retained at all, or perhaps retained in a format that limits the

⁴⁰ M. Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (Philadelphia: University of Pennsylvania Press, 2017).

⁴¹ “One-Quarter of Britons Witnessed Hate Speech in Past Year Poll Finds”, *The Guardian*, 27 January 2018, <https://www.theguardian.com/society/2018/jan/27/uk-hate-speech-poll-holocaust-memorial-day-2018> [Accessed 9 March 2018].

⁴² J. Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights” (2010) 41(4) *Metaphilosophy* 464.

⁴³ A. Supiot, *Governance by Numbers: The Making of a Model of Allegiance* (Oxford: Bloomsbury/Hart, 2017).

⁴⁴ See fn.6 above. The *Joint Report from the Negotiators of the EU and the UK Government* of 8 December 2017 only focuses on EU citizens’ residence status after Brexit, but does not discuss the EU Charter’s absolute protection of its Ch.1 rights.

current effectiveness of their protection. In this scenario, humanity would cease to be a special good at the heart of human rights requiring special protection by law and taking priority over other interests, be they political or economic. The overall purpose of human rights as the ultimate barrier against dehumanisation and barbarism would be dissolved as a result. Protecting humanity would no longer be the priority of human rights and, in the absence of formal entrenchment,⁴⁵ the constitutional weight to give to human dignity would therefore be set through a process of bargaining on a case-by-case basis. This flattening process is particularly problematic in the post-Brexit context as retained EU law is due to lose its supremacy over domestic law, so that whatever right—and possibly dignity-related rights too—might be reconstructed will have the same normative ranking as other non-rights-related-norms. As a result, UK law conflicting with these rights could not be disappled.⁴⁶

The disappearance of inviolable human dignity as the ultimate purpose of human rights and beacon of democracy would leave the UK without a clear direction and tools to protect humanity, at a time when they might need them most. A state, such as the UK post-Brexit, which deliberately turns its back on the post-totalitarian commitment to human dignity, which is also an explicitly built-in requirement for the EU external relations, might have a difficult task to convince fellow trading partners, such as the EU itself or its Member States (to the extent that they retain such a commitment themselves), that it is safe to engage in relationships with.

3. Retaining the EU Charter as a standalone constitutional statute

Looking ahead to the post-Brexit context and considering the strategic significance of the EU Charter together with its strongest and most emblematic provision—the commitment to inviolable human dignity—this section briefly makes two final points.

First, it is important to note that the commitment to human dignity appears in two other very significant provisions of the TEU that are relevant to the post-Brexit context. Article 2 of the TEU provides that:

“The Union is founded on *the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”⁴⁷

Article 21 of the TEU provides that:

“The *Union’s action on the international scene shall be guided by principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*”⁴⁸

While the Government has not yet (at the time of writing) outlined a precise post-Brexit plan to reconstruct its relationship with the EU, it is certain that the UK will continue trading with the EU and engaging in a range of other relationships with its Member States. Post-Brexit UK will not be just any third country, it will be a third country whose government has vehemently rejected the EU and, crucially, it will be a third country that—together with Poland currently targeted by the art.7 of the TEU procedure—expressed explicit reservation against the EU Charter under Protocol 30. Therefore, and from

⁴⁵ Joint Committee on Human Rights, *The Human Rights Implications of Brexit*, 19 December 2016, HL Paper 88 of session 2016–17, p.19.

⁴⁶ Joint Committee on Human Rights, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*, 24 January 2018, HL Paper 70 HC 774, paras 9-12.

⁴⁷ Emphasis added.

⁴⁸ Emphasis added, generally see P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford: Oxford University Press, 2011).

a pragmatic point of view, it is suggested that retaining the EU Charter and its explicit commitment to human dignity under art.1 might be a good strategy for the first former EU Member State to indicate to the EU its acknowledgement of the EU's first foundational value under art.2 of the TEU, and its willingness to abide by art.21 of the TEU. This might be all the more worthy of consideration given that Brexit is unfolding at the same time as the EU is seeking to tighten its monitoring and sanctioning of Member States that fail to comply with art.2 EU values.⁴⁹ As a result and in recent years, the EU has become quite aware of these values' significance for safeguarding post-totalitarian democracy founded in human dignity. The EU has also become increasingly aware of the need to ensure that its actions towards non-compliant Member States match its own standards and commitments as set out in the TEU, specifically under arts 2 and 21.

Secondly, building on this and considering the uncertain future of the HRA 1998 under the 2015 and 2017 Conservative Manifestos, it is suggested that the EU (Withdrawal) Bill might be envisaged as an opportunity to secure human rights. Indeed, if the UK were to retain only one distinct and self-contained normative text from its 40 years of EU membership and shared adventure in the construction of an unprecedented type of democracy, the EU Charter would be an eminently suitable choice to make. A key problem associated with the EU (Withdrawal) Bill is not just that the Charter would be lost, with victims, lawyers, judges and government left to put together its various pieces scattered across the law, it is that EU law and with the EU Charter would lose its supremacy status.⁵⁰ As a result, even retaining the EU Charter as a whole would not retain the commitment to protect and respect inviolable human dignity, for—as discussed above—it could always be superseded by a later Act of Parliament (or judgment with regards to human dignity dimensions that are only protected through case law). One way to counter this eventuality is arguably to give the retained EU Charter a special constitutional status, akin to that currently acknowledged for the HRA 1998. However, this constitutional statute contains no explicit commitment to “inviolable human dignity” and indeed not even a mention of human dignity. In addition, repealing the HRA 1998 is constitutionally possible and is on the current government’s political agenda. Recognising the retained EU Charter as having a similar constitutional status would not prevent its repeal, depleting therefore the human dignity commitment of its political, sociological and normative significance. The Brexit project and process have so far raised many novel and difficult constitutional questions for the UK, and finding a constitutional and political way to retain the commitment to inviolable human dignity represents another such challenge.

Conclusion

Excluding the EU Charter from the EU (Withdrawal) Bill will put an end to a brief experiment, barely a decade long (2009–2019), during which the central tenets of free-market economy were explicitly framed by some protection for human beings and their rights. While the UK Government’s overarching claims that it “does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened”,⁵¹ this article has sought to demonstrate that the merits of retaining the EU Charter are not limited to the visibility of codified rights, but also include their effective protection. Indeed, codifying human dignity as inviolable lies at the heart of a particular type of democracy, and is a crucial aspect of the extent to which the UK wishes to continue upholding an inclusive protection of humanity in the post-Brexit context. As discussed above, a return to a *status quo ante*, which implicitly seems to be the Government’s leading assumption, might turn the clock back to a pre-1948 situation, an ironic move in

⁴⁹ A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press, 2017). D. Kochenov and L. Pech, “Better Late than Never? Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law” (2016) *Journal of Common Market Studies* 1062.

⁵⁰ House of Lords, Select Committee on the Constitution, *Report on the EU (Withdrawal) Bill*, 29 January 2018, HL 69.

⁵¹ Analysis, p.4.

the year in which the world will celebrate the anniversary and achievements of the UN Universal Declaration of Human Rights.

Bulletin: European Court of Human Rights and Council of Europe

The Court issued, inter alia, judgments and decisions in the following cases in December 2017–January 2018:

Article 2

- *Lopes de Sousa Fernandes v Portugal* (Grand Chamber), finding, where the applicant's husband had died in hospital from complications following routine surgery, that there had been no substantive breach of art.2 but that there had been a procedural breach due to the lack of adequate and timely response by the domestic system to the applicant's complaints;
- *Gjikondi v Greece*, finding a failure properly to investigate the killing of an Albanian in Athens, including a failure to examine whether there had been a racist motivation;
- *Afiri and Biddarri v France*, rejecting as inadmissible complaints by parents of a 14-year-old girl in a vegetative state about the decision by the courts permitting the withdrawal of life support.

Articles 2 and 3

- *DL v Austria*, finding no breach arising from the proposed extradition of the applicant to Kosovo on murder charges; the applicant had complained of conditions of detention in Kosovo and about the alleged risk of being targeted in a blood feud by his victim's clan;
- *A v Switzerland*, finding no breach would arise from the proposed removal of the applicant, a Christian convert, to Iran.

Articles 2 and 5(1) and (5)

- *Khayrullina v Russia*, finding substantive and procedural breaches of art.2 where the applicant's husband had died of asphyxiation while in police custody and breaches of art.5 due to the unlawfulness of his detention and lack of availability of compensation in that regard.

Article 3

- *SF v Bulgaria*, finding that conditions of detention of three Iraqi minors in an immigration centre were inhuman and degrading;
- *Lopez Elorza v Spain*, finding that no breach would arise from the extradition of the applicant to face drugs charges in the US that might attract a life sentence.

Articles 3 and 5

- *Ksenz v Russia*, finding that six applicants, arrested for foul language or traffic infringements, had been subject to various forms of police brutality and that there had been no adequate investigation into their complaints in that regard; for two applicants, there was also a finding of lack of lawful deprivation of liberty.

Articles 3, 6 and 14

- *Sidiropoulos and Papakostas v Greece*, finding a procedural breach of art.3 due to the undue lenience disclosed by commuting the sentence of the police officer, who had tortured the

two applicants, from five years to a fine, and finding a breach of art.6 due to the length of the proceedings and art.13 due to lack of remedy for the excessive delay.

Articles 3, 5(1) and (2) and 34

- *JR v Greece*, finding, in respect of three Afghan migrants held in detention, that there had been no breach of art.3 regarding conditions, that the deprivation of liberty was lawful, that there had been a violation of art.5(2) in that they had not been given the reasons for their detention and that there had been no hindrance in the exercise of their right of individual petition.

Articles 5(1) and 7 and Article 4 of Protocol No.7

- *Kadusic v Switzerland*, finding a breach of art.5(1) in that the applicant had been subject to a therapeutic measure of detention shortly before his due release from prison and no violation of the other provisions invoked.

Article 6(1) and (3)(d)

- *Zadumov v Russia*, finding a breach where the applicant was convicted of manslaughter at a trial where a key statement was read out but the witness did not appear; while the witness had been in psychiatric care, she was due to be released and the courts did not take adequate steps to ensure her attendance at trial.

Articles 6 and 8

- *Lopez Ribalda v Spain*, finding, where supermarket employees had been dismissed for theft following video surveillance footage taken of them at work, that there had been a lack of respect for private life as the employees had not been told of the existence of the video surveillance but no breach of fair trial requirements under art.6.

Articles 6 and 13

- *Cipolletta v Italy*, finding that 25 years for liquidation proceedings, even of a complex nature, disclosed excessive delay for which no effective remedy was available.

Article 6 and Article 1 of Protocol No.1

- *Feldman and Slovyansky Bank v Ukraine*, finding violations arising in respect of the complaints of the applicants, a bank and its major shareholder, about the liquidation of the applicant bank and the inability to challenge this in court.

Articles 6, 8 and 13 and Article 1 of Protocol No.1

- *Sharxhi v Albania*, finding violations where the authorities, without lawful basis, confiscated and demolished the applicants' properties in a coastal town, also failing to pay any compensation.

Article 6(1) and Article 4 of Protocol No.7

- *Ramda v France*, finding that the applicant, convicted of terrorist offences by a special assize court, had been given sufficient reasons for understanding the conviction and that this conviction had been based on facts distinct from those in issue in an earlier criminal procedure.

Article 8

- *Orlandi v Italy*, finding a breach where the applicants, who had contracted same-sex marriages abroad, were unable to have their unions recognised in some form at home;
- *Anchev v Bulgaria*, rejecting as inadmissible complaints by the applicant, a lawyer who had held various important posts, about the exposure of his prior connection with the security services of the communist regime;
- *Fédération Nationale des Syndicats Sportifs v France*, finding no violation arising from anti-doping regulations that required athletes to report on their whereabouts and to make themselves available at specified times and places, including their home, for testing.

Article 8 in conjunction with Article 14 of the Convention

- *Alkovic v Montenegro*, finding that the authorities had failed properly to investigate the complaints of the applicant, a Roma and a Muslim, that he and his family had been subjected to a series of attacks by his neighbours.

Article 9

- *Hamidovic v Bosnia and Herzegovina*, finding a breach where the applicant was found guilty of contempt of court for refusing to remove his skull cap which he wore as part of his religious beliefs.

Article 10

- *Frisk and Jensen v Sweden*, finding no violation disclosed by the domestic courts' decision to convict and fine two TV journalists for defaming a hospital and surgeon in a programme that criticised their treatment of patients with cancer;
- *GRA Stiftung Gegen Rassismus Und Antisemitismus v Switzerland*, finding a breach of freedom of expression where an NGO had been found liable in defamation for accusing a politician of verbal racism for comments made in a speech during the pre-referendum debate on a proposed minaret ban;
- *Catalan v Romania*, finding no violation where a civil servant was dismissed for leaking information without permission;
- *Szpiner v France*, rejecting as inadmissible complaints by a lawyer that he had been subject to a disciplinary warning for referring to a prosecutor as "genetically a traitor" with reference to alleged Nazi collaboration in his family's past;
- *Sekmadienis v Lithuania*, finding a violation where a clothing company was fined for advertising posters referring to "Jesus" and "Mary".

Article 11

- *Süleyman Celebi v Turkey*, finding a violation where the applicants, a trade union and some of its members, were subject to police dispersal measures, and later prosecuted, due to participation in a commemoration event in Taksim square in Istanbul in 2007;
- *Ögrü v Turkey*, finding that the domestic courts in fining the applicants for participation in various demonstrations had failed properly to review the proportionality of the interference with their rights.

Article 14 in conjunction with Article 8

- *Hallier v France*, finding that the refusal to allow a lesbian partner to take paternity leave was manifestly ill-founded.

Article 14 in conjunction with Article 1 of Protocol No.1

- *Ribać v Slovenia*, finding discrimination where the applicant, previously a military officer in the former Yugoslav army, was denied a pension due to lack of Slovenian citizenship;
- *B Plaisier BV v Netherlands*, rejecting as inadmissible complaints by the applicant companies about a tax paid by employers on high salaries as part of austerity measures.

Article 14 in conjunction with Article 2 of Protocol No.1

- *Enver Şahin v Turkey*, finding a violation where a paraplegic was unable to attend university due to the lack of adequate facilities.

Article 35

- *Bencheref v Sweden*, rejecting for abuse, the applicant's complaints detention pending expulsion where he had claimed to be Moroccan and had not informed the Court that he was in fact from Algeria.

Article 41

- *Chiragov v Armenia (just satisfaction)* (just satisfaction) (Grand Chamber), awarding the six applicants, who had fled from their homes in Lachin in 1992 due to the Nagorno-Karabakh conflict, aggregate sums of €5,000 for all heads of damage; *Sargsyan v Azerbaijan (just satisfaction)* (Grand Chamber), awarding the applicant who had fled from his home in the Shahumyan region due to the conflict in 1992 the same sum above;

Article 2 of Protocol No. 1

- *Cölgeçen v Turkey*, finding a violation where the applicant students were subject to disciplinary measures and suspended after requesting courses to be given in the Kurdish language;
- *AR and LR v Switzerland*, rejecting as manifestly ill-founded complaints by the applicants about the refusal of the authorities to exempt a child from sex education in primary school.

The Court held hearings in the following cases:

- in *Molla Sali v Greece* (Grand Chamber), concerning the complaints of the applicant under arts 6 and 14 of the Convention and art.1 of Protocol No.1 that the domestic courts had ruled that Shariah law should apply to succession to her deceased husband's estate, as he was a member of the Thrace Muslim community, rather than the terms of the will registered under civil law, with the result that she would have to share the inheritance with her sisters-in-law;
- *Beuze v Belgium* (Grand Chamber), concerning the complaints of the applicant convicted of murder, that he did not have access to a lawyer during the early stages of the pre-trial investigation;
- *S, V and A v Denmark* (Grand Chamber), concerning the complaints of the applicant football supporters under art.5 about their detention before the football match which they claimed was unlawfully long and had a preventive purpose falling outside the exceptions to the right to liberty;

- *Navalny v Russia* (Grand Chamber) concerning the complaints of the applicant, an opposition activist and anti-corruption campaigner, under arts 5, 6, 11, 14 and 18 about five occasions of arrest and detention for his participation in demonstrations, which measures were allegedly carried out by the authorities for political considerations.

CPT

From December 2017 to January 2018, the CPT made the following visits: a seven-day visit to the Chechen Republic of the Russian Federation and a two-week visit to Ukraine.

It issued a report on its first visit in 2017 to the UK Sovereign Base areas in Cyprus.

The CPT also published a factsheet on women in prisons, highlighting the particular needs and vulnerabilities of women in prisons, and setting out standards on accommodations, hygiene, antenatal, post-natal and child care and gender-sensitive personal searches, amongst others.

Council of Europe

- Dunja Mijatovic (Bosnia and Herzegovina) was elected as Human Rights Commissioner for the Council of Europe. She was formerly the OSCE Representative on the Freedom of the Media.
- The ECSR (the European Committee on Social Rights) issued its conclusions for 2017 under the European Social Charter and the revised version, covering 33 states and finding 175 violations, 228 situations of conformity and 83 cases where it could reach any findings due to lack of information. For the UK, it found, inter alia, that the situation was not in conformity with art.12(1) of the 1961 Charter on the grounds that:
 - the level of the Statutory Sick Pay (SSP) is inadequate;
 - the minimum levels of the Employment Support Allowance (ESA) are inadequate;
 - the level of long-term incapacity benefits is inadequate;
 - the level of unemployment benefits is inadequate.
- The Council of Europe body on anti-corruption GRECO issued reports finding that there had been little progress in Romania and in Spain in fighting corruption in respect of members of Parliament, judges and prosecutors. Reports were also issued on Belarus and Armenia.
- The Venice Commission (the Council of Europe's Commission for Democracy through Law) issued an opinion stating, inter alia, that recent changes in Poland had put the independence of the entire judiciary at risk and advising that the posts of Minister of Justice and Public Prosecutor-General should be split as they had been before.

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, inter alia, judgments and decisions in the following during December 2017–January 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 41

- *Léon Van Parys v Commission* (T-125/16), 11 December 2017, import declarations and licences allowed bananas to be imported at reduced customs duty as part of Regulation 404/93. Upon discovering forgeries of these licences, authorities required the applicant to pay approximately €7 million in post-clearance duties. The Commission attempted to re-examine evidence regarding remission of duties, which the applicant challenged. The original judgment was already partially annulled in the applicant's favour. It was held that the Commission's requests to authorities were not only to unduly suspend time-limits on reopening the procedure for examining evidence.

Articles 41 and 42

- *Evropaïki Dynamiki v Parliament* (T-136/15), 14 December 2017, applicant participated in a call for tenders for IT services and requested documents from Parliament, which was eventually rejected because of limits on the right to access and an unreasonable workload arising from the large number of documents. It was held that Parliament would have had to carry out a specific examination to determine if partial access were to be allowed, and that this did constitute an unreasonable burden which justified denying access to the documents.

Court of Justice of the European Union

The Court issued, inter alia, judgments and decisions in the following during December 2017–January 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 1 and 7

- *F* (C-473/16), 25 January 2018, in which the claimant submitted an asylum application to Hungary having escaped his own country for fear of persecution for being homosexual. His application was rejected on the basis that they could not confirm his assertion relating to his sexual orientation based on various psychological tests. He argued that the tests prejudiced his fundamental rights, but this was also rejected. On the question of whether an expert report could be taken into consideration, it was held that it could be, as long as the procedures for the report were consistent with fundamental rights, and as long as the decision was not based solely on the report and the authorities were not bound by it. It was held that relying on the report was not consistent with the right to private and family life.

Article 16

- *Polkomtel* (C-277/16), 20 December 2017, the President of the Office for Electronic Communications had identified Polkomtel as an undertaking with significant market power, and sought to adjust and verify its mobile termination rate. It then set a rate and required Polkomtel to justify their rates annually. This was held to be an interference with the right to pursue a business but could be justified and was proportionate;

- *Global Starnet* (C-322/16), 20 December 2017, Global Starnet was granted a concession by the Autonomous Administration of State Monopolies (AAMS) to launch and operate management networks for legal gaming outside the selection process for other gaming operators. When laws changed in a less favourable way for Global Starnet, and the AAMS opened concessions to a procurement procedure, Global Starnet contested the change. It was held that the legislation was justified by overriding reasons of general interest and was suitable for pursuing the objectives and did not go beyond what was necessary to achieve those objectives.

Articles 20 and 21

- *Miravitles Ciurana* (C-243/16), 14 December 2017, former employees of Contimark, a company that became insolvent, were granted compensation upon termination of their employment contracts, but did not recover it in full. They raised the matter against Contimark's sole director to establish liability against him. It was held that the Charter was not at issue in this case.

Article 24

- *Piotrowski* (C-367/16), 23 January 2018, a Polish national had a European Arrest Warrant (EAW) issued against him by Polish authorities for two separate offences. It was argued that the EAW could not be executed because the claimant had been a minor for one of the offences. It was held that the executing state must refuse to surrender minors if, under their law, they have not reached the age of majority.

Article 41

- *Spain v Council* (C-521/15), 20 December 2017, Spain reported its government deficits for 2008–2012 to Eurostat in March 2012, only to revise them in May 2012, which prompted an investigation into manipulation of statistics in Spain by the Commission. Misrepresentation by Spain was found and therefore a fine was imposed. Spain sought annulment of this decision on grounds that there was no objective impartiality in the investigation. The application was rejected.

Article 47

- *Hasan* (C-360/16), 25 January 2018, the claimant made an application for asylum in Germany, but Eurodac showed he had already applied for international protection in Italy. He was to be returned to Italy under the Dublin III Regulation, so Germany rejected his asylum application. He requested a suspension, which was also rejected. He was returned to Italy, but then illegally returned to Germany, upon which he appealed his return to Italy on the grounds that it was after the six-month time-limit under Dublin III. The Court held he had had an effective remedy;
- *El Hassani* (C-403/15), 13 December 2017, a third country national submitted a Schengen visa application in Poland to visit his Polish wife and son, but was refused. He requested a review which was again rejected. He attempted to bring appeals, but these were refused, so he claimed an infringement of his right to an effective remedy. His claim was upheld;
- *Ardic* (C-571/17 PPU), 22 December 2017, a German national in the Netherlands had an EAW executed against him for two offences, for both of which he appeared in person during the trial. After serving some part of the sentences, the German authorities suspended the execution of the rest of the sentences, a suspension which was later revoked because he

infringed several probation conditions. He was not present at the revocation decision. It was held that “trial resulting in a decision” in art.4a(1) of Framework Decision 2002/584 does not include the revocation decision if that decision does not change the nature or the level of the sentence initially imposed.

Articles 47 and 51

- *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15), 20 December 2017, in which a ski resort requested an extension for a permit for a snow-production facility in Austria, which Protect contested. It was held that Protect could bring a claim even if it was not a “member of the public”. The time-limit to bringing the claim was also held to be against the right to effective judicial protection.

Article 49

- *Vadittrans* (C-102/16), 20 December 2017, a fine for lorry drivers taking regular weekly rest periods in the vehicle itself were contested by the claimant on the grounds that the fine did not have a proper legal basis. It was held that the fine did not infringe the principle of legality in criminal law;
- *MAS and MB* (C-42/17), 5 December 2017, in the *Taricco* judgment, national criminal proceedings related to VAT fraud could only be extended by a quarter of their initial duration. There was a question as to whether this was compatible with obligations under art.325(1) and (2) of the TFEU under which, to ensure effective and dissuasive penalties, there must be the ability to provide for longer limitation periods. It was held acceptable to disapply national limitations to comply with obligations under art.325(1) and (2) of the TFEU and extend the limitation.

European Court of Human Rights

The European Court of Human Rights issued, *inter alia*, judgment in the following during December 2017–January 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 1 and 7

- *Nedescu v Romania* (App. No.70035/10), judgment of 16 January 2018, in which the Court held there was a violation of the right to private and family life when a couple was prevented from retrieving embryos from a fertility clinic that had been closed in the process of a criminal investigation.

Articles 2 and 35

- *Lopes de Sousa Fernandes v Portugal* (App. No.56080/13), judgment of 19 December 2017 [GC], in which the Court found a violation of the procedural limb of art.2 of the ECHR (right to life), because the regulatory system in the state failed to address in an adequate and timely way the complainant’s case that her husband had died as a result of medical negligence.

Articles 9 and 21

- *Orlandi v Italy* (App. Nos 26431/12, 26742/12, 44057/12 and 60088/12), judgment of 14 December 2017, in which the Court held there was a violation of the right to private and family life because, before 2016, the state had not offered the applicants any recognition of

their same-sex marriages, which had been contracted abroad. Although the state had a wide margin of appreciation there was a violation in this case.

UK Appellate Courts

The appellate courts in the UK issued, *inter alia*, judgments and decisions in the following during December 2017–January 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 7, 8 and 52(1)

- *Secretary of State for the Home Department v Watson MP* [2018] EWCA Civ 70, in which the Court of Appeal applied the decision of the EU Court of Justice in the same case, and declared that the Data Retention and Investigatory Powers Act 2014 was unlawful, insofar as it allowed access to retained data in cases other than those involving serious crime, and without prior review by an independent authority.

Articles 7 and 24

- *Patel v Secretary of State for the Home Department* [2017] EWCA Civ 2028, in which the Court considers an appeal in relation to derivative claims for residence based upon the appellants' care for British citizens who are their "direct relatives". The appeals were dismissed and the Court held that the CJEU decision in Case C-133/15 did not extend *Zambrano* rights.

Articles 4, 7, and 8

- *RSM (A Child), R. (on the application of) v Secretary of State for the Home Department* [2018] EWCA Civ 18, in which the Court of Appeal was critical of, and reversed, a decision of the Upper Tribunal in relation to an unaccompanied child under the Dublin III regulation. It was held that the application for asylum ought to be dealt with in Italy under the terms of the regulation.

Plaidoyer for the European Court of Human Rights¹

Paulo Pinto de Albuquerque*

✉ Accountability; Courts' powers and duties; European Court of Human Rights; Human rights; Judicial independence; Jurisprudence; Prisoners' rights; Statutory interpretation; Transparency; Voting rights

Abstract

In this article, the author debates the reasons for the current strained relationship between some Contracting Parties and the European Court of Human Rights. The author argues that much of the criticism addressed to the Court is ultimately aimed at the founding principles of the European human rights protection system, like the principles of evolutive interpretation and European consensus, as well as at the Court's soft law and social rights friendly stance. He briefly analyses the contradictory reaction of the Court to this criticism. In this context, he considers that both the UK rebellion against Hirst and the Court's backtracking from its own principles of interpretation in some major cases have had a negative "snow ball" effect on other Contracting Parties to the European Convention on Human Rights, as the recent confrontational attitude of the Russian legislator towards the Court has shown. The article concludes with a defence of the Court's traditional mode of reasoning and a pledge for reform of some practices of the Court based on three steps: more independence, more transparency and more accountability.

1. Why the strain?

It is stating the obvious that the current relationship between some Contracting Parties and the European Court on Human Rights (the Court) is a strained one.² But why the strain?

There are two types of critiques, one of political and the other of legal nature, levelled against the Court. The political criticism is encapsulated in the idea that the Strasbourg judge acts as a subsidiary legislator, an *Ersatzgesetzgeber*. This criticism is directed to the allegedly obscure working methods of the Court, the supposedly deficient status of Strasbourg judges and the apparent lack of consideration for the British exceptional situation.

The argument drawn from the working methods of the Court is the following: judicial activism leads the Court to a mission creep.³ By means of a not-so-transparent development of the case-law, the Court attempts to aggrandise itself. This is most visible in the invention of new rights and the enlargement of its own supervisory powers. The Court's micro-management of cases threatens democracy and state sovereignty, since Governments lose control of the European Convention on Human Rights (the Convention) and domestic authorities are side-stepped and discredited.

¹ This article merges my speeches delivered at the Bonavero Institute of Human Rights, Mansfield College, Oxford, 28 April 2017 ("Is the European Court of Human Rights facing an existential crisis?"), and at the Middlesex University, London, 15 December 2017 ("How to save the European Court of Human Rights in three steps"). The usual caveat applies: these are my own views and they do not bind the European Court of Human Rights.

² Judge at the European Court of Human Rights and full professor at the Law Faculty of the Catholic University of Lisbon.

³ See, among others, Ziegler, Wicks and Hodson (eds), *The UK and European Human Rights—A Strained Relationship?* (Hart Publishing, 2015).

³ On this line of reasoning see Marc Bossuyt, "Judicial Activism in Strasbourg", in Karel Wellens (ed.), *International Law in Silver Perspective* (2015), pp.31–56; Dragoljub Popović, "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights" (2009) 42 *Creighton Law Review* 361, and Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 *Human Rights Law Journal* 57.

Lord Hoffmann put it this way:

“[t]he proposition that the Convention is a ‘living instrument’ is the banner under which the Strasbourg Court has assumed power to legislate what they consider to be required by ‘European public order’. I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times.”⁴

The argument based on the status of the judges states that the Strasbourg judge lacks political legitimacy to act as a subsidiary legislator, the Court suffering from a democratic deficit.⁵ The problem of the unaccountable judge is aggravated by the fact that some judges come from alleged second-class democracies. The undemocratic pedigree of some Contracting Parties taints the judges’ independence and the Court’s authority.

The British exceptionalism argument goes like this: Parliament is sovereign and domestic courts must defer to it, and the same applies a fortiori to international courts, since that parliamentary sovereignty is protected by a dualist system of relationship between national and international law. As Lord Neuberger put it, “the idea of courts overruling decisions of the UK parliament, as is substantially the effect of what the Strasbourg and the Luxembourg courts can do, is little short of offensive to our notions of constitutional propriety”.⁶

The second type of critiques addressed to the Court is more complex, since they pertain to the nature of the subject-matter that the Court deals with, namely the rights and freedoms enshrined in the Convention. They turn around the motto that there is a conflict between “genuine” versus “fake” human rights. Three claims are made:

First, human rights are residual, civil liberties which serve only minorities, not the majority of citizens. The Convention is portrayed as the villains’ charter, not as the bill of rights of the common man on the street. Furthermore, social rights are not human rights, not enforceable rights at all. Human rights only imply negative, not positive obligations and certainly not a budgetary cost. The transformation of the Convention into a disguised social charter betrays its nature.

Secondly, human rights result from an originalist, “true” interpretation, not an evolutive, “abusive” interpretation. The true interpretation of the Convention is based on the *travaux préparatoires* and eventually also on the Contracting Parties’ law at the time of drafting of the Convention. Soft law is not law, and should not be taken into account, not even as a contextual element of interpretation of the Convention and its protocols.

Thirdly, human rights are truly “homegrown”, not “foreign” rights. There are no universal human rights. Universal human rights are indeed foreign human rights, imposed by alien judges who lack sensitivity to domestic traditions. The defence of homegrown rights imposes a sort of scepticism regarding international law and bodies. Cultural relativism and legal diversity are the sole weapons to oppose to the Court’s moral tutelage.

⁴ Lord Hoffmann, “The Universality of Human Rights” (2009) 125(3) *Law Quarterly Review* 428.

⁵ On this line of argumentation see Kanstantsin Dzechiarou and Alan Greene, “Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners” (2011) 12 *German Law Journal* 1707; and Tom Barkhuysen and Michiel L. van Emmerik, “Legitimacy of European Court of Human Rights Judgements: Procedural Aspects”, in N. Huls, M. Adams and J. Bomhoff (eds), *The Legitimacy of Highest Courts Ruling* (2009), pp.437–449.

⁶ Lord Neuberger, Cambridge Freshfields Annual Law Lecture 2014, “The British and Europe”, 12 February 2014.

2. Evolutive interpretation

A response to these claims requires us to go back to basics and recall what the European Court of Human Rights (the Court) was built for.

The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms (art.1, para.b of the 1949 Statute of the Council of Europe). With 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights. Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations of negative and positive nature for States Parties towards all individuals within their jurisdiction, with a view to the practical implementation of the protected rights and freedoms in the domestic legal order of the States Parties. Put it in legal jargon, the Convention is a law-making treaty and not a mere contract treaty.

Very early on, the former Commission, in its decision of 11 January 1961 in the case of *Austria v Italy*, expressed the same principle when it affirmed the “objective character” of the Convention:

“... the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.”⁷

Therefore, the States Parties to the Convention are legally obliged not to hinder in any way the effective exercise of the right of individual application and to make such modifications to their domestic legal systems as may be necessary to ensure the full implementation of the obligations incumbent on them.⁸ Seen from another perspective, these are the consequences of the principle of good faith in fulfilling treaty obligations, provided for in arts 26 and 31 of the Vienna Convention on the Law of Treaties.

The Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with other international law and soft law. Ever since *Golder*, account shall be taken of any relevant principles and rules of international law applicable in the relations between the parties, as indicated in art.31(3)(c) of the Vienna Convention on the Law of Treaties of 1969.⁹ Hence, the Court departs from the contested position that there are “self-contained regimes” within international law.¹⁰ From the Court’s perspective, there is no methodological difference between the interpretation of international human rights law and other international law, or between contractual and law-making treaties, and therefore it assumes that the same interpretative methods can be applied in both fields of international law. As Judge Rozakis so elegantly formulated it, the judges of Strasbourg “do not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR’s interpretative inventions or those of the States party to the Convention”.¹¹

This methodology is warranted by the Court’s cardinal principle of interpretation, according to which the Convention must be interpreted in the light of present-day conditions.¹² It was in the seminal case

⁷ Commission, *Austria v Italy* (App. No.788/60), decision of 11 January 1961. The Court adhered to this doctrine in *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25.

⁸ *Maestri v Italy* (2004) 39 E.H.R.R. 38.

⁹ *Golder v United Kingdom* (1975) 1 E.H.R.R. 524.

¹⁰ The point was already made in my opinions in *Al-Dulimi and Montana Management Inc v Switzerland* [GC] (App. No.5809/08), judgment of 21 June 2016 at [71]; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4, fn.23, and *Centre for Legal Resources on behalf of Valentin Câmpeanu* [GC] (App. No.47848/08), judgment of 17 July 2014, fn.14.

¹¹ Rozakis, “The European Judge as a Comparativist” (2005) *Tulane Law Review* 278.

¹² *Tyler v United Kingdom* (1978) 2 E.H.R.R. 1 at [31]. On this method of interpretation, see among many others, Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009); and Andreas Fllesdal, Birgit Peters and Gert Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013).

Tyrer v United Kingdom that the Court for the very first time used the leitmotiv of “the Convention as a living instrument”, whose interpretation has to take account of evolving norms of national and international law.¹³ Deeply entrenched into American¹⁴ and Canadian¹⁵ constitutional law since the early twentieth century, this interpretation technique was introduced in European human rights law in 1978.

In *Tyrer*, confronted with the Attorney General of the Isle of Man’s arguments advanced under former art.63 of the Convention that, “having due regard to the local circumstances in the Island”, the continued use of judicial corporal punishment on a limited scale was justified as a deterrent, the Court replied that:

“it is noteworthy that, in the great majority of the Member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; … If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country.”

By concluding that the Isle of Man must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers, the Court rejected that there were local requirements affecting the application of art.3 in the Isle of Man and, accordingly, found that the applicant’s judicial corporal punishment constituted a violation of that article.

Hence, since the very beginning of the Court’s existence, the evolutive interpretation of the Convention was intimately linked to the need for a consensual reading of the text, based on the consideration of the domestic legal framework of the “great majority” of the Member States of the Council of Europe and, ultimately, of the common heritage of political traditions, ideals, freedom and the rule of law, to which the preamble makes reference.

The foundational principle of evolutive interpretation has been recently put at stake in *Hassan v United Kingdom*.¹⁶ Contrary to the Government’s position, the Grand Chamber affirmed that IHRL applies to international armed conflicts concurrently to IHL, but it went on to admit, as pleaded by the Government, that IHL, namely the Third and Fourth Geneva Conventions relating to internment, may be used to qualify and, in practical terms, to weaken IHRL standards. On the basis of an alleged subsequent practice of the Contracting Parties during international armed conflicts outside Europe, which did not use the derogation clause of art.15 of the Convention in order to detain people indefinitely in such war scenario, the Grand Chamber assumed that all Contracting Parties had proceeded to an implicit review of their own Convention commitments and enlarged the exhaustive list of detention grounds of art.5 of the Convention. The principle of evolutive interpretation of the Convention was turned upside down with a view to include in art.5 a new ground for detention, namely internment under international humanitarian law, the practical consequence being that in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, art.5 can be interpreted as permitting the exercise of such broad powers and the looser standards of review of detention of the Geneva Conventions will apply. Hence, review of such detention should take place by a “competent body” with “sufficient guarantees of impartiality”, and not necessarily by a judicial

¹³ *Tyrer* (1978) 2 E.H.R.R. 1 at [31].

¹⁴ *Missouri v Holland* 252 U.S. 416 (1920). Writing the majority’s opinion, Justice Holmes made this remark on the nature of the constitution: “With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.” The Supreme Court’s reference to “evolving standards of decency” is also understood as a clear mention to the “living constitutionalism” (see *Trop v Dulles* 356 U.S. 86 (1958): “The words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

¹⁵ *Henrietta Muir Edwards v The Attorney General of Canada* [1929] UKPC 86, [1930] A.C. 124 (18 October 1929). The case is not only memorable because it established that Canadian women were eligible to be appointed senators, but also because it introduced the “living tree doctrine” in Canadian constitutional law, according to which the constitution is organic and must be read in broad and liberal manner so as to adapt it to changing times.

¹⁶ *Hassan v United Kingdom* [GC] (App. No.29750/09), judgment of 16 September 2014.

authority. In other words, evolutive interpretation of the Convention may now permit a regression in terms of human rights protection in Europe.

3. European consensus

In Strasbourg, soft law provided, and still provides, the most important source of crystallisation of the European consensus and the common heritage of values. In fact, soon after *Tyler*, the Court took the fundamental step of enlarging the array of sources of law in the light of which the European consensus may be established. In *Marckx v Belgium*, the Court took into consideration the European shared values based on the domestic law of the “great majority” of Member States of the Council of Europe, as well as the 1962 Convention on the Establishment of Maternal Affiliation of Natural Children, signed but not ratified by the respondent State, and the Council of Europe 1975 Convention on the Legal Status of Children born out of Wedlock, not even signed by the respondent State, and finally the Committee of Ministers Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children. To the argument that the 1962 and the 1975 Conventions had a small number of parties, the Court replied that

“[b]oth the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between ‘illegitimate’ and ‘legitimate’ children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.”¹⁷

Mirroring the interpretative techniques of constitutional courts, the Court went even further and modulated the effects of its judgment, dispensing the respondent State from re-opening legal acts or situations that antedate the delivery of the judgment. For that purpose, it made reference to the fact that “a similar solution is found in certain Contracting States having a constitutional court: their public law limits the retroactive effect of those decisions of that court that annul legislation”.¹⁸ As if it were a European Constitutional Court, the Court resorted to the principle of legal certainty to accord itself the implied power of modulation of the temporal effect of its own judgments.¹⁹

In the landmark case of *Demir v Turkey*, after having recalled that “the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies”, and having regard to the developments in labour law, both international and national, and to the pertinent practice of Contracting States, the Court concluded that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one’s interests set forth in art.11 of the Convention. For that purpose, it cited the relevant ILO Conventions, which the respondent State had ratified, the respective ILO Committee of Experts’ interpretation, as well as art.28 of the European Union’s Charter of Fundamental Rights, art.6(2) of the European Social Charter, which Turkey had not ratified, the European Committee of Social Rights’ interpretation of this article, and Principle 8 of Recommendation No.R(2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe.²⁰

In other words, for the purpose of the interpretation of the Convention, the legal relevance of human rights standards set out in other treaties and conventions depends neither on the number of their respective

¹⁷ *Marckx v Belgium* (1979) 2 E.H.R.R. 330 at [41].

¹⁸ *Marckx* (1979) 2 E.H.R.R. 330 at [58].

¹⁹ On the constitutional nature of the Court see my opinion co-written with Judge Dedov in *Baka v Hungary* [GC] (App. No.20261/12), judgment of 23 June 2016, and the literature cited therein.

²⁰ *Demir v Turkey* (2009) 48 E.H.R.R. 54 at [146]–[154].

ratifying parties, nor on the number of Council of Europe Member States bound by them and nor even on the fact that the respondent State ratified them. Thus, under European human rights law, hard law is profoundly interwoven with soft law.

The Court's soft law and social rights friendly stance has been questioned in recent times. A remarkable example of this trend is *National Union of Rail, Maritime and Transport Workers v United Kingdom*.²¹ The UK banned secondary action more than two decades ago and throughout this time has been subject to critical comments by the ILO Committee of Experts and the ECSR. The applicant union prayed these soft law materials in aid. The Government did not consider the particular criticisms made to be relevant to the factual situation denounced in the present case, or otherwise significant. The Court acknowledged the wealth of international law material relevant for the case and that the analysis of the interpretative opinions emitted by the competent bodies set up under the most relevant international instruments mirrored the conclusion reached on the comparative material before the Court, namely that the UK's outright ban on secondary industrial action finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach. Nonetheless, the Court preferred to underscore the distinct character of its review compared with that of the supervisory procedures of the ILO and the European Social Charter and consequently it concluded that in this legislative policy area of recognised sensitivity the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action. No violation of art.11 of the Convention was therefore found.

Evolutionary interpretation of the Convention also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing State Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court made use, for example, of the work of the European Commission for Democracy through Law (the Venice Commission). The first case where the Court cited the Venice Commission was *Hirst v United Kingdom (No.2)*.²² The source quoted was the "Code of Good Practice in Electoral Matters", adopted by the Venice Commission at its 51st Plenary Session (5–6 July 2002).

4. International democracy

From the seminal formulation of the European consensus in *Tyrer* emanates a vision of an deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and thus is entitled to impose its will on other parties. As a matter of constitutional principle formatting the Council of Europe, consensus is decoupled from unanimity. Consensus as a *volonté générale* can still exist even if not all Contracting Parties concur in the same reading of the Convention.

It cannot be argued today that the founding fathers did not want this to happen, and states had been trapped into engagements that they did not agree upon. The now worn-out argument of lack of state consent is sometimes accompanied, as the reverse side of the coin, by the no less *démodé* critique to the Court's lack of political legitimacy to interpret innovatively the Convention, *rectius*, to create law, using soft law to circumvent the competent legislative bodies and to flout the principles of democracy, rule of law and subsidiarity. Underlying this speech is almost invariably the sovereignist leitmotiv *in dubio pro mitius*.

The preamble sets the Convention against the background of the Council of Europe general aims, with a view to creating a "closer union" among Member States, based on "a common understanding and observance of the Human Rights upon which they depend". In the Statute of the Council of Europe, the

²¹ *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 E.H.R.R 10.

²² *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41.

language used makes reference not only to a “closer unity between all like-minded countries of Europe”, but also to an “organisation which will bring European States into closer association”. The very first Article of the Statute sets as the aim of the Council “to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”. In the explicit terms of the Statute, the realisation of these ideals and principles warrants “agreements and common action” in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and “in the maintenance and further realisation of human rights and fundamental freedoms”. No better words could proclaim the primacy of human rights obligations in all areas of governance. The principle *in dubio pro persona* could find no better formulation.²³ Hence, social and economic progress is intimately connected to the progress of human rights as two sides of the same coin.

This put, evolutive interpretation, European consensus and hardening of soft law comprise the three pillars of the European normative system within which state consent is relevant. In a nutshell, the Court’s golden rule of interpretation rejects a self-contained, literal, originalist, *in dubio mitius* and sovereigntist Convention interpretation.

Based upon these pillars from the very beginning, and animated by the common quest for “economic and social progress”, the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed national egoisms. Sovereignty is no longer an absolute given, as it was in the Westphalian times, but an integral part of a human rights-serving community.

In this context, the Convention cannot but be interpreted in the light of the formally binding “agreements” (i.e. treaties) and the immense plethora of formally not binding “common actions” performed by the political and technical bodies of the Council of Europe, such as recommendations, guidelines and declarations of its Committee of Ministers. Furthermore, the Convention itself calls for an open-minded approach to international law and soft law, since it is inspired by the Universal Declaration on Human Rights, as the preamble states, and open to other legal instruments, both of domestic or international legal nature, when these offer a better human rights protection (art.53 of the Convention).²⁴ In sum, the Court’s interpretative latitude is dictated by the letter and the very nature and purpose of the Convention.

The Convention “makes no distinction as to the type of rule or measure concerned and does not exclude any part of the Member States’ ‘jurisdiction’ from scrutiny under the Convention”.²⁵ This means that the Convention is not subordinated to domestic rules, since it is the supreme law of the European continent.²⁶ Neither the supremacy of Parliament nor the independence of the judiciary may be invoked to fail to perform the Convention obligation of implementation of the Court’s judgments and decisions.²⁷ As Lady Hale wrote, “[i]t stands to reason that, once a state has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way”.²⁸

As a matter of constitutional law, not even the core of the national constitution, where the political stakes are higher (such as the provisions on the composition of the highest political and judicial bodies of the state), may be determinative in case of conflict with international obligations derived from the

²³ On this principle see my separate opinions in *Khamtokhu v Russia* [GC] (App. Nos 60367/08 and 961/11), judgment of 24 January 2017, and *Garib v Netherlands* [GC] (App. No.43494/09), judgment of 6 November 2017.

²⁴ On the “floor-ceiling problem” of the wide margin to lead ahead, but no margin to lag behind the Court, see my separate opinion in *Hutchinson v United Kingdom* (App. No.57592/08), judgment of 17 January 2017.

²⁵ Among many authorities, *United Communist Party of Turkey v Turkey* [1998] 26 E.H.R.R. 121 at [29], and more recently, *Anchugov v Russia* (App. Nos 11157/04 and 15162/05), judgment of 4 July 2013 at [50].

²⁶ See *Sejdic v Bosnia and Herzegovina* [GC] (App. Nos 27996/06 and 34836/06), judgment of 22 December 2009 at [40]–[41]; *Popescu v Romania* (No.2) (App. No.71525/01), judgment of 27 April 2007 at [103]; and *Anchugov* (App. Nos 11157/04 and 15162/05) at [50]. The practice of the Contracting Parties until at least the mid-1990s consistently confirmed this reading of the Convention. See the reform of the Maltese Constitution following the findings in the *Demicoli v Malta* judgment (Council of Europe Committee of Ministers Resolution DH (95) 211 of 11 September 1995) and the 14th Amendment of the Irish Constitution following the findings in the *Open Door and Dublin Well Woman v Ireland* judgment (Council of Europe Committee of Ministers Resolution DH (96) 368 of 26 June 1996).

²⁷ Article 27 of the Vienna Convention on the Law of Treaties.

²⁸ Lady Hale, “Common Law and Interpretation: the limits of interpretation” [2011] E.H.R.L.R. 538.

Convention and its Protocols.²⁹ Any other approach, which pays lip service to the Court's judgments and decisions but ultimately rejects its legal force as *res judicata* among the parties and *res interpretata* for all Contracting parties, will breach the principle of *pacta sunt servanda* and the instrumental precept of good faith.³⁰ As put in the Court's "Memorandum to the states with a view to preparing the Interlaken Conference", delivered on 3 July 2009,

"It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ('direct effect') and the notion of ownership of the Convention by the States."

The Court's task is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention.³¹ Subsidiarity does not mean that the protection of human rights takes place primarily at the national level in accordance with the Contracting Parties' Constitutions and constitutional traditions, thus implying a limited, if not subservient role for the Court. Instead, subsidiarity means that the responsibility to ensure Convention rights and freedoms falls primarily on the Contracting Parties. Effective national implementation of the Convention remains the sine qua non precondition for subsidiarity. At this juncture, it is not needed to recall the shameful examples in the history of Europe of gravely discriminatory, unjust and inhuman legislation and regulation being passed by democratically elected assemblies, governments and officials. Majorities can get it wrong. As an international court distanced from local politics, the Strasbourg Court is there to provide a legal avenue to the alleged victims of such wrongs.

Against this background, no Contracting Party can legitimately claim special exemption from its Convention obligations and the Court's judgments on the basis of its "exceptional situation", other than in the strict terms of art.15 of the Convention. Even then that exemption is under the Court's oversight. Outside of the very specific context of art.15, any possibility of democratic override of the Convention obligations and the Court's judgments is fundamentally inconsistent with the rule of law inherent in the Convention system and with the concept of the Convention as a charter of fundamental rights and freedoms and a "constitutional instrument of European public order".³²

5. The Court's existential crisis

The unfortunate *Hirst*³³ saga is a telling example of the current danger facing the European human rights protection system. The British legal framework imposed a blanket restriction on all convicted prisoners in prison. It applied automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right, as the Court put it, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with art.3 of Protocol No.1.

Thirteen years have passed without implementation of the *Hirst* judgment delivered in 2004, this omission being aggravated after 2010 by the delivery of a pilot judgment in *Greens v United Kingdom*.³⁴ In spite of the Court's crystal clear indication that the disenfranchisement system of prisoners in the UK

²⁹ See *Sejdić* [GC] (App. Nos 27996/06 and 34836/06), judgment of 22 December 2009 for a case of conflict between constitutional provisions on the composition of highest political bodies of the state and the European standards, and more recently *Baka* (App. No.20261/12), judgment of 23 June 2016 on a case of conflict between constitutional provisions on the composition of the Supreme Court of Hungary and the Convention.

³⁰ Article 26 of the Vienna Convention on the Law of Treaties.

³¹ ECHR art.19.

³² *Loizidou v Turkey (preliminary objections)* (1996) 21 E.H.R.R. 188.

³³ *Hirst v United Kingdom* (No.2) (2006) 42 E.H.R.R. 41.

³⁴ *Greens v United Kingdom* (App. Nos 60041/08, 60054/08), judgment of 23 November 2010.

constituted a systemic failure which required the adoption of measures of general nature, none were adopted even after the Grand Chamber itself nuanced the Court's position in *Scoppola v Italy* in 2012.³⁵ In an exact similar case of automatic disenfranchisement as a result of a life sentence, without any assessment of the individual case, the Grand Chamber backtracked from the principled position taken in *Hirst* by accepting the Italian legislation depriving of voting rights automatically all those who are sentenced to three years or more in prison, irrespective of the nature of their offence and their individual circumstances. Despite the compounding circumstance that deprivation of voting rights could entail a life ban in Italy, while the UK deprived all persons sentenced to imprisonment, for the duration of their time in prison, the Court found that the Italian system was indeed acceptable in the light of art.3 of Protocol No.1.

Both the British rebellion against *Hirst*, and the Court's backtracking from its own principles of interpretation, had and still have an enduring, negative effect on the European system of human rights protection.³⁶ After the shock waves sent by the 2012 *Konstantin Markin* Grand Chamber case on the right of servicemen to parental leave,³⁷ which was felt as an interference with the organisation of the Russian army, the 2013 *Anchugov* judgment³⁸ dealt with the exact same issue of *Hirst*, the ban of the voting rights of prisoners, but this time with the particularity that the ban was based on a constitutional provision: art.32(3) of the Russian Constitution. That did not hinder the Court from repeating the finding of a violation of art.3 of Protocol No.1, which would logically entail a constitutional reform in Russia. No such thing happened.

On the contrary, in July 2015 the Russian Constitutional Court judgment on the Federal Law on the Accession of the Russian Federation to the European Court of Human Rights affirmed that a judgment of the Court is not enforceable in Russian territory if the Constitutional Court finds that it contradicts the Russian Constitution. Since there was no legal framework for such finding, the Constitutional Court suggested that the Duma approve legislation to create a special legal mechanism "to ensure the supremacy of the Constitution in the implementation of European Court of Human Rights judgments".³⁹ Such interpretation of the Russian Constitution was enshrined in December 2015 in a Law on the Constitutional Court powers, which establishes the Constitutional Court power to declare rulings of international judicial bodies non-executable (including on compensation) if they contradict the Russian Constitution.⁴⁰ In April 2016, the Russian Constitutional Court applied the new law for the first time and decided that the *Anchugov* judgment is not enforceable in Russia.⁴¹

The 2016 Constitutional Court judgment only worsened the present existential crisis of the Court.⁴² If it is true that the vast majority of the Court's judgments are implemented with more or less delay or precision, the fact remains that in a fast-growing number of cases states are not willing to go along with the Court and oppose directly or indirectly any kind of implementation of its judgments.⁴³ In the case of Russia, there are now 1,573 non-executed judgments pending,⁴⁴ of them 204 in leading cases, among

³⁵ *Scoppola v Italy* (2013) 56 E.H.R.R. 19.

³⁶ This is not the first time that this type of reaction occurs. One example suffices. Following the *McCann v United Kingdom* judgment, the media reported: "Ministers said they would ignore it and were not ruling out the ultimate sanction of a withdrawal from the court's jurisdiction. 'Every possible option is being kept open, including walking away,' said one insider." "Downing Street said the ruling in the so-called Death on the Rock case 'defied common sense'. Deputy Prime Minister Michael Heseltine branded it 'ludicrous'" (see *Daily Mail*, 28 September 1995). The novelty with the *Hirst* crisis is the contagious effect that it had.

³⁷ *Markin v Russia* (2013) 56 E.H.R.R. 8.

³⁸ *Anchugov v Russia* (App. Nos 11157/04 and 15162/05).

³⁹ Constitutional Court of the Russian Federation judgment No.21-P/2015 of 14 July 2015.

⁴⁰ See the Federal Constitutional Law No.7-FKZ of 14 December 2015, introducing amendments to the Federal Constitutional Law No.1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation.

⁴¹ Constitutional Court of the Russian Federation judgment No.12-P of 19 April 2016.

⁴² On the impact of this crisis on the European human rights protection system see the European Commission for Democracy through Law (Venice Commission) Opinion No.832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court, 13 June 2016, CDL-AD(2016)016.

⁴³ On the problems regarding the effectiveness of the Court raised by non-execution of its judgments, see among others Keller and Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 E.J.I.L. 829; and Hillebrecht, "Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals" (2009) 1 *Journal of Human Rights Practice* 362.

⁴⁴ Data as of December 2017.

which the famous 2014 *Yukos*⁴⁵ judgment that set the highest ever compensation amount in the history of the Court, €1.8 billion to be paid to the applicants. Precisely in this case, in January 2017 the Russian Constitutional Court came to the conclusion that the Court's decision on just satisfaction violates the Russian Constitution and cannot be enforced.⁴⁶

In this context, it does not come as a surprise that even the binding force of a unanimous Grand Chamber judgment (*Paposhvili v Belgium*⁴⁷) has recently been rejected by the UK Upper Tribunal, which considered the Grand Chamber judgment as setting an “over-elastic and ill-defined” test which is “as long as the judge’s sleeve”.⁴⁸ The systemic effect of this crisis is evidently aggravated by the possibility of Brexit. If fundamental rights in general and migration law in particular were main points of contention between the United Kingdom and the EU, leaving the EU will not be a solution, in view of the reciprocal influence between the Strasbourg and the Luxembourg jurisprudences on such issues like protection of the right to privacy, mutual recognition of judicial decisions, procedural rights in criminal proceedings, guarantees in asylum procedures or family reunification rights. If Brexit takes place, the dispute will be transposed to the Council of Europe and the Strasbourg Court will be the first to suffer.

6. The institutional response to the crisis

Faced with this adverse context, the Council of Europe should not ignore the critiques addressed to the Court. A proactive stance is needed to reinforce the role of the Court in the European human rights protection system and protect it from undeserved criticism. Having had the benefit of serving the Court for six years now, it seems to me that the following steps should be taken in order to strengthen the independence, the transparency and the accountability of the Court.

The Court is a high-independence judicial body, because the judges are elected by a democratic assembly (the Parliamentary Assembly of the Council of Europe) for a long, non-renewable nine-year mandate⁴⁹ and benefit from functional immunity for speech and acts while discharging their duties.⁵⁰ In terms of their legitimacy, the judges enjoy a broad European-wide political legitimacy, since the members of the Parliamentary Assembly are representatives of the 47 national Parliaments of the Contracting Parties to the Statute of the Council of Europe. This indirect political legitimacy of the Strasbourg judges is often forgotten.

Yet both the internal and the external independence of the judges can be improved. As in many Constitutional and Supreme Courts, there should be a rotation of the presidency of the sections of the Court, combined with a reduction of the term of section presidents. Article 25(c) of the Convention provides that the plenary Court shall “elect the Presidents of the Chambers of the Court” (who may be re-elected). In fact, the Court’s 47 judges are divided into five sections, within each of which three to four chambers are formed. The plenary elects the presidents of the five sections. The present Convention framework does not hinder the election of section presidents in accordance with a seniority-based system of voluntary rotation. Such system would avoid the inconveniences of campaigning and lobbying for electoral posts and therefore better protect the internal independence of the judges.

This new electoral philosophy should be articulated with a new voting philosophy. Pending cases should only be discussed by the judges in the court room, and not externally. Rule 22(1) of the Rules of Court states: “The Court shall deliberate in private. Its deliberations shall remain secret”. Rule 28(2)(d) provides that: “A judge may not take part in the consideration of any case if he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or

⁴⁵ OAO Neftyanaya Kompaniya Yukos v Russia (2014) 59 E.H.R.R. SE12.

⁴⁶ Constitutional Court of the Russian Federation Judgment No.1-P of 19 January 2017.

⁴⁷ Paposhvili v Belgium [GC] (App. No.41738/10), judgment of 13 December 2016.

⁴⁸ EA (Article 3 medical cases—Paposhvili not applicable) [2017] UKUT 00445 (IAC).

⁴⁹ ECHR arts 22, 23.

⁵⁰ ECHR art.51 and Statute of the Council of Europe art.40.

otherwise, that are objectively capable of adversely affecting his or her impartiality". These rules should be reinforced by the adoption of a strict "rule of silence" outside the courtroom.

The independence of the judges could be further strengthened with some fundamental ineligibility rules. Judges should be ineligible to apply for posts within the Court Registry (which provides legal and administrative support to the Court)⁵¹ for a period of five years after their mandate has ended; an equivalent rule should apply to Registry staff as regards applying for judicial posts at the European Court.

Judges should also be ineligible to apply for certain state positions for a period of five years after their mandate has ended; an equivalent rule should apply to the holders of those state positions as regards applying for judicial posts at the European Court. These "cooling-off period" rules would put an end to any risk of a "revolving door" between the Court and Government-dependent posts.⁵²

The Court is a high-transparency judicial body, because the Convention secures the right of judges to join separate opinions to Grand Chamber and Chamber judgments and advisory opinions.⁵³ Nevertheless, the Court's transparency could be further enhanced.

The transparency of the Court relates essentially to the mode of constitution of the Chamber and the Grand Chamber for each case. With regard to the Grand Chamber, art.26(4) and (5) of the Convention is complemented by r.24 of the Rules of Court. Rule 24(e) provides:

- "(e) The judges and substitute judges who are to complete the Grand Chamber in each case referred to it shall be designated from among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar. The modalities for the drawing of lots shall be laid down by the Plenary Court, having due regard to the need for a geographically balanced composition reflecting the different legal systems among the Contracting Parties."

The practice has been that six "regional" groups are organised for the constitution of the Grand Chamber for each case; these "regional" groups are reviewed from time to time and the individual judges are chosen from these "regional" groups by manual drawing of lots.

With regard to the chambers and the sections, r.25(3) of the Convention is complemented by rr.25 and 26 of the Rules of Court. Rule 25 of the Rules of Court on the "Setting-up of Sections" states: "The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties [the term 'Section' is used instead of 'Chamber']". Rule 26 of the Rules of Court on the "Constitution of the Chambers" states: "1(b) The other members of the Chamber shall be designated by the president of the section in rotation from among the members of the relevant section". The practice has been that, after consultation with the individual judges, the President of the Court proposes and the plenary ratifies the composition of sections. The constitution of the Chamber for each case depends ultimately on the section president.

These rules should be reviewed with a view to avoid any element of chance or discretion in the composition of judicial formations. Instead, there should be predictability and certainty, eliminating any room for doubt. The constitution of the Chamber and the Grand Chamber for each case should be determined in accordance with strictly objective criteria and a fully automated, publicly available procedure.

In accordance with a long-standing practice, judge rapporteurs are assigned anonymously to preside over the processing of each case. It is an open secret that the practice follows an internal rule according to which the national judge is the judge rapporteur in Chamber cases from his or her own country,⁵⁴ save

⁵¹ ECHR art.24.

⁵² This would remove the risk to which is made reference in Dunoff and Pollack, "The Judicial Trilemma" (2017) 111(2) *American Journal of International Law* 225, fn.102.

⁵³ ECHR arts 45(2) and 49(2).

⁵⁴ This is why applications are normally allocated to the Section in which the national judge sits. Rule 26(1)(a) of the Rules of Court provides that in constituting Chambers to consider an application, where the national judge is not a member of the Section to which the application has been assigned, he or she shall sit as an ex officio member of the Chamber.

when the section president decides differently. In Grand Chamber cases, the President of the Court has total discretion in appointing the judge rapporteur.⁵⁵ This practice should be changed.

First, the Convention does not prevent the judge rapporteur from being identified. Secondly, rr.48–50 of the Rules of Court are manifestly insufficient to ensure the needed institutional transparency, in view of the utmost importance of the judge rapporteur’s input into the processing of cases. Thirdly, the applicants, the Governments, the lawyers and the general public have a right to know the identity of the judge rapporteur, in accordance with the overarching principle of transparency of the Council of Europe.⁵⁶ Hence, judge rapporteurs should be publicly named and their appointment should be based on strictly objective criteria and a publicly available procedure.

The single judge may declare inadmissible or strike out of the Court’s list of cases an application under art.34 of the Convention.⁵⁷ The single judge is assisted by a non-judicial rapporteur who shall function under the authority of the President of the Court.⁵⁸ In practice, both the single judge and the non-judicial rapporteur are appointed by the President of the Court. Other than the restriction that a single judge shall not examine any application against a country in respect of which he or she has been elected,⁵⁹ the President of the Court has full discretion in the appointment of the single judge and the non-judicial rapporteur. This should not be the case. The criteria for designating single judges and non-judicial rapporteurs to particular countries should be objective and public. The mere fact that the single judge decisions are non-appealable, final decisions⁶⁰ warrants such objectivity and transparency. The additional fact that they represent the vast majority of the Court’s output only shores up the argument for increased objectivity and transparency.

The transparency of the Court’s output still leaves much to be desired.⁶¹ Separate opinions are a major, but still underestimated tool to guarantee the Court’s transparency and promote the development of its case-law. Article 45 of the Convention does not hinder the identification of the majority and the minority in decisions. Judges who form the majority and minority in decisions should be identified in order to clarify the position of each individual judge.⁶²

The practice of the Court has been open to separate opinions (on inadmissibility issues) joined to merits judgments which also incorporate inadmissibility decisions.⁶³ Indeed, there is no reason why this practice should not extend to decisions as such. The omission in art.45(2) of the Convention of a reference to decisions is a mere historical accident, given the original competence of the Convention organs, where admissibility was essentially a matter for the Commission.⁶⁴ Furthermore, r.74(2) of the Rules of Court

⁵⁵ Sometimes his or her identity is known (see Dzehtsiarov and Lukashevich, “Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court” in (2012) 30(3) *Netherlands Quarterly of Human Rights* 274, fn.10).

⁵⁶ See the “Guidelines for civil participation in political decision making”, adopted by the Committee of Ministers on 27 September 2017 at the 1295th meeting of the Ministers’ Deputies. These Guidelines recommend increasing transparency of decision-making processes around Europe, and namely that all public bodies responsible for decision making should be subject to access to information laws. See also the Parliamentary Assembly Resolution 2182 (2017) on “Follow-up to Resolution 1903 (2012): promoting and strengthening transparency, accountability and integrity of Parliamentary Assembly members”, adopted by the Assembly on 10 October 2017.

⁵⁷ ECHR art.27 and Rules of Court r.27A.

⁵⁸ ECHR art.24(2).

⁵⁹ ECHR art.26(3).

⁶⁰ ECHR art.27(2).

⁶¹ Since this article is focused on institutional transparency reform efforts, it will not address substantive transparency issues related to the motivation of judgments, like the unpredictable use of the margin of appreciation and the distortion of the European consensus, regarding which the Court’s practice has been the subject of much criticism (see the interesting remarks of Strasbourg Judges on these issues in Dzehtsiarov, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015, ch.7), as well as Tulkens and Donnay, “L’usage de la marge d’appréciation par la Cour européenne des droits de l’homme. Paravent juridique superflu ou mécanisme indispensable par nature?” (2006) *Revue de Science Criminelle et de Droit Pénal Comparé* 3, and Tulkens, “Conclusions Générales”, in Frédéric Sudre (ed.), *Le principe de la subsidiarité au sens du droit de la Convention européenne des droits de l’Homme* (Anthemis, 2014)).

⁶² Sometimes it is frustrating that a minority member of the judicial composition does not have the chance to dissociate him or herself from the majority, especially in cases coming from his or her own country of origin.

⁶³ See, among recent examples, the separate opinions joined by Judges Keller and Dedov in *Navalnyye v Russia* (App. No.101/05), judgment of 17 October 2017, by Judges Karakas, Vucinic and Laffranque in *Tibet Mentes v Turkey* (App. No.57818/10), judgment of 24 October 2017, and my own opinion in *de Tommaso v Italy* [GC] (App. No.43395/09), judgment of 23 February 2017.

⁶⁴ As shown by the Court’s practice even during the time of the Commission (see *Van Oosterwijck v Belgium* (1981) 3 E.H.R.R. 557 and *Cardot v France* (1991) 13 E.H.R.R. 853).

has already gone *praeter legem*, by including the possibility of a “bare statement of dissent”. Most importantly, decisions on inadmissibility occasionally deal with complex, crucial issues which relate to the Court’s jurisdiction and the interpretation of the Convention and the Protocols thereto. It is simply nonsensical that judges cannot express their individual views on issues of this magnitude in decisions on applications under arts 33 and 34 of the Convention⁶⁵ while decisions rejecting requests for advisory opinions may be accompanied by separate opinions or statements of dissent.⁶⁶

Article 46(3), (4) and (5) of the Convention does not rule out separate opinions in interpretation and infringement judgments. Yet r.93 of the Rules of Court prohibits such opinions in interpretation judgments while r.99 does not prohibit them in infringement judgments. This groundless difference of treatment should be solved by bringing the erroneous r.93 into line with the open rule enshrined in art.46(4) of the Convention, read in conjunction with art.45(2).⁶⁷

Sufficient reasoning (which is not “stereotypical”) should be provided for single judge decisions on inadmissibility⁶⁸ and for the decisions of the Grand Chamber panels that reject a case to the Grand Chamber⁶⁹ and these decisions should be published.⁷⁰ These were the crystal-clear demands of the Governments in the 2015 Brussels Declaration,⁷¹ after the criticism expressed by other national and international authorities⁷². Following the same logic, and since it deprives the parties of one degree of jurisdiction, any decision to relinquish in favour of the Grand Chamber should be reasoned.⁷³

All the sources of information relied on by the Court for the drafting of a judgment or decision should be made public, including information provided by the Court’s Jurisconsult,⁷⁴ international and comparative law reports of the Court’s Research Division and third-party interventions.⁷⁵ One essential element for the motivation of the Court’s judgments is its internal guidelines on just satisfaction. There is no reason why these guidelines should remain secret.⁷⁶ The parties to the case have a right to know how the awarded just satisfaction was calculated.⁷⁷

Scholarly research shows that normally there is an inverse relation between independence and accountability of judicial bodies: more independence comes at the expense of less accountability.⁷⁸ The Court is a low-accountability judicial body. Save for dismissal procedures when the judge no longer fulfils the “required conditions”⁷⁹ and the prohibition of engaging in “any activity which is incompatible with their independence, impartiality or with the demands of a full-time office”,⁸⁰ there is no other accountability

⁶⁵ Rules of the Court r.56(1).

⁶⁶ Rules of the Court r.88(2).

⁶⁷ In fact, the practice of the old Court admitted such separate opinions in interpretation judgments (see the separate opinion of Judges Verdross and Zekia in *Ringeisen v Austria (Interpretation)* (1979) 1 E.H.R.R. 513).

⁶⁸ ECHR art.27, in conjunction with art.45(1).

⁶⁹ ECHR art.43(2) and (3). Rule 73(2) of the Rules of Court states that “Reasons need not be given for a refusal of the request”.

⁷⁰ Rule 33(4) of the Rules of Court only provides for publication of “general information” on decisions taken by the single judge.

⁷¹ See the High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility”, Brussels Declaration, 27 March 2015: “welcomes the intention expressed by the Court to provide brief reasons for the inadmissibility decisions of a single judge, and invites it to do so as from January 2016; invites the Court to consider providing brief reasons for its decisions indicating provisional measures and decisions by its panel of five judges on refusal of referral requests”.

⁷² See *Maria Cruz Achaval Puetas v Spain*, United Nations Human Rights Committee, Communication No.1945/2010, 18 June 2013, and my opinion in *Centre for Legal Resources on behalf of Valentin Căpăeanu v Romania* [GC] (App. No.47848/08).

⁷³ Rule 72(3) of the Rules of Court provide for the opposite.

⁷⁴ Rule 18B of the Rules of Court provides as follows: “For the purposes of ensuring the quality and consistency of its case-law, the Court shall be assisted by a Jurisconsult. He or she shall be a member of the Registry. The Jurisconsult shall provide opinions and information, in particular to the judicial formations and the members of the Court”.

⁷⁵ ECHR art.36 and Rules of Court r.44.

⁷⁶ See the CDDH Report on “the longer-term future of the system of the European Convention on Human Rights”, CDDH(2015)R84, Addendum I, 11 December 2015, p.83: “Regarding the issue of just satisfaction awarded by the Court, the CDDH considers that the criteria applied by the Court need to be more transparent”.

⁷⁷ In fact, the Court’s own case law imposes a very demanding transparency obligation on national courts (e.g. *Ferreira Alves v Portugal* (No.3) (App. No.25053/05), judgment of 21 June 2007 at [40]–[43]).

⁷⁸ Dunoff and Pollack, “The Judicial Trilemma” (2017) 111(2) *American Journal of International Law* 225, 226.

⁷⁹ ECHR art.23(4) and Rules of Court r.7.

⁸⁰ ECHR art.21(3) and Rules of Court r.4.

mechanism for judges. With regard to the members of the Registry, the general disciplinary rules of the Council of Europe apply.⁸¹ But more could be done to make the Court accountable.

The Court's plenary is responsible for the most important decisions regarding the Court's administrative and managerial policy.⁸² The Bureau, which does not have a Convention footing, is an advisory body to the President of the Court and does not have any decision-making power of its own.⁸³ All judicial matters lay outside the scope of the advisory competence of the Bureau, which can only pronounce itself on administrative and extra-judicial matters which fall within the competence of the Court's President.⁸⁴ Hence, the Bureau's task of facilitating coordination between the Court's sections only contemplates matters of administrative and extra-judicial nature.⁸⁵ Any pronouncement of the Bureau on judicial matters, including case-law consistency, would be ultra vires.

Prior to the adoption of the Council of Europe's budget each year, a detailed annual report approved by the Court's plenary should be presented to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, with information on the past results and future, expected results, in accordance with the Court's administrative and managerial policy. Most importantly, the Contracting Parties should be given more input into the adoption of the Rules of Court.⁸⁶

In line with the nature of the Convention as a "constitutional instrument of European public order"⁸⁷, the focus of the Court's administrative and managerial policy should be on inter-state cases and pilot-judgment procedures.⁸⁸ Special human and financial resources should be allocated to these types of cases. Among other strategic options to be taken, a "situation room" should be established within the Court to provide centralised, internal supervision of the development and follow up to these cases. This should be a high-ranking executive department that enables the Court to assess more efficiently the development of such cases and the impact of the respective judgments in cooperation with the Committee of Ministers' own supervisory mechanism.⁸⁹

More generally, the further judicialisation of the execution of the Court's judgments, namely by means of the increased use of the art.46(4) infringement procedure and the full acknowledgment of the right to reopen the case at domestic level after the Court's finding of a Convention violation, is a crucial strategic step that both the Court and the Committee of Ministers should envisage in order to be fully responsive to recalcitrant states.⁹⁰

⁸¹ See "Staff Regulations of the Council of Europe", arts 54–58.

⁸² ECHR art.25.

⁸³ Rules of Court r.9A(3).

⁸⁴ Rules of Court r.9A(3).

⁸⁵ Rules of Court Rule r.9A(4) read in conjunction with the previous r.9A(3).

⁸⁶ Rule 110 of the Rules of Court is manifestly insufficient in this regard.

⁸⁷ *Loizidou v Turkey (preliminary objections)* (1996) 21 E.H.R.R. 188 at [75].

⁸⁸ Already the 2005 report Lord Woolf on the *Review of the Working Methods of the European Court of Human Rights* proposed that "Cases that are candidates for a pilot judgment should be given priority, and all similar cases stayed pending outcome of that case". See also the CDDH Report on "the longer-term future of the system of the European Convention on Human Rights", CDDH(2015)R84, Addendum I, 11 December 2015, p.82: "Concerning systemic issues, the CDDH supports wider use by the Court of efficient judicial policy and case-management, allowing effective adjudication of large numbers of applications and inducing the respondent States through pilot judgments or other existing procedures to resolve the underlying systemic problems under the supervision of the Committee of Ministers." The 2015 Brussels Declaration, cited above, supported "further exploration and use of efficient case-management practices by the Court in particular its prioritisation categories for the examination of cases, according to, among other things, their level of importance and urgency, and its pilot-judgment procedure." According to the Court's priority policy, pilot-judgment procedures are Category II cases. But in its recent review of the priority policy, with effect from 22 May 2017, the Court placed inter-state cases, which were hitherto in Category II, outside the priority policy "in view of their special character which in any event attracted special procedural treatment" (see "The Court's Priority Policy", available on the Court's site).

⁸⁹ This means that the treatment of repetitive cases once the pilot judgment is delivered should not be entirely de-judicialised. The strike-out judgment delivered in *Burnysh v Ukraine* (App. Nos 46852/13 et al.), judgment of 12 October 2017 must be read in the light of the very special circumstances of that case, to which the Grand Chamber repeatedly referred (at [174], [175], [181] and [199]).

⁹⁰ See my separate opinion in *Fabris v France* (2013) 57 E.H.R.R. 19 on the legal and political importance of Article 46(4) infringement procedures and see my separate opinion in *Moreira Ferreira v Portugal (No.2)* (App. No.19867/12) judgment of 11 July 2017, on the implementation of Recommendation (2000) 2 on re-examination or reopening of certain cases at domestic level following judgments of the Court.

An accountability-based culture focused on producing a high-quality output, and not just statistical results,⁹¹ should pervade the Court's administration and management. This is evidently only possible with a highly authoritative judicial body and a fully motivated and increasingly specialised Registry. The election of judges should involve an intensive public vetting process. A European-wide uniform vetting process should improve the already existing standards,⁹² both at the national and the international stages, including public interviews by the Parliamentary Assembly Committee on the Election of Judges to the European Court of Human Rights. After being elected, judges have an accountability obligation also with regard to their private lives. There should be full publicity about the "off-the-bench" engagements of judges, including details about events sponsored by the Member States.

The Registry is the backbone of the Court's structure and contributes importantly to the quality of its output. Article 25(e) of the Convention provides that the plenary Court shall elect the Registrar and Deputy Registrar. This responsibility of the judges should be expanded to other positions of the Registry. Judges should have decisive input into the recruitment and career progression policy within the Court Registry.

The above-mentioned reform proposals should be perceived as a shared responsibility of the Court and the other bodies of the Council of Europe. Now, more than ever, the Court as the jewel of the crown of the Council of Europe needs the unequivocal and unbaiting support of the other bodies of the Council. The obvious sometimes needs stating. There should be no doubt that, if the Court falls, the Council will also fall.

⁹¹ See Elisabeth Lambert Abdelgawad, "La mesure de la performance judiciaire de la Cour Européenne des Droits de l'Homme: Une logique managériale à tout prix?" (2016) 159 *Revue Française d'Administration Publique* 824.

⁹² See the Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights Information document prepared by the Secretariat, AS/Cdh/Inf (2018) 01, 19 December 2017.

Will the Fundamental Rights Enshrined in the EU Charter Survive Brexit?

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✉ Brexit; EU law; EU nationals; Fundamental rights; Human rights; Jurisprudence; Treaties; Withdrawal

Abstract

Recently tabled draft legislation proposes that, upon the UK's exit from the EU, EU law as it then stands would be incorporated into domestic law but with the exclusion of the Charter of Fundamental Rights. The Explanatory Notes to the Withdrawl Bill suggest that underlying rights and general principles would nevertheless be retained. This article explores a number of questions raised by this proposal: As a matter of international law, can the UK "withdraw" from the Charter? Assuming it can, how could courts apply the underlying fundamental rights without reference to the Charter? Is it possible to disentangle "retained EU law" from an instrument that reflects foundational values of the EU legal order? Can the EU and its Member States enter into a withdrawal agreement that does not preserve Charter rights, at least for EU citizens? If not, would it be sustainable for the UK to afford greater human rights protections to EU citizens than it provides to its own citizens?

Introduction

The UK has embarked upon an unprecedented attempt to withdraw from the EU. The implications of withdrawal remain unclear in a number of areas, but one area in which the contours and challenges of the post-Brexit world are beginning to emerge is in the area of human rights protections. As of the date of writing this article, March 2018, Parliament is considering a "European Union (Withdrawal) Bill" (Withdrawal Bill or the Bill). The current draft of the Bill proposes that, from the date of exit, the European Communities Act 1972 would be repealed, but that EU law as it exists on the date of exit would be converted into domestic law. There is, however, one notable exception to the proposed conversion of EU law into domestic law: art.5(4) of the Bill provides that: "[t]he Charter of Fundamental Rights is not part of domestic law on or after exit day".¹

The aim of this article is to examine the proposal to abandon the Charter from the perspective of international law, while also considering relevant aspects of EU law and domestic law. The article first considers international law on withdrawal of treaties and on withdrawal of human rights protections and the extent to which the EU Charter is a "treaty" to which such rules of international law apply. Secondly, the article considers the UK government's depiction of the Withdrawal Bill as incorporating EU law as it existed on the day before exit in the light of the Bill's exclusion of the Charter. Finally, it considers the

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¹ Article 5(4) of the European Union (Withdrawal) Bill of 18 January 2018.

questions related to the withdrawal agreement, and in particular, whether the EU institutions and Member States could accept an agreement that does not respect the Charter and whether the UK could find itself in the anomalous position of guaranteeing Charter rights to EU-27 citizens while denying those same rights to others living in the UK.

International law—withdrawal from treaties, withdrawal of rights protections

Article 54 of the Vienna Convention on the Law of Treaties (Vienna Convention) provides that the withdrawal of a party to a treaty may take place only “(a) [i]n conformity with the provisions of the treaty; or (b) [a]t any time by consent of all the parties after consultation with the other contracting States”.² Where a treaty does not contain a withdrawal provision, unilateral withdrawal may not be possible.³ Thus, in 1997, when North Korea sought to withdraw from the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee issued an opinion concluding that such withdrawal was not possible, given that the ICCPR “does not provide for denunciation or withdrawal” and “is not the type of treaty which, by its nature, implies a right of denunciation”.⁴

Article 50 of the Treaty on European Union (TEU) introduced the possibility of withdrawal from “the Treaties”,⁵ but on its face does not apply to the EU Charter, because art.1 of the TEU defines “the Treaties” as consisting of “two Treaties”, namely, the TEU itself and the Treaty on the Functioning of the European Union (TFEU).⁶

The EU Charter does not contain a provision on withdrawal. The fact that the EU Charter is not one of “the Treaties” to which art.50 applies highlights a more basic question: is the EU Charter “a treaty” at all to which international law on withdrawal applies?

The official EUR-Lex database of European Union Law lists the Charter as one of four “Treaties currently in force”.⁷ Similarly, the Commission’s Draft Withdrawal Agreement classifies the Charter as one of “the Treaties” in its definition of “Union law”.⁸ However, the Vienna Convention defines a “treaty” by reference to three criteria: a “treaty” is (1) “an international agreement concluded between States”, (2) “in written form” and (3) “governed by international law”⁹.

The Charter is certainly in written form, but it is unclear whether it meets the other two criteria. As to the first criterion, the Charter began its life on 7 December 2000 as a “solemn proclamation” issued in

² Article 54 of the Vienna Convention on the Law of Treaties 1969.

³ See Article 56(1) of the Vienna Convention on the Law of Treaties 1969: “1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.” See e.g. Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp.493–494: “Thus, the normal basis of approach adopted in the United Kingdom and, it is believed, in most States, towards a treaty is that it is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination or some other provision for its coming to an end. There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties. Some existing British treaties have endured for nearly six centuries, and many for three.”

⁴ UN Human Rights Committee, *CCPR General Comment No.26 Continuity of Obligations* CCPR/C/21/Rev.1/Add.8/Rev.1 (9 December 1997), paras 1 and 3, <http://www.refworld.org/docid/453883fde.html> [Accessed 9 March 2018]. See also G. Naldi and K. Magliveras, “Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations” (2013) 33 *Polish Yearbook of International Law* 113.

⁵ Article 50(3) of the TEU: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

⁶ Article 1 of the TEU: “... The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as “the Treaties”). Those two Treaties shall have the same legal value ...”.

⁷ See EUR-Lex, Treaties currently in force, <http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> [Accessed 9 March 2018].

⁸ Article 2 of the European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom and Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (“Commission’s Draft Withdrawal Agreement”) of 28 February 2018: “For the purposes of this Agreement, the following definitions shall apply: (a) ‘Union law’ means: (i) the Treaty on European Union (‘TEU’), the Treaty on the Functioning of the European Union (‘TFEU’) and the Treaty establishing the European Atomic Energy Community (‘Euratom Treaty’), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as ‘the Treaties’ ...” The Draft Withdrawal Agreement has been prepared by the European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 (“TF50”).

⁹ Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969.

Nice by the European Parliament, the Council and the Commission, rather than as an agreement concluded between States.¹⁰ In this first iteration, the Charter was politically, but not legally, binding. As the Council declared when issuing its decision to create the Charter in June 1999, following this solemn proclamation, “[i]t will then have to be considered whether and, if so, how the Charter should be integrated into the treaties”.¹¹ The Treaty Establishing a Constitution for Europe would have incorporated the Charter as Part II of the EU Constitution,¹² but that treaty never came into force. Subsequently, in June 2007 the Heads of State or Government of the EU Member States agreed to give the Charter legally binding force, and the European Parliament passed a resolution approving the legally binding status of the Charter on 29 November 2007.¹³ On 12 December 2007 the Charter, as adapted with a view to making it legally binding,¹⁴ was solemnly proclaimed anew by the European Parliament, Council and Commission.¹⁵ The EU Charter became legally binding through the Lisbon Treaty,¹⁶ which introduced into the TEU a provision stipulating that the Charter has the “same legal value as the Treaties”.¹⁷

There are two ways of interpreting the effect of this provision. One could say that, by ratifying the Lisbon Treaty, the Member States were also ratifying the Charter as a separate treaty on a par with the TEU and TFEU. This interpretation, however, is difficult to reconcile with the language of art.1 of the TEU, which defines “the Treaties” as referring only to the TEU and the TFEU. Article 50 only contemplates the possibility of withdrawal from “the Treaties” (the TEU and TFEU), such that if the Charter did become a treaty by virtue of the Lisbon Treaty, it is outside the scope of the withdrawal provision in art.50 and thus would not cease to apply upon a Member State’s exit from the Union. However, if the parties to the Lisbon Treaty had intended to make the Charter into a treaty, one might have expected them to include it within the definition of Lisbon Treaty itself (following the model of the draft EU Constitution) or at least included it in the definition of “the Treaties” in art.1 of the TEU.

Alternatively, the reference to the Charter having the “same legal value as the Treaties” can be seen as doing no more than to signify the (now legally binding) Charter’s place within the hierarchy of sources of EU law.¹⁸ Such a reading is reinforced by the parallel language in art.1 of the Lisbon Treaty proclaiming that the “two Treaties shall have the same legal value”.¹⁹ On balance, it seems that the best reading of this language is that the Charter, while not technically a “treaty”, shall be treated within EU law as having the same status as the TEU and TFEU.

As to the third criterion under the Vienna Convention, it is unclear to what extent the Charter is “governed by international law” as distinct from EU law.

If the Charter does not appear to meet the definition of a “treaty” under the Vienna Convention, does that mean that it can be freely abandoned? Or do the fundamental rights recognised in the Charter belong to persons within the territories to which such rights have extended, such that a Member State’s withdrawal from the EU would not deprive them of those rights?

¹⁰ Charter of Fundamental Rights of the European Union (2000/C 364/01) of 18 December 2000.

¹¹ European Parliament, Conclusions of the Presidency—Cologne European Council (3 and 4 June 1999), Annex IV European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/summits/kol2_en.htm#an4 [Accessed 9 March 2018].

¹² See Treaty Establishing a Constitution for Europe (2004/C 310/01) of 16 December 2004.

¹³ See European Parliament, Background Note, “EU Charter of Fundamental Rights—proclamation at Parliament in Strasbourg 12 December 2007” (29 November 2007), p.3, <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=2007II127BKG13869&language=EN> [Accessed 9 March 2018].

¹⁴ See “Charter of Fundamental Rights: the Presidents of the Commission, European Parliament and Council sign and solemnly proclaim the Charter in Strasbourg” (12 December 2007), http://europa.eu/rapid/press-release_IP-07-1916_en.htm?locale=en [Accessed 9 March 2018].

¹⁵ See Charter of Fundamental Rights of the European Union (2007/C 303/01) of 14 December 2007. See also “Charter of Fundamental Rights: the Presidents of the Commission, European Parliament and Council sign and solemnly proclaim the Charter in Strasbourg” (12 December 2007), http://europa.eu/rapid/press-release_IP-07-1916_en.htm?locale=en [Accessed 9 March 2018].

¹⁶ Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community (2007/C 306/01), signed at Lisbon on 13 December 2007 and entered into force on 1 December 2009.

¹⁷ Article 6(1) of the TEU.

¹⁸ See L. Rossi, “‘Same Legal Value as the Treaties’? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights” (2016) 18 *German Law Journal* 771.

¹⁹ Article 1 of the TEU.

Certainly, the inapplicability of the Vienna Convention does not of itself exclude the relevance of international law to the interpretation and application of the EU Charter.²⁰ And there is authority in international law for the proposition that fundamental rights recognised in international human rights instruments vest in individuals and survive changes to territorial jurisdiction. Thus, in its Opinion rejecting the possibility of withdrawal from the ICCPR, the UN Human Rights Committee observed that²¹:

“The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.”

This principle was invoked by the European Court of Human Rights in *Bijelic v Montenegro and Serbia*, where it referred to the Committee’s 1997 Opinion in support of the principle that “fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession”.²²

As a threshold question, one might ask whether this principle applies with respect to the Charter in circumstances where art.51(1) of the Charter defines a limited scope for application of the Charter: it is “addressed … to the Member States only when they are implementing Union law.”²³

A partial answer might be found in the fact that the Charter proclaims its purpose as to “reaffirm … the rights as they result” from other sources of law, including, inter alia, the constitutional traditions of Member States, international law, the European Convention on Human Rights (ECHR), the European Social Charter, and the case-law of the European Court of Human Rights and the Court of Justice of the European Union (CJEU). The Charter aims to “strengthen the protection of fundamental rights … by making those rights more visible” within the context of implementing Union law.²⁴ The Human Rights Committee expressed a similar point when it explained that the ICCPR, together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, “codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights”.²⁵ To the extent that the EU Charter replicates fundamental rights rooted in other international human rights instruments, such rights arguably equally belong to individuals within the UK, notwithstanding its withdrawal from the EU.

However, this is an incomplete answer, as it ignores the fact that the Charter expands upon and enhances the protections for the fundamental rights it addresses.

The European Parliament has recognised that this reaffirmation is accompanied by some innovation, in particular in the provisions on non-discrimination in art.21(1)²⁶:

²⁰ Article 3 of the Vienna Convention on the Law of Treaties 1969: “The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) The legal force of such agreements; (b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of this Convention; (c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.”

²¹ UN Human Rights Committee, *CCPR General Comment No.26 Continuity of Obligations* CCPR/C/21/Rev.1/Add.8/Rev.1 (9 December 1997), para.4, <http://www.refworld.org/docid/453883fde.html> [Accessed 9 March 2018]. See also A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2013), pp.256–257: “Although the views of the Committee are not determinative of the matter, and must sometimes be treated with due caution, they would seem to be correct in this case”.

²² *Bijelic v Montenegro and Serbia* (App. No.11890/05), judgment of 28 April 2009 at [69]. See also at [58].

²³ Article 51(1) of the EU Charter.

²⁴ Preamble of the EU Charter.

²⁵ UN Human Rights Committee, *CCPR General Comment No.26 Continuity of Obligations* CCPR/C/21/Rev.1/Add.8/Rev.1 (9 December 1997), para.3.

²⁶ European Parliament, Fact Sheet on the Charter of Fundamental Rights, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftid=FTU_4.1.2.html [Accessed 9 March 2018].

“While the Charter mostly reaffirms rights which already existed in the Member States, and which had been recognised as forming part of the general principles of EU law, it is also innovative in some respects. For instance, disability, age and sexual orientation are now explicitly mentioned as prohibited grounds of discrimination.”

Indeed, a briefing paper prepared for the House of Commons highlighted other enhancements to human rights protections provided by the Charter²⁷:

“Where the Charter applies, it provides *more rights* than ECHR claims under the Human Rights Act 1988; for example:

- a right to dignity (Article 1)
- an express right to protection of personal data (Article 8)
- rights of the child (Article 24)
- a broader right to a fair trial (Article 47)

A wider class of applicants can use it

Stronger remedies are available.”

One commentator identified four ways in which the Charter provides for broader rights protections, i.e.²⁸:

“First, the Charter provides specific protection for rights that are not currently clearly provided in the ECHR. The clearest example of this is Article 8 of the Charter [on personal data] ...

Second, the Charter provides a clearer specification of rights which might be within the scope of Convention rights or the common law, but where uncertainty persists both as to the existence of the right and its scope....

Third, the Charter helps to condition the legislative process to be ‘rights-centric’, prompting and guiding legislation. This can be seen, for example, with regard to workers’ rights [Article 27] ...

Finally, unlike the Human Rights Act 1998 or the common law, the Charter sets a framework for the interpretation of the rights it contains.”

The Charter’s innovations and enhancements of human rights protections would be lost under the currently proposed Withdrawal Bill, which would direct UK courts to ignore the Charter and instead apply the underlying rights and principles when interpreting and applying retained EU law.²⁹

This prospect is, quite understandably, alarming to those within the UK for whom the Charter is presently a key source of human rights protection.³⁰ A group of more than 20 organisations and human rights experts signed an open letter highlighting that “[l]osing it creates a human rights hole because the Charter provides

²⁷ A. Lang, V. Miller and S. Caird, EU (Withdrawal) Bill: the Charter, general principles of EU law, and “Francovich” damages, *House of Commons Library Briefing Paper No.8140* (17 November 2017), p.11, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8140> [Accessed 9 March 2018] (bold text in original). See also House of Lords and House of Commons Joint Committee on Human Rights, *The Human Rights Implications of Brexit—Fifth Report of Session 2016–17*, HL Paper 88/HC 695 (8 June 2017), para.15, <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/695.pdf> [Accessed 9 March 2018]: “Some Charter rights mirror rights, including many civil and political rights, found in the ECHR; others go beyond the ECHR, including some economic and social rights not found in the ECHR. Charter rights which go beyond the ECHR include, for example: the right to fair and just working conditions, the right to preventive healthcare, the right to good administration, the right to access to documents and a more wide ranging right to privacy.”

²⁸ A. Young, “Four Reasons for Retaining the Charter Post Brexit: Part 1—A Broader Protection of Rights” (2 February 2018), *Oxford Human Rights Hub*, <http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-post-brexit-part-1-a-broader-protection-of-rights> [Accessed 9 March 2018]. See also C. Gallagher QC, A. Patrick and K. O’Byrne, “Report on Human Rights Implications of UK Withdrawal from the EU: an independent legal opinion commissioned by the European United Left/Nordic Green Left (GUE/NGL) Group of the European Parliament” (2 March 2018), paras 2.14-2.17, 3.19-3.20, 3.48, 4.11, http://www.guengl.eu/uploads/news-documents/GUE_NGL_Brexit_and_HR_Final_020318_TO_PRINT.pdf [Accessed 19 March 2018].

²⁹ See Department for Exiting the European Union, *European Union (Withdrawal) Bill Explanatory Notes* (13 July 2017), paras 100 and 103, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> [Accessed 9 March 2018].

³⁰ See J. Cooper, “Why is no one talking about the Brexit threat to LGBT rights?” (22 January 2018), *The Guardian*, <https://www.theguardian.com/commentisfree/2018/jan/22/eu-protection-lgbt-people-persecution-withdrawal-bill-lgbt-gay-rights> [Accessed 9 March 2018].

some rights and judicial remedies that have no clear equivalents in UK law”.³¹ These concerns have been confirmed by the independent legal advice commissioned by the Equality and Human Rights Commission, which concluded that “[t]he Bill’s failure to retain any of the provisions of the Charter within domestic law will result in a dilution of current rights protections enjoyed pursuant to the Charter”, for several reasons, including that “[c]ontrary to the Government’s analysis, the Charter has created valuable new rights, and extended the scope of existing rights” and that “rights conferred by the Charter are not comprehensively reflected in other aspects of domestic law such as the Human Rights Act 1998 (‘HRA’) and the common law”.³²

This takes us back to the question of whether, as a matter of international law, the expanded human rights protections in the Charter are similar to those in the ICCPR, such that they now belong to people living in the UK and cannot be taken away?

On the one hand, like the ICCPR, and other international human rights treaties, the Charter reflects “indivisible, universal values”, applicable amongst civilized nations of the EU.³³ Such values have been described by the CJEU as being part of the “very foundations” of the European legal order.³⁴ Prior to 2007 (i.e. before the Lisbon Treaty was signed) the CJEU held that EU law, including the Charter, gave individuals rights, “which become part of their legal heritage”.³⁵ Arguably, that heritage “belong[s] to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession”.³⁶

On the other hand, it would be difficult to suggest that such a principle applies to the totality of the Charter. In light of art.51(1) of the Charter, its scope of application is more narrowly defined than an instrument like the ICCPR. Furthermore, some of the rights—such as the rights to stand for election and vote in elections for the European Parliament—are plainly dependent on a constitutional architecture that could and would cease to apply after Brexit. Indeed the 1999 Cologne Council specifically emphasised that the Charter was intended not only to include general fundamental rights and freedoms and basic procedural rights, but “should also include the fundamental rights that pertain only to the Union’s citizens”.³⁷ Thus, a more granular analysis of the particular right in question would be necessary to determine whether the right falls within the category of general fundamental rights or whether it is a right associated with EU citizenship. In this regard, the Commission’s Draft Withdrawal Agreement calls for the Charter to

³¹ “EU Withdrawal Bill will not protect UK rights: open letter” (14 January 2018), *Equality and Human Rights Commission*, <https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter> [Accessed 9 March 2018].

³² J. Coppel QC, “Opinion on the European Union (Withdrawal) Bill—E.U. Charter of Fundamental Rights” (5 January 2018), *Equality and Human Rights Commission*, para.8, <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> [Accessed 9 March 2018].

³³ Preamble of the EU Charter: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.” See also P. Eeckhout and E. Frantziou, “Brexit and Article 50 TEU: A Constitutional Reading” (December 2016), *UCL European Institute Working Paper*, p.23, <https://www.ucl.ac.uk/european-institute/brexit-article-50.pdf> [Accessed 9 March 2018]: “The constitutional order of the European Union stems from the common traditions of its Member States: it is neither autonomous nor created in a contextual vacuum. It is premised on respect for national constitutions, fundamental rights, and democratic values. It is indeed the product of years of integration between the Convention, the constitutions of the Member States and the goals that these have entrusted the EU with safeguarding. Failure to respect it at any point during the withdrawal process raises immediate concerns not only for EU constitutional law but also for UK constitutional law itself.”

³⁴ *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05), judgment of 3 September 2008 at [303]-[304].

³⁵ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26-62) [1963] E.C.R 1 at 12: “The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”

³⁶ *Bijelic v Montenegro and Serbia* (App. No.11890/05), judgment of 28 April 2009 at [69].

³⁷ European Parliament, Conclusions of the Presidency—Cologne European Council (3 and 4 June 1999), Annex IV European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/summits/kol2_en.htm#an4 [Accessed 9 March 2018].

remain “applicable to and in” the UK during any transition period, with the sole exceptions of the rights to vote and to stand as a candidate in European Parliament and municipal elections.³⁸

Assuming some of the rights in the Charter are indeed human rights norms analogous to those in the ICCPR that cannot be denounced, there remains the question of how such rights might be given effect in the UK if the Charter itself is not incorporated into UK law. In light of the UK’s constitutional dualism, its courts have not traditionally been willing to directly apply human rights norms where they are not incorporated in domestic legislation. However, there are some recent hints at an openness to do so, including on the basis of a legitimate expectation that international human rights norms once recognised by the UK will be respected, regardless of whether they have been expressly incorporated into domestic legislation.³⁹ If the Charter is not included as part of the Withdrawal Bill, such allusions by the UK courts to the persistence of certain fundamental human rights might be relevant in the context of challenging amendments to EU-derived law post-Brexit.

EU law—can it be applied without the Charter?

Even if one assumes that international law would permit the UK to abandon at least some of the Charter’s protections post-Brexit, one must also consider whether it can be plausibly maintained that the Withdrawal Bill would result in a situation where “the same rules and laws will apply on the day after the UK leaves the EU as before”,⁴⁰ given that the Bill would strip out the Charter from the laws and rules that applied on the day before exit.

Article 51 of the Charter declares the Charter’s provisions to be “addressed … to the Member States only when they are implementing Union law”.⁴¹ The CJEU has emphasised that “the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules”.⁴² In short, as a matter of EU law it is clear that the Charter’s provisions are binding whenever EU law and rules are being applied.

The Explanatory Notes to the Withdrawal Bill declare its effect as being to “convert EU law as it stands at the moment of exit into domestic law” albeit “subject to some limited exceptions”⁴³—the two principal “limited” exceptions being (1) that “[t]he principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day”,⁴⁴ and (2) that “[t]he Charter of Fundamental Rights is not part of domestic law on or after exit day”.⁴⁵

³⁸ Article 122(1) of the Commission’s Draft Withdrawal Agreement of 28 February 2018: “Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period. However, the following provisions of the Treaties … shall not be applicable …: Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, and acts adopted on the basis of those provisions …”. See also *Ibid.*, Article 4(1): “Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States”.

³⁹ See dissenting opinion of Lord Kerr in *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [246] stating that: “The proposition that the doctrine of legitimate expectation can generate a right to rely on the provision of an unincorporated treaty in the interpretation and application of domestic law is, at least, controversial. But treaties concerning human rights are, for reasons that I will develop, in a different position”; at [247], citing Lord Slynn in *Lewis v AG of Jamaica* [2001] 2 A.C. 50, PC as suggesting that human rights treaties may be an exception to the strict approach to non-justiciability of treaties that are not incorporated into domestic law; and citing Lord Collins in *Foreign Relations and the Judiciary* (2002) 51 I.C.L.Q. 485, 496 as stating that “these words contemplate the possibility that unincorporated treaties relating to human rights may be given effect without legislation … [I]t may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases”. See also per Lord Kerr at [254]: “I consider that the time has come for the exception to the dualist theory in human rights conventions … to be openly recognized”; *Re McKerr* [2004] UKHL 1, per Lord Steyn at [248]: “The rationale of the dualist theory … is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future.”

⁴⁰ Department for Exiting the European Union, *European Union (Withdrawal) Bill Explanatory Notes* (13 July 2017), para.23.

⁴¹ Article 51(1) of the EU Charter.

⁴² *Karlsson* (C-292/97) [2000] E.C.R. I-2737 at [37].

⁴³ Department for Exiting the European Union, *European Union (Withdrawal) Bill Explanatory Notes* (18 January 2018), paras 2, 42.

⁴⁴ Article 5(1) of the European Union (Withdrawal) Bill of 18 January 2018.

⁴⁵ Article 5(4) of the European Union (Withdrawal) Bill of 18 January 2018.

The Explanatory Notes do not take account of the Charter's innovations and enhancements in human rights protection (as described above), but instead declare the following⁴⁶:

“The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill. References to the Charter in the domestic and CJEU case law which is being retained are to be read as if they referred to the corresponding fundamental rights.”

The assertion with which this explanation begins appears to be based on the Preamble to the Protocol on the Application of the Charter to the UK and Poland, which contains the following statement⁴⁷:

“WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.”

Whatever legal effect this preambular language may have,⁴⁸ it does not alter the text of the Charter, nor does it make a party's invocation of a right under the Charter conditional upon that party demonstrating that the right or principle in question is not a new one.

In any case, the focus in the Explanatory Notes on distinguishing between existing and new rights ignores the Charter's impact on the scope of existing rights as well as the means by which they can be enforced. Notably, while a Charter right may at present form the basis of a cause of action in UK domestic courts, general principles may not of themselves provide any right of action—a point upon which the Bill would remove any doubt by stipulating that “[t]here is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law”.⁴⁹

The approach reflected in the Bill generates a host of questions. The confusion is only exacerbated by the discrepancies in the way the UK government has explained how the Bill is supposed to work. For example, the UK government's more recent “Right by Right” analysis of the Charter asserts that, when considering a non-discrimination claim, the UK courts post-exit “will be required to interpret retained EU law consistently with Article 21(1) [of the Charter]*so far as it reflects a general principle of EU law*”.⁵⁰ This latter affirmation, however, is inconsistent with the language of art.6 of the Withdrawal Bill, which defines “retained general principles of EU law” specifically to exclude the Charter.⁵¹

The only way that a Charter right might sneak into “retained EU law” is through the back door of Sch.1 para.2 to the Bill, which calls upon courts in the UK to recognise as general principles of EU law only those that have been recognised as such by the CJEU prior to exit day.⁵² But as one commentator has noted, “[i]t is not entirely clear in how far all Charter rights also exist as general principles” and “not all rights contained in the Charter have so far been dealt with in the CJEU's case law”.⁵³ The House of Lords

⁴⁶ Department for Exiting the European Union, *European Union (Withdrawal) Bill Explanatory Notes* (18 January 2018), para.103.

⁴⁷ Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Official Journal of the European Union (C-306/156) of 17 December 2007.

⁴⁸ If the Charter were a “treaty”, then such language would form part of the “context” for interpreting the treaty under art.31(2) of the Vienna Convention.

⁴⁹ Schedule 1, para.3(1) to the European Union (Withdrawal) Bill of 18 January 2018.

⁵⁰ Department for Exiting the European Union, *Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017), p.40, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf [Accessed 9 March 2018].

⁵¹ Article 6(7) of the European Union (Withdrawal) Bill of 18 January 2018.

⁵² Schedule 1, para.2 to the European Union (Withdrawal) Bill of 18 January 2018.

⁵³ T. Lock, “What Future for the Charter of Fundamental Rights in the UK?” (6 October 2017), *European Futures*, <http://www.europeanfutures.ed.ac.uk/article-5607> [Accessed 9 March 2018].

Select Committee on the Constitution has noted the “confusion”⁵⁴ and referred to the submissions of one commentator to the Committee, who noted that⁵⁵:

“It may also be difficult to separate the general principles from the Charter, particularly as the two develop symbiotically, with general principles deriving from the Charter and being relevant to the interpretation of the rights and principles found in the Charter. The Court of Justice of the European Union (CJEU) often refers to both the general principles and the Charter in support of the same human right. This may also result in greater uncertainty.”

All of this places post-exit UK courts in a difficult position. Where are courts to look to find these fundamental rights if not to the Charter? And when a court is required to interpret an underlying fundamental right whose scope has been expanded by the Charter, is a court to ignore the Charter in interpreting the scope of the right? Is a court to read precedents applying the Charter as if those precedents were applying the underlying fundamental right instead?

It is doubtful whether such an approach would be faithful to the case-law of the CJEU. As one CJEU judge has explained⁵⁶:

“[R]eferences to the fundamental rights guaranteed by the Charter have not only become current practice in the jurisprudence but are also a necessary element of the interpretation and the application of European provisions.... References made in the jurisprudence to the guarantees of fundamental rights are not simply ornamental. They influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders.”

It is also doubtful whether such an approach would be practicable. To illustrate the difficulty, consider the CJEU’s decision on the right to be forgotten in the *Google* case. In that decision, the CJEU described the right to privacy as amongst “the general principles of law whose observance the Court ensures and which are now set out in the Charter”,⁵⁷ but the Court went on to decide the relevant issues by reference only to “fundamental rights under Articles 7 and 8 of the Charter”.⁵⁸ Fast-forward to a time after March 2019: how is a post-Brexit UK court supposed to separate the “general principle” that it must apply from the Charter right that it must ignore? Or consider two cases on discrimination on the basis of sexual orientation. In its recent judgment in the *Walker* case, the UK Supreme Court upheld claims of discrimination on the basis of sexual orientation by reference to the relevant Directives and general principles of EU law, concluding that “non-discrimination on grounds of sexual orientation is now a principle of EU law” without ever referring to the Charter or its non-discrimination provision in art.21(1).⁵⁹ Conversely, the recent Opinion of the Advocate General in the *Coman* case considers a claim of discrimination on the basis of sexual orientation solely through the lens of the Charter, in particular art.21(1), without uttering the phrase “general principle”.⁶⁰ It would be absurd if the existence or scope of rights in the UK post-Brexit were to depend upon such vagaries as whether a particular court decision

⁵⁴ House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill—9th Report of Session 2017–2019* (28 January 2018), paras 108–114, <https://publications.parliament.uk/pa/ld201719/ldelect/ldeconst/69/69.pdf> [Accessed 9 March 2018].

⁵⁵ Constitution Committee, *Written evidence from Professor Alison Young, University of Oxford (EUV0003)* (August 2017), <http://data.parliament.uk/writenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/69634.html> [Accessed 9 March 2018].

⁵⁶ M. Safjan, “Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union” (9 May 2014), EUI CJC Distinguished Lecture 2014/02, p.2, http://cadmus.eui.eu/bitstream/handle/1814/32372/CJC_DL_2014_02.pdf [Accessed 9 March 2018].

⁵⁷ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (C-131/12), (Grand Chamber) judgment of 13 May 2014 at [68].

⁵⁸ *Google Spain SL and Google Inc.* (C-131/12) at [81] and [97]–[99].

⁵⁹ *Walker v Innospec Ltd* [2017] UKSC 47 at [74].

⁶⁰ See *Relu Adrian Coman v Inspectoratul General pentru Imigrari* (C-673/16), Opinion of Advocate General Wathelet of 11 January 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198383&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1010794> [Accessed 9 March 2018].

referred to the right in question as a “general principle” or only made reference to the Charter provisions concerning the right.

As one commentator observed: trying to take the Charter out of the case-law would be “like trying to remove an egg from an omelette, because the judicial reasoning on the Charter and the EU legislation is intertwined”.⁶¹ Another observed that “[t]he current drafting of the Bill is a recipe for legal uncertainty and hence for litigation to establish the parameters of rights protection following Brexit which would be unnecessary if relevant parts of the Charter were retained”.⁶² In its report on the Bill, the House of Lords Select Committee on the Constitution has noted this problem in the following terms⁶³:

“The effects of excluding the Charter rights, retaining the ‘general principles’, but excluding rights of action based on them, are unclear. This risks causing legal confusion in a context where clarity is needed.”

Thus, the effect of the Bill’s exclusion of the Charter appears to be that retained EU law will be applied only by reference to the underlying rights and principles without reference to any innovations or clarifications as to the scope of those rights and principles contained in the Charter. Such a result is incompatible with EU law existing prior to exit, which plainly requires compliance with the Charter whenever applying EU law and rules. Thus, contrary to the affirmation in the Explanatory Notes, it is not the case that, without the Charter, “the same rules and laws will apply on the day after the UK leaves the EU as before”.⁶⁴ The EU negotiators have signalled in art.4 of the Commission’s Draft Withdrawal Agreement that they will not accept the Charter-free regime contemplated by the current Withdrawal Bill but rather are likely to insist that, to the extent EU law is to be applied in the UK after withdrawal, such law must produce “the same legal effects” and “be interpreted and applied in accordance with the same methods and general principles” as in any other Member State, including by ensuring “conformity with” CJEU decisions issued before the end of the transition period and by giving “due regard” to post-transition CJEU decisions.⁶⁵

Can the representatives of the EU agree to terms of withdrawal under which the Charter would cease to apply in the UK?

Article 50 of the TEU contemplates a negotiated withdrawal under which “the Union shall negotiate and conclude an agreement with that State, setting out the arrangement for its withdrawal, taking account of the framework for its future relationship with the Union”.⁶⁶

The TEU and its art.50 are plainly “Union law”, and thus when implementing art.50, the institutions and bodies of the Union as well as the Member States are bound to “respect the rights, observe the principles

⁶¹ S. Peers, “The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers” (31 March 2017), *EU Law Analysis Blog*, <http://eulawanalysis.blogspot.co.uk/2017/03/the-white-paper-on-great-repeal-bill.html> [Accessed 9 March 2018].

⁶² J. Coppel QC, “Opinion on the European Union (Withdrawal) Bill—E.U. Charter of Fundamental Rights” (5 January 2018), *Equality and Human Rights Commission*, para.8(6), <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> [Accessed 9 March 2018]. See also House of Commons Library, “EU (Withdrawal) Bill: the Charter, general principles of EU law, and ‘Francovich’ damages”, 17 November 2017, pp.13–15, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8140> [Accessed 9 March 2018] (describing the “overall result” as a “lack of clarity”); A. Young, “Four Reasons for Retaining the Charter Post Brexit: Part 3—Clarity and Democracy” (5 February 2018), *Oxford Human Rights Hub*, <http://ohrh.law.ox.ac.uk/four-reasons-for-retaining-the-charter-part-3-clarity-and-democracy> [Accessed 9 March 2018], “[P]reserving the Charter provides greater certainty than the preservation of ‘fundamental rights or principles which exist irrespective of the Charter’. It is harder to understand which fundamental rights from EU law are retained on or after exit day without chasing through a series of provisions and having a background knowledge of EU law. By contrast, retaining the Charter merely requires a reference to ‘the Charter’ ...”.

⁶³ House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill—9th Report of Session 2017–2019* (29 January 2018), para.120, <https://publications.parliament.uk/pa/ld201719/lselect/lconst/69/69.pdf> [Accessed 9 March 2018].

⁶⁴ Department for Exiting the European Union, *European Union (Withdrawal) Bill Explanatory Notes* (18 January 2018), para.24.

⁶⁵ Article 4 of the Commission’s Draft Withdrawal Agreement of 28 February 2018.

⁶⁶ Article 50(2) of the TEU. See further R. McCrea, “Can a Brexit Deal Provide a Clean Break with the Court of Justice and EU Fundamental Rights Norms?” (3 October 2016), *UK Constitutional Law Blog*, <https://ukconstitutionallaw.org/2016/10/03/ronan-mccrea-can-a-brexit-deal-provide-a-clean-break-with-the-court-of-justice-and-eu-fundamental-rights-norms/> [Accessed 9 March 2018].

and promote the application of' the Charter.⁶⁷ The EU institutions have taken note of this obligation. The European Parliament adopted a resolution on 5 April 2017 declaring that "the withdrawal agreement must be in conformity with the Treaties and the Charter of Fundamental Rights of the European Union, failing which it will not obtain the consent of the European Parliament".⁶⁸ Specifically, the European Parliament demanded that EU-27 citizens living in the UK retain "protection of the integrity of Union law, including the Charter of Fundamental Rights, and its enforcement framework".⁶⁹ The European Commission's "Guiding Principles for the dialogue on Ireland/Northern Ireland" have similarly noted that⁷⁰:

"The Good Friday Agreement requires equivalent standards of protection of rights in Ireland and Northern Ireland. The United Kingdom should ensure that no diminution of rights is caused by the United Kingdom's departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law."

Member States are also raising questions about how their Charter obligations will affect their cooperation with the UK post-Brexit if the Charter is abandoned. For example, on 1 February 2018 Ireland's Supreme Court referred a question to the CJEU as to whether it should refuse extradition to the UK because of uncertainty about whether the appellant's rights, including under the Charter, will be capable of enforcement after Brexit.⁷¹ Citizens are raising questions as well: a Dutch court has referred to the CJEU the question of whether the UK's withdrawal will lead to the automatic loss of EU citizenship rights for UK citizens living in the Netherlands.⁷²

According to the negotiating parties' joint report, the withdrawal agreement will indeed cover certain "citizens' rights", including the rights of EU citizens living in the UK and of UK citizens living in the EU.⁷³ At the time of writing, the negotiating parties have agreed that the terms of withdrawal agreement will provide for certain family members joining EU citizens living in the UK "on the same conditions as under current Union law".⁷⁴ This will be enacted in new UK domestic legislation,⁷⁵ providing not only that such citizens' rights can be directly invoked in UK domestic courts, but that domestic law that is "inconsistent or incompatible [with the Withdrawal Agreement] ... will be disapplied".⁷⁶ Moreover, to ensure consistent interpretation and application of citizens' rights, both parties envisage the possibility of UK courts referring questions on interpretation to the CJEU.⁷⁷

By permitting entry to EU citizens' family members "on the same conditions as under current Union law" (and for the lifetime of the right holder), is the UK not also committing to do so in conformity with

⁶⁷ Article 51(1) of the EU Charter.

⁶⁸ European Parliament Resolution 2017/2593(RSP) of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para.16, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0102> [Accessed 9 March 2018].

⁶⁹ European Parliament Resolution 2017/2593(RSP) of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, para. 18—a position that has since been reflected in the Commission's Draft Withdrawal Agreement, at least through the end of the transition period.

⁷⁰ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland* (6 September 2017), p.4, https://ec.europa.eu/commission/sites/beta-political/files/guiding-principles-dialogue-ei-ni_en.pdf [Accessed 9 March2018]. J. See also C. Gallagher QC, A. Patrick and K. O'Byrne, "Report on Human Rights Implications of UK Withdrawal from the EU: an independent legal opinion commissioned by the European United Left/Nordic Green Left (GUE/NGL) Group of the European Parliament" (2 March 2018), para 4.23, http://www.guengl.eu/uploads/news-documents/GUE_NGL_Brexit_and_HR_Final_020318_TO_PRINT.pdf [Accessed 19 March 2018].

⁷¹ See Minister for Justice O'Connor [2018] I.E.S.C. 3.

⁷² Case No. C/13/640244 / KG ZA 17-1327 (District Court of Amsterdam), judgment of 7 February 2018, <https://uitspraken.rechtspraak.nl/inzendocument?id=ECLI:NL:RBAMS:2018:605> [Accessed 19 March 2018]. For an unofficial English translation see <https://cadsnewsletter.files.wordpress.com/2018/02/1802-amsterdam-district-court-ruling-translation1.pdf> [Accessed 19 March 2018]

⁷³ Negotiators of the European Union and the United Kingdom Government, *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during Phase I of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union* (8 December 2017), paras 6–41, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf [Accessed 9 March 2018].

⁷⁴ *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during Phase I of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, para. 12.

⁷⁵ *Joint Report from the negotiators of the European Union* (see fn.70 above), para.34.

⁷⁶ *Joint Report from the negotiators of the European Union* (see fn.70 above), para.35.

⁷⁷ *Joint Report from the negotiators of the European Union* (see fn.70 above), para.38.

the constitutive instruments of Union law, including the EU Charter? Is it not thereby mandating its own judiciary to look to the Charter when interpreting and applying UK domestic law implementing the withdrawal agreement? Is the EU Charter not essential to ensuring consistent interpretation and application of citizens' rights by both parties post-Brexit?

If the answer to any of these questions is "no", could the Council and European Parliament legally ratify such a withdrawal agreement? If the answer to these questions is "yes", can the UK Government realistically maintain a post-Brexit scenario where EU citizens living in the UK are granted a greater scope of human rights protections under the EU Charter, while UK citizens are not?

Conclusion

The Withdrawal Bill's proposal to exclude the entirety of the EU Charter from the body of EU law that is to be retained and converted into domestic law raises a host of legal and practical difficulties—and is antithetical to the terms of the Commission's Draft Withdrawal Agreement. The current draft of the Bill would not only reduce the scope of human rights protections available in the UK, but would also create significant legal uncertainty as to the scope of those protections, which in turn would be likely to spawn a wave of litigation in the course of which the courts will face the impossible task of trying to remove the Charter egg from the omelette of retained EU law.

In any event, there is a significant likelihood (if not already apparent) that the EU negotiators will consider themselves to be legally prohibited from accepting any withdrawal agreement that does not respect the Charter, in particular in relation to the rights of EU citizens in the UK. It is not inconceivable that the exclusion of the Charter from retained EU law could lead to a future in which EU citizens in the UK enjoy Charter protections that are denied to other residents of the UK.

A Nightmare on Downing Street: Brexit Reaches the CJEU

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✉ Brexit; Citizenship; EU nationals; European Court of Justice; Extradition proceedings; Fundamental rights; Jurisdiction

Abstract

This article explores two recent referrals made by two different Member States' national courts to the Court of Justice of the European Union (CJEU) on the impact the UK's withdrawal from the EU has on EU citizenship and fundamental rights. The key concern in both referrals is that the terms of the re-arrangement of the UK's future relationship with the EU are unclear and variable depending on the way the withdrawal negotiations might ensue. As this article argues, the application of fundamental rights contained in the EU Charter of Fundamental Rights and the jurisdiction of the CJEU will be the most crucial and sensitive issues in such re-arrangement. Thus, the CJEU's involvement through the preliminary ruling procedure will provide a legal clarity on the matter.

Introduction

Since the UK's referendum on leaving the EU, the relationship of the UK with the EU has been swept into a political whirlpool. As the negotiations for disentangling the UK from the EU and for rearranging their future relationship progress in slow-motion, resentments over the destabilising impact of the UK's withdrawal from the EU (i.e. Brexit) has become louder. Key concern amongst others is that British nationals and EU citizens will be devoid of essential protection that they have enjoyed under the rubric of EU law.

The recent CJEU referrals by two Member States' national courts cast light on this concern in particular, and the legal uncertainties surrounding Brexit in general. One referral concerns a legal challenge by British nationals living in the Netherlands on the continuity of their EU citizenship rights despite Brexit.¹ Other referral relates to whether a Member State that has received a request for surrender of suspects and/or convicts by the UK under the specific EU surrender system must execute this request given that the CJEU jurisdiction and the EU fundamental rights architecture that underpin this system will lapse in the UK upon Brexit.² These referrals converge on the UK's treatment of the CJEU and the rights protection after Brexit, and thus require attention in relation to the existential question of the rights landscape of the UK post-Brexit. Whilst so far this question has been unravelled as a political matter, the CJEU's involvement is a great opportunity to have legal clarity in the field. This is of great importance for safeguarding individuals' rights despite the political ambiguity surrounding the Brexit negotiations. Moreover, the CJEU might be able to set out the legal matters upon which the negotiators must engage in Brexit.

* The author is indebted to the reviewers for their valuable suggestions.

¹ ECLI:NL:RBAMS:2018:605, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605> [Accessed 9 March 2018]. For the unofficial English translation see <https://cadsnewsletter.files.wordpress.com/2018/02/1802-amsterdam-district-court-ruling-translation1.pdf> [Accessed 9 March 2018].

² *Minister for Justice v O'Connor* [2018] I.E.S.C. 3.

In light of the foregoing information, this article discusses the respective CJEU referrals. It explores the implications of Brexit on EU citizenship rights and on EU extradition law, respectively. Each section considers the political discourse in the corresponding matter, the background to the referrals concerned, and the key concerns on fundamental rights protection.

On EU citizenship rights

Since it was first introduced in the Maastricht Treaty, anyone who is a citizen of an EU Member States has been considered as the citizen of the EU.³ Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) reaffirms the legal construction of EU citizenship as follows: “[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.⁴ Thus, EU citizens are entitled to enjoy the associated rights coupled with the EU citizenship including the right to move and reside freely within the EU,⁵ the right to vote,⁶ the right to petition the European Parliament,⁷ and the right to call for new EU legislation.⁸

Article 20(1) of the TFEU is the key to understanding the Dutch District Court’s referral to the CJEU, which is discussed further below. To date it has invoked different approaches to EU citizenship. One approach is that EU Member State citizenship is a prerequisite for EU citizenship, and thus depriving a person of the former means the termination of the latter.⁹ This approach is current in many reports on the consequences of Brexit on the EU citizenship rights of British nationals.¹⁰

Another approach to this statement is that Member State citizenship is a gateway to the EU citizenship, but the latter can be detached from the former.¹¹ This point is justified by the reading of the last statement as merely retaining Member States’ responsibility of designating their citizens, and thus providing a distinction between two identities: Member State citizenship on the one hand, and the EU citizenship on the other, by allocating the former within the competence of EU Member States and the latter within the competence of the EU.¹² As discussed below, the second approach is now being tested before the CJEU through the Dutch Court’s referral on the meaning of art.20 of the Treaty post-Brexit.

The general assumption is that once the UK leaves the EU, the EU citizenship of British nationals ceases to exist.¹³ Therefore, after Brexit, they will become third-country nationals under EU law because the UK will no longer be part of the Union. They will have to adhere to third-country national rules under EU law and national immigration laws of the EU Member State in areas which have not been harmonised. In this regard, EU measures on third-country nationals might be considered as a layer of protection for British nationals after Brexit when compared with more demanding UK immigration rules that the EU nationals must adhere to. (EU citizens in the UK will be subject to the UK immigration rules, whose

³ TEU arts 8–8e.

⁴ TFEU art.20(1).

⁵ TFEU arts 20(1)(a) and 21.

⁶ TFEU arts 20(1)(b) and 21.

⁷ TFEU arts 20(1)(d) and 24.

⁸ TFEU art.24.

⁹ Guayasén Marrero González, “‘Brexit’ Consequences for Citizenship of the Union and Residence Rights” (2016) 23 *Maastricht Journal of European and Comparative Law* 796, 798.

¹⁰ House of Lords, Select Committee on the European Union, *Brexit: acquired rights* (HL 2016–17, 82); Susie Alegre et al., “The Implications of the United Kingdom’s withdrawal from the European Union for the Area of Freedom, Security and Justice” (December 2017), *LIBE Committee Study*, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596824/IPOL_STU\(2017\)596824_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596824/IPOL_STU(2017)596824_EN.pdf) [Accessed 9 March 2018]; Richard Gordon and Rowena Moffatt, “Brexit: The Immediate Legal Consequences” (2016) *The Constitution Society*, <https://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf> [Accessed 9 March 2018].

¹¹ Mark Dawson and Daniel Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship” (14 July 2016) *Verfassungsblog*, <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> [Accessed 9 March 2018]. On possible forms in which detaching EU citizenship from national citizenship may be possible see Rainer Bauböck, “The Three Levels of Citizenship in the European Union” (2014) 15(5) *German Law Journal* 751.

¹² Dawson and Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship” (July 14, 2016) *Verfassungsblog*.

¹³ Gordon and Moffatt, “Brexit: The Immediate Legal Consequences”, p.44.

requirements are less generous than EU rules.)¹⁴ Yet, even those measures will not provide as many rights as enjoyed by an EU citizen in any EU Member State.¹⁵ For example, those British nationals who have been living in an EU Member State more than five years will be able to apply for a long-term residency from that Member State under EU law, but even in this case they will enjoy fewer rights than they would have enjoyed as EU citizens with permanent residence.¹⁶ Consequently, the UK's withdrawal from the EU raises severe concerns for an array of British nationals such as those living in EU Member States, those who do not live in any EU Member State but who exercise their free movement rights, those who exercise their EU citizenship rights other than free movement, and those who moved from the UK to an EU Member State and back. The uncertainty and legal vagueness surrounding the citizenship rights' dialogue might affect the life that they had planned in the UK or in an EU Member State.

This uncertain climate provided the impetus for the legal challenge before the Dutch Court, leading to a referral to the CJEU on the legal status of the British nationals post-Brexit. Before considering this referral, the following section gives a snapshot of the current negotiations (as of March 2018) on the status of citizenship rights post-Brexit because it tells the political side of the matter.

Political discourse on the status of EU citizenship post-Brexit

The political tide of the impact of Brexit over the rights of EU citizens living in the UK and the British nationals living elsewhere in the EU has been incoming since the June 2016 referendum. The first informal consensus over the issue materialised in December 2017 in a joint report to the European Council whereby the negotiators of the EU and the UK set forth a basis for a future withdrawal agreement.¹⁷ In general, the report freezes the rights of EU citizens living in the UK by the cut-off date (probably 29 March 2019) and those of British nationals living elsewhere in the EU by the same date.¹⁸ It also preserves the rights associated with the EU citizenship of their family members as defined in the Citizenship Directive residing in the host state by that date.¹⁹ The corollary impact of the joint report's personal scope is that the EU citizens and British nationals who arrive in the UK or any EU Member States after the cut-off date, and certain right-holders under EU law such as family members as defined under the Free Movement of Workers Regulation²⁰ will not preserve the rights conferred them under EU laws.²¹ The status of the EU citizens or British nationals who arrive during the transitional period is still a controversy.²² Additionally, the status of British nationals working at the EU institutions (in Brussels, or wherever they are based) post-Brexit has not been touched upon yet.²³

Equally important is how the Joint Report envisages the CJEU jurisdiction for citizens' rights after Brexit. This is of particular relevance in relation to how the EU (Withdrawal) Bill deals with the same

¹⁴ One example is the rules on the family reunification, whereby British nationals must meet the income threshold and their third-national family members must pass the language and integrations tests. Katya Ivanova and Georgiana Turculeț, "Breaking up families is easy to do: family reunification post-Brexit" (13 June 2017), *LSE Blog*, <http://blogs.lse.ac.uk/brexit/2017/06/13/breaking-up-families-is-easy-to-do-family-reunification-post-brexit/> [Accessed 9 March 2018].

¹⁵ European Union Committee, "Brexit: acquired rights", para.33.

¹⁶ House of Lords, Written Evidence: Brexit: acquired rights (4 September 2016), Select Committee on the European Union, Home Affairs Sub-Committee (14 December 2016), <http://data.parliament.uk/writtenEvidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/37921.html> [Accessed 9 March 2018].

¹⁷ *TF50 (2017) 19—Commission to EU27* (hereinafter, "Joint Report").

¹⁸ Joint Report, para.10.

¹⁹ Joint Report, para.10.

²⁰ Regulation 492/2011 on freedom of movement for workers within the Union [2011] OJ L 141.

²¹ Steve Peers, "The Beginning of the End? Citizens' rights in the Brexit 'Sufficient Progress Deal'" (9 December 2017), *EU Law Analysis*, <http://eulawanalysis.blogspot.co.uk/2017/12/the-beginning-of-end-citizens-rights-in.html> [Accessed 9 March 2018]. The author is of the opinion that those rights holders under EU law will be covered in the later stages of the negotiations process because the joint technical note accompanied to the joint report mentions who moves according to the EU Treaties. *TF50 (2017) 20—Commission to EU 27*.

²² "No deal for EU citizens coming to UK during Brexit transition" (31 January 2018) *The Guardian*, <https://www.theguardian.com/politics/2018/jan/31/theresa-may-brexit-transition-no-deal-for-eu-citizens-coming-to-uk> [Accessed 9 March 2018].

²³ Bert Theeuwes and Frédéric Dopagne, "The Impact of Brexit on UK Staff Working for the EU Institutions" (17 January 2017), *Lexology*, <https://www.lexology.com/library/detail.aspx?g=776944b-9e1a-452e-aa87-1d4ffdcd4b0> [Accessed 9 March 2018].

matter; details of which are discussed below under the section on the fundamental rights in the UK post-Brexit. In this regard, the UK courts maintain their option to resort to the CJEU for the interpretation of those rights for a period of eight years starting from the application of the citizens' rights provision (notice that it is not the withdrawal date, supposedly in the hope of referring to a transition period).²⁴ They must also pay "due regard" to the decisions of CJEU, including those decided after Brexit for an unlimited time, whereas they *may* consider the post-Brexit decisions.²⁵

The joint report gives an initial insight into the possible direction towards which the Withdrawal Agreement might go. That said, its restricted personal scope comes as a set-back for those who would want to join their family members in the UK or in the EU. In this regard, spouses, registered partners, children, and dependent partners who reside outside either the EU or the UK may join the EU citizen in the UK, or British national in the EU, on the condition that they are related to them on the withdrawal date.²⁶ This means that those who are not related to an EU citizen or British national must jump the hoops of national laws in order to join their family members in either any EU Member State or the UK.²⁷

The Withdrawal Agreement proposed by the European Commission on 28 February 2018 translates the political deal on the citizenship rights as underlined in the joint report into legal language.²⁸ Whilst maintaining a large portion of the report in general, it adds new issues in relation to the citizenship rights that are subject to further negotiation. One issue stands out as particularly important for the rights of British nationals who have been living in EU Member States: they will lose their right to free movement to other Member States, right of establishment in another Member State, right to provide services on the territory of another Member State, and right to provide services to a person established in another Member State after the transition period. However, it is yet to be seen whether the UK agrees to the European Commission's proposal on citizenship rights. Moreover, it is uncertain whether the drafting of the Withdrawal Agreement will go smoothly, particularly in relation to the Northern Ireland borders and the financial settlement. Another point is that the UK Government might agree on a withdrawal insofar it is satisfied with any future arrangement it might make with the EU including the future relation of the UK-EU. Otherwise, it might leave the table without a deal (a so-called 'Hard Brexit' scenario). Amidst all these uncertainties, the legal character of EU citizenship under art.20 of the TFEU was referred to the CJEU in the hope that the Court will provide at least a degree of legal certainty to this unchartered Brexit territory.

The decision by the Dutch District Court

Five British nationals living in the Netherlands along with the Commercial Anglo Dutch Society and a lobby group, Brepax—Hear Our Voice, sought referral to the CJEU by the Dutch Court on the legal status of the EU citizenship after Brexit.²⁹ The crux of the matter was that the joint report was of a political nature, and thus the claimants will be stripped of their EU citizenship rights, unless the EU and the UK negotiators agree on the terms for safeguarding those rights.³⁰ Therefore, they question the consequences of Brexit for their rights derived from art.20 of the TFEU. In considering the claimants' arguments, the Dutch Court made certain observations; (i) the political negotiation process does not make the legal

²⁴ Joint Report, para.38.

²⁵ Joint Report, para.38.

²⁶ Joint Report, para.12(a).

²⁷ It is sufficient to note here that the Family Reunification Directive sets the minimum rules in family reunification except for UK, Ireland and Denmark, who opted out of this Directive.

²⁸ TF50 (2018) 33—Commission to EU 27.

²⁹ ECLI:NL:RBAMS:2018:605 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605> [Accessed 9 March 2018]. For the unofficial English translation see <https://cadsnewsletter.files.wordpress.com/2018/02/1802-amsterdam-district-court-ruling-translation1.pdf> [Accessed 9 March 2018].

³⁰ ECLI:NL:RBAMS:2018:605, para.5.6.

intervention unnecessary³¹; (ii) the dispute was not fictional due to the real threats that the claimants might face with the UK's withdrawal from the EU³²; (iii) the Vienna Convention on Treaties was not the right legal basis to address the status of the EU citizenship rights as derived from the EU Treaties because whilst the latter covered the rights of citizens vis-à-vis the EU, the former concerned the obligations between states³³; and (iv) it needs to be determined whether the principle developed by the CJEU in constraining Member States measures that limit the enjoyment of the EU citizenship rights can be expanded to the peculiarity of the loss of those rights *en masse* due to a Member State's withdrawal from the EU.³⁴

Consequently, the Dutch Court referred two questions to the CJEU:

- (i) “Does the withdrawal of the United Kingdom from the EU automatically lead to the loss of the EU citizenship of British nationals and thus to the elimination of the rights and freedoms deriving from EU citizenship, if and in so far as the negotiations between the European Council and the United Kingdom are not otherwise agreed?”; and
- (ii) “If the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship?”³⁵

What does the future hold for the EU citizenship?

The Dutch Court's referral to the CJEU on the meaning of the EU citizenship, regardless of what is established under the Withdrawal Agreement, resurges the idea of a European identity.³⁶ As mentioned earlier, there are two views on the matter. The first view considers that the EU citizenship is bound to the Member State citizenship by an umbilical cord. In this regard, the UK's withdrawal from the EU means the removal of EU citizenship from the UK national as the UK will no longer be part of the EU.³⁷

The second view heavily relies on the argument that the Member State citizenship is a gateway, but not a condition for the EU citizenship.³⁸ Seen from this perspective, it is necessary to detach EU citizenship from EU Member State citizenship in a move towards finding a European community within the continent.³⁹ According to this view, the case-law of the CJEU justifies dissociating EU citizenship from national citizenship in a series of cases where it has constrained the Member States' measures in depriving individuals of their citizenship rights in order to protect the EU citizenship.⁴⁰ For example, in *Rottmann*, a German citizen was faced with denaturalisation due to his failure when naturalising to provide information on the criminal investigations against him in Austria. He was originally an Austrian national at birth, but his naturalisation application in Germany caused him to lose his Austrian nationality under Austrian law.⁴¹ Thus, his loss of German citizenship meant that he would be wholly deprived of EU citizenship. The CJEU decided that state measures revoking a person's citizenship are subject to judicial review in light of EU law, and thus must not substantially affect the enjoyment of EU citizenship.⁴²

³¹ ECLI:NL:RBAMS:2018:605, para.5.9.

³² ECLI:NL:RBAMS:2018:605, para.5.10.

³³ ECLI:NL:RBAMS:2018:605, paras 5.12–5.14.

³⁴ ECLI:NL:RBAMS:2018:605, paras 5.19–5.21.

³⁵ ECLI:NL:RBAMS:2018:605, paras 5.19–5.21.

³⁶ Loïc Azaoula, “The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law” (2014), *EUI Department of Law Research Paper No.2014/14*.

³⁷ Ronan McCrea, “Brexit EU Citizenship Rights of UK Nationals and the Court of Justice” (8 February 2018), *UK Constitutional Law*, <https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/> [Accessed 9 March 2018].

³⁸ Dawson and Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship” (14 July 2016) *Verfassungsblog*. On the different scopes of the EU citizenship and EU Member State citizenship see Dimitry Kochenov, “Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights” (2009) 15 *The Columbia Journal of European Law* 171.

³⁹ Dawson and Augenstein, “After Brexit: Time for a further Decoupling of European and National Citizenship” (14 July 2016) *Verfassungsblog*.

⁴⁰ *Mario Vicente Micheletti v Delegación del Gobierno en Cantabria* (C-369/90), 7 July 1992; *Janko Rottman v Freistaat Bayern* (C-135/08), 2 March 2010.

⁴¹ *Janko Rottman v Freistaat Bayern* (C-135/08) at [26].

⁴² *Janko Rottman* (C-135/08) at [48].

In fact, the Dutch Court's referral invokes the second view and questions whether the CJEU can maintain its stance towards the idea that the EU citizenship is "destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality".⁴³ Still, the question is then whether the observations in *Rottmann* can be expanded to the rights of the British nationals after Brexit. That said, the facts of *Rottmann* are rather different from those in Brexit. The latter does not concern the revocation of British nationality, but rather withdrawal from the EU as a result of which British nationals are stripped of their EU citizenship *en masse*. Still, this does not mean that the issues raised in the referral are redundant. Instead, the peculiarity of the case necessitates legal clarification by the CJEU; something that the negotiators have not provided to either British nationals or EU citizens.

There are other issues regarding the Dutch Court's referral that are worth mentioning here. The first issue is that, as mentioned earlier, Brexit will affect many British nationals who do not currently live in an EU Member State. As the facts of the referral relate only those who reside elsewhere in the EU, the question is whether the CJEU will deal with them and those who do live in the UK differently. A mere reading of the first question in the referrals, which is concerned with automatic loss of EU citizenship upon Brexit, might suggest that in theory the CJEU might not do so because the issue relates to the legal status of EU citizenship in EU Treaties. However, the second question adds some uncertainty to this anticipation because the unofficial English translation refers to the possibility of engaging upon a proportionality analysis of restrictions on the maintenance of the rights and freedoms to be derived from EU citizenship. This statement might be interpreted to support arguments that only British nationals who exercised their rights deriving from EU citizenship (e.g. those who reside in the EU) can keep their EU citizenship rights after Brexit.

The second issue is that if the CJEU accepts the applicant's arguments and engages upon disentangling EU citizenship from national citizenship, this might undermine the reciprocity principle for the EU citizens living in the UK.⁴⁴ According to this scenario, British nationals will benefit more than EU citizens living in the UK from the outcome of the referral post-Brexit.

Be that as it may, it is impossible to ignore the possible litigation against the Withdrawal Agreement itself before the CJEU if such an Agreement is to be reached by the EU and the UK negotiators. In this regard, the litigation against the Withdrawal Agreement can ensue in two ways. The first way is to rely on art.263 of the TFEU, whereby the EU institutions' and bodies' actions are subjected to judicial review, in order to adjudicate the decisions on signature and approval of the Withdrawal Agreement.⁴⁵ The second way is that the European Parliament can ask the opinion of the CJEU on the Withdrawal Agreement under art.218(11) of the TFEU before making a decision on its conclusion.⁴⁶ The European Parliament has previously showed its active involvement in the negotiations of international agreements, and thus it might show its political influence in finalisation of the Withdrawal Agreement.⁴⁷

⁴³ *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (C-184/99), 20 September 2001 at [31].

⁴⁴ For this view see McCrea, "Brexit EU Citizenship Rights of UK Nationals and the Court of Justice" (8 February 2018) *UK Constitutional Law*.

⁴⁵ Adam Lazowski, "Withdrawal from the European Union and Alternatives to Membership" (2012) 37(5) *European Law Review* 523 at 528.

⁴⁶ Lazowski, "Withdrawal from the European Union and Alternatives to Membership" (2012) 37(5) *European Law Review* 523 at 528. Article 50 refers solely to art.218(3) as the procedure for the conclusion of the Withdrawal Agreement, which raises doubts as to whether the European Parliament can indeed invoke the opinion procedure under para.11 of the same article.

⁴⁷ The examples include the European Parliament's rejection of the agreement signed between the US and the EU on the transfer of financial information, its referral to the CJEU of the agreement signed between Canada and the EU, of the draft agreement for EU accession to the ECHR, and of the free-trade agreement with Singapore. Jörg Monar, "The Rejection of the EU-US Swift Interim Agreement by the European Parliament: A Historic Vote and Its Implications" (2010) 15 *European Foreign Affairs Review* 143; European Parliament, "MEPs refer EU-Canada air passenger data to the EU Court of Justice" (25 November 2014) press release, <http://www.europarl.europa.eu/news/en/press-room/20141121IPR79818/meps-refer-eu-canada-air-passenger-data-deal-to-the-eu-court-of-justice> [Accessed 9 March 2018]; *Opinion 2/15* (C-2/15) (Grand Chamber), 16 May 2017; *Opinion 2/13* (C-2/13) (Grand Chamber), 18 December 2014.

EU citizenship and fundamental rights

The consequences of the possible loss of British nationals' EU citizenship as a result of the UK's withdrawal from the EU is not limited to what that citizenship entails. This might also result in possible interferences with British nationals' human rights under the European Convention on Human Rights. Those rights are the right to privacy as safeguarded under art.8 of the ECHR, the prohibition against discrimination under art.14 of the ECHR, and the right to property under art.1 of the First Protocol of the ECHR (A1P1 ECHR).

An interference with art.8 of the ECHR (even if not a violation) might occur if the deportation of British nationals from the EU and EU citizens from the UK affects family unity.⁴⁸ Another situation that might give right to the application of art.8 is where the loss of citizenship has an impact on the social identity of the individual, as was considered in the European Court of Human Rights' *Kurić* decision concerning citizens of the former Yugoslavia being removed from the register.⁴⁹ The Court considered that art.8 protects an individual's right to establish and develop relationships with other human beings, and "sometimes embrace aspects of an individual's social identity".⁵⁰ Thus, "it must be accepted that the totality of social ties between settled migrants and community in which they are living constitute part of the concept of private life within the meaning of Article 8".⁵¹ On the basis of these observations, the European Court of Human Rights found that Slovenia was in breach art.8 rights by withdrawing the applicants' legally established residence rights in Slovenia under the then Socialist Federal Republic of Yugoslavia laws. Along the same lines, when giving evidence before the UK House of Lords EU Justice Sub-Committee, Alegre made reference to *Genovese* decision to justify this view.⁵² Accordingly, in this decision, the European Court of Human Rights held that the "impact [of the denial of citizenship] on the applicant's social identity was such as to bring it within the general scope and ambit of [art.8 of the ECHR]".⁵³ Although these examples relate either to residence status (i.e. *Kurić*), which can be settled under the Withdrawal Agreement, or to the withdrawal of national citizenship (i.e. *Genovese*), they indicate possible art.8 breaches due to the loss of EU citizenship.

As regards the non-discrimination clause under art.14 of the ECHR, the most compelling argument came from Alegre in her evidence before the UK House of Lords EU Justice Sub-Committee.⁵⁴ Accordingly, certain British nationals are able to acquire the citizenship of other EU Member States, and thus EU citizenship without having to reside there through national naturalisation rules which may be predicated on the nationality of the grandparents, nationality of the spouses, or financial investment.⁵⁵ This, in turn, taken together with art.8 may breach the prohibition on discrimination on the ground of "national or social origin, association with a national minority, property, birth or other status".⁵⁶

Additionally, the right to property enshrined under A1P1 ECHR might be invoked to protect tangible and intangible property acquired in the EU including entitlements to non-contributory social security benefits.⁵⁷

The above-claimed violations may be able to be invoked before the European Court of Human Rights by British nationals and EU citizens affected by Brexit if no satisfactory Withdrawal Agreement is reached.

⁴⁸ *Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17; *Tuquabo-Tekle v Netherlands* (App. No.60665/00), judgment of 1 March 2006.

⁴⁹ *Kurić v Slovenia* (App. No.26828/06), judgment of 13 July 2010. For a comprehensive analysis of this case see González, "'Brexit' Consequences for Citizenship of the Union and Residence Rights" (2016) 23 *Maastricht Journal of European and Comparative Law* 796

⁵⁰ *Kurić v Slovenia* (App. No.26828/06) at [352]. The Grand Chamber reiterated the Chamber's observations and found a violation of art.8 right in its decision of March 2014.

⁵¹ *Kurić v Slovenia* (App. No.26828/06) at [352].

⁵² *Genovese v Malta* (2014) 58 E.H.R.R. 25.

⁵³ *Genovese v Malta* (2014) 58 E.H.R.R. 25 at [33].

⁵⁴ House of Lords, Written Evidence: Brexit: acquired rights (7 November 2016), Select Committee on the European Union, Home Affairs Sub-Committee (14 November 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/42760.html> [Accessed 9 March 2018], para.6.

⁵⁵ House of Lords, Written Evidence: Brexit: acquired rights (7 November 2016), para.6.

⁵⁶ ECHR art.14.

⁵⁷ European Union Committee, "Brexit: acquired rights", paras 73–76.

As mentioned above, the CJEU has jurisdiction over the conclusion of that Agreement under certain articles of the TFEU. Thus, a challenge on the incompatibility of the Withdrawal Agreement with the fundamental rights as safeguarded under the EU Charter of Fundamental Rights (Charter) can be brought before the CJEU. The Court has already had the opportunity to reject an international agreement due to its incompatibility with the Charter.⁵⁸ Therefore, to the extent that Charter rights overlap with the ECHR rights mentioned above, the foregoing findings might be relevant for the CJEU's interpretation of the matter.⁵⁹ The UK side might gnash its teeth over the CJEU's adjudication on the Withdrawal Agreement itself because no matter how insistent it tries to be in ending the CJEU jurisdiction in the UK post-Brexit, the Court will retain an important role in the composition of the Agreement.⁶⁰

Certain other issues remain over the extent which British nationals can retain their rights accompanied with their EU citizenship status. The first issue relates to the fact that the EU citizenship includes certain rights that are not expressly recognised by the ECHR such as the right to work, right to retire, and access to the healthcare in the EU.⁶¹ The second issue concerns the UK Government's insistent redline in ending the jurisdiction of the CJEU in the UK, as mentioned earlier. The implications of this redline are dealt with in more detail below in the section on the consequences of Brexit for EU surrender procedures.

Consequently, a fundamental question in relation to the Dutch District Court's referral is whether and how the CJEU will answer the questions referred and ruffle feathers over the meaning of EU citizenship in the Brexit scene. Needless to say, the CJEU has shaped the EU policy-making process over the years through its decisions.⁶² Therefore, there are reasons to assume that whether or not it declares the existence of a European identity by detaching EU citizenship from national citizenship, if the CJEU accepts the referral, it will certainly make an interesting judicial contribution to the debate on the post-Brexit legal status of millions of British nationals.

On extradition

The 2002 Framework Decision on the European Arrest Warrant simplified the procedure for surrender of suspects or convicts of criminal offences amongst EU Member States by introducing the European Arrest Warrant (EAW) system.⁶³ What makes this system different to extradition outside the EU is that a Member State authority who receives a surrender request under the EAW in principle must execute this request without litigation within 60 days or, in some exceptional cases, 90 days.⁶⁴ This could be done through the application of the principle of mutual recognition of judicial decisions, according to which Member States must enforce and execute decisions of each other's authorities despite procedural differences amongst each other.⁶⁵ In this regard, it creates a single area wherein Member States are banned from refusing to surrender their own nationals.⁶⁶ That said, facilitating a simplified surrender procedure amongst Member States as such must not encroach upon fundamental rights of individuals. Therefore, the EAW is rooted in the assumption that Member States participating in the EAW adhere to the Charter, to general principles

⁵⁸ Opinion 1/15 (C-1/15) (Grand Chamber) 26 July 2017.

⁵⁹ CFEU art.52(3).

⁶⁰ The UK Government's stance towards the CJEU jurisdiction is illustrated in the White Paper, which mentions the plans "to bring an end to the jurisdiction in the UK of the Court of Justice of the European Union". See Department for Exiting the European Union, "The United Kingdom's exit from and new partnership with the European Union" White Paper, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf [Accessed 9 March 2018].

⁶¹ "Brexit and Loss of EU Citizenship: Cases, Options, Perceptions" (December 2017), ECAS, <http://ecas.org/wp-content/uploads/2017/12/Brexit-and-Loss-of-EU-Citizenship-1.pdf> [Accessed 9 March 2018], p.13.

⁶² For example see Opinion 1/15 (C-1/15); *Commission v Council* (C-440/05), 23 October 2007; *Commission v Council* (C-176/03), 13 September 2005.

⁶³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States—Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1 (hereinafter, "the EAW Framework Decision").

⁶⁴ EAW Framework Decision, art.23(2)-(4).

⁶⁵ Valsamis Mitsilegas, *EU Criminal Law* (Portland: Hart Publishing, 2009), pp.115–159.

⁶⁶ EU Member States waived their rights to refuse extradition of their own citizens because neither art.3 of the EAW Framework Decision on the mandatory grounds for non-execution nor art.4 of the same Framework Decision on optional grounds for non-execution mentions such refusal.

of EU law, and to the jurisdiction of the CJEU.⁶⁷ For this reason, Germany or Poland, whose constitutions provide a ban on extraditing their own citizens, cannot refuse to surrender their citizens to other Member States, but can refuse to extradite them to other third countries.

The importance of mutual recognition principle and fundamental rights safeguards as the backbones of the EAW system was highlighted in another referral by the Irish High Court on this system in March 2018, but this time in relation to the surrender of a suspect to Poland.⁶⁸ At its core, this referral concerned the immense changes to Poland's judiciary, which had been repeatedly criticised by the European Commission Reasoned Proposal of December 2017 and the opinions of the Venice Commission as damaging the rule of law, independency of the judiciary, and integrity of the Constitutional Court. These changes led the Irish High Court to refuse the surrender of the suspect to Poland and to refer the case to the CJEU, asking whether systemic breaches of the rule of law as a result of those changes would mean that the mutual recognition principle upon which the EAW request had been made is no longer operative.

The UK re-joined the EAW system in December 2014 following its block opt-out from pre-Lisbon criminal and policing measures in accordance with Protocol 36 of the TFEU.⁶⁹ It has praised the system in numerous occasions and has approached the acceptance of the supervisions of the CJEU as a trade-off for the greater good of the system.⁷⁰ The figures on the surrender requests from and to the UK in the 2010–15 period shows that the UK surrendered around 1,000 people every year to other Member States and requested around 100 people from them.⁷¹

Once the UK's membership to the EU ceases to exit, it will not be able resort to the EAW system. This means that in principle the extradition process between the UK and the remaining EU Member States will revert to being slower and more cumbersome when compared with the EAW system. In principle, the UK can conclude an agreement with the EU on extradition matters, but EU Member States can still refuse to extradite their own citizens. There might also be certain limitations for an EU Member State wishing to extradite citizens of remaining EU Member States. As in *Petrushhin*, if a Member State bans extradition of its own citizens outside the EU, it has to ask the remaining Member States whose citizenship the subject of extradition request holds, before extraditing him or her to third country.⁷²

These issues raised concerns from the UK side over the continuity of its cooperation with the EU in the fight against terrorism and serious crime.⁷³ The number of extradition requests made by the EU Member States to the UK suggests that there is a mutual interest in an unhindered extradition process which currently assists the timely administration of justice.⁷⁴ Lengthier and harder extradition procedures might also affect individuals' interests and pre-trial detention might be longer when compared with detention periods under the EAW.

Political discourse on extradition post-Brexit

The UK's departure from the EAW as a consequence of Brexit raises two fundamental questions: (i) how should the pending EAWs be treated; and (ii) how can the extradition be carried out after Brexit? Concerns over the former question was echoed in the updated text of the draft Withdrawal Agreement, according to which Member State can refuse the surrender of their own nationals to the UK during the transitional

⁶⁷ EAW Framework Decision, art.1(3).

⁶⁸ *Minister for Justice and Equality v Artur Celmer* [2018] IEHC 119.

⁶⁹ House of Commons, Select Committee on European Scrutiny Committee, *The UK's 2014 Block Opt-Out Decision session 2013–14*, para.1.

⁷⁰ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant", (HL 2017–19 (6)), para.12.

⁷¹ National Crime Agency, Historical European Arrest Warrant Statistics 2004-May 2016 (Calendar and Fiscal year) (May 2016) <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/historical-eaw-statistics/693-historical-european-arrest-warrants-statistics-calendar-and-financial-year-totals-2004-may-2016> [Accessed 9 March 2018].

⁷² Aleksei Petruhhin v Latvijas Republikas Generalprokuratura (C-182/15), 6 September 2016.

⁷³ "European Arrest Warrant 'absolutely essential', Amber Rudd confirms" (7 March 2017), *Holyrood*, <https://www.holyrood.com/articles/news/european-arrest-warrant-absolutely-essential%E2%80%99-amber-rudd-confirms> [Accessed 9 March 2018].

⁷⁴ "Brexit & the European Arrest Warrant: How Will Change Affect the Interest of Citizens" (20 November 2017) ECAS, <http://ecas.org/european-arrest-warrant-brexit/> [Accessed 9 March 2018], pp.6–7.

period.⁷⁵ The future relationship between the UK and the EU on extradition remains another mystery. The UK Government has been vocal in its insistence on the continuation of cooperation with the EU on this field post-Brexit.⁷⁶ Different scenarios for the future cooperation such as negotiating bilateral agreements with each remaining Member State, falling back to the Council of Europe's extradition mechanism (i.e. the 1957 European Convention on Extradition), or negotiating an agreement with the EU mirroring the EAW system.⁷⁷ The prototype for the latter is the agreement signed between the EU and Norway/Iceland, which includes a modified version of the EAW system. However, there are reasons to argue that this solution will not be an easy one because it took over 10 years to conclude this agreement and it is not yet in force. The Council of Europe's extradition mechanism might not be a good solution either, because it will be lengthier and more cumbersome when compared with the EAW system.⁷⁸

The UK Government's persistent rejection of CJEU jurisdiction and of the application of the Charter after Brexit sits at odds with its position to continue cooperation in extradition under an EAW-like arrangement. This is because judicial authorities in Member States are considered as equal and as fundamental-right compliant by virtue of the application of mutual recognition in criminal matters. Thus, the CJEU is the final arbiter through the preliminary ruling procedure if a dispute arises on the execution of an EAW. For this reason, discussions on judicial oversight of any possible UK-EU extradition arrangement have surfaced in the UK side, acknowledging the tension that the UK Government's redline of the CJEU jurisdiction post-Brexit creates for the continuity of an EAW-like extradition arrangement.⁷⁹ Moreover, cutting the ties with the Charter might be detrimental to fundamental rights protection in the UK post-Brexit for two reasons. The first reason is that, as mentioned earlier, it is the source for ensuring the rights of suspects and convicts under the EAW system. The second reason is that, as discussed below, the Charter potentially has a wider spectrum in comparison with the ECHR. Thus, this additional protection can only be enforced before the CJEU. In fact, this tension was the main reason why the Irish Supreme Court referred questions to the CJEU on Member States' possible refusal to execute the ongoing EAWs issued by the UK. So the dispute is whether, and if so how, the EU fundamental rights of an individual be guaranteed in the UK if the imprisonment will end at a time when the UK is no longer part of the EU.

The decision by the Irish Supreme Court

Thomas O'Connor was convicted of tax fraud in the UK in 2001. He fled to Ireland while he was on bail. This led the UK to issue an EAW to Ireland for his surrender to serve his time and possibly to subject him to more charges in relation to his flight to Ireland.⁸⁰ The applicant argued that Ireland was asked to surrender an EU citizen to a country which might become a third country before he serves his time there. Therefore, depending on how the arrangements for the ongoing EAW procedures might evolve between the UK and the EU, he might not be able to enjoy his Charter rights.⁸¹ This point was of particular relevance in deciding whether the time he spent in custody in Ireland could be deducted from his imprisonment time in the UK should the EAW is found to be invalid; a point that calls the application of EU law in question. However, if this point is raised before the UK courts after the withdrawal date, they might not be entitled to refer it to the CJEU.⁸² In this regard, the applicant argued that either his surrender to the UK was impossible or

⁷⁵ TF50 (2017) 33/2—Commission to UK.

⁷⁶ European Union Committee, "Brexit: future UK-EU security and police cooperation" (HL 2016–17, 77), para.141.

⁷⁷ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant"; "Brexit Briefing No.2—The implications for extradition" (13 July 2016), *6KBW College Hill*, <http://www.6kbw.com/wp-content/uploads/2016/07/6KBW-College-Hill-Brexit-Briefing-No.2.pdf> [Accessed 9 March 2018]; Steve Peers, "EU Referendum Brief 5: How would Brexit impact the UK's involvement in EU policing and criminal law" (21 June 2016), *EU Law Analysis*, <http://eulawanalysis.blogspot.co.uk/2016/06/eu-referendum-brief-5-how-would-brexit.html> [Accessed 9 March 2018].

⁷⁸ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant", para.71.

⁷⁹ European Union Committee, "Brexit: judicial oversight of the European Arrest Warrant", para.4.

⁸⁰ O'Connor [2018] I.E.S.C. 3 at [5.8].

⁸¹ O'Connor [2018] I.E.S.C. 3 at [5.9].

⁸² O'Connor [2018] I.E.S.C. 3 at [5.14].

he can be extradited insofar as the UK's future arrangements with the EU on the extradition ensures EU rights that the applicant would have enjoyed if the UK had not withdrawn from the EU including the right to take complaints before the CJEU.⁸³

Having acknowledged the uncertainty surrounding any arrangement and 20 other similar cases on EAWs issued by the UK to Ireland before it, the Irish Supreme Court referred the case to the CJEU and asked whether or not the receiving country can refuse to extradite the subject of an EAW.

Fundamental rights in the UK post-Brexit

The referral by the Irish Supreme Court illustrates the controversy surrounding the UK Government's stance in ending the CJEU jurisdiction and the applicability of the Charter after Brexit. According to the EU (Withdrawal) Bill, the existing case-law stays binding upon UK courts under certain exceptions.⁸⁴ For example, the Supreme Court, Parliament, or the executive can depart from the CJEU precedent.⁸⁵ Upon Brexit, however, the CJEU jurisdiction in the UK comes to an end, and the UK courts will not have to consider the post-Brexit case-law of the CJEU.⁸⁶ However, the UK courts have the option to take this case-law into account if they find it appropriate to do so.⁸⁷ This option, on the other hand, was not welcomed by the UK judges, who asked for more clarity on the extent of their discretion on the matter.⁸⁸

Clearly, the state of the CJEU jurisdiction under the EU (Withdrawal) Bill is different from how it was envisaged in relation to EU citizenship rights under the joint report, according to which the UK courts can refer a case to the CJEU for a period of eight years starting from the application of the citizens' rights provision and can take "due regard" to the CJEU case-law without a time-limit.

As mentioned above, alternatives to the CJEU jurisdiction in order to keep an EAW-like partnership with the EU have been circulating in the UK side. Until an official consensus is reached on the matter, the CJEU jurisprudence will cease to apply in the UK upon Brexit, and EU citizens will not be able to enforce their rights under the Charter, as anticipated in the Irish Supreme Court's CJEU referral. This means that the general status of the fundamental rights protection in the UK might be at risk after Brexit.⁸⁹

Another source of EU law that the UK Government wants to eliminate is the Charter, and this cut-off is materialised in the EU (Withdrawal) Bill.⁹⁰ So, one out of the three current sources will be removed from the architecture of UK fundamental right protection (the other two sources are the common law, and the ECHR as brought into UK law through the Human Rights Act 1998). What this means for rights protection in the UK is that individuals will not enjoy the wider protection that the Charter potentially offers in certain areas when compared with the ECHR. Particularly in the field of extradition, the Charter offers more detailed rights in the context of criminal matters than the ECHR.⁹¹ For example, the European Court of Human Rights does not consider the extradition process as a criminal procedure, but rather an administrative procedure, and thus it does not afford the minimum fair trial rights listed in art.6 of the ECHR unless the subject of an extradition request "has suffered or risks suffering a flagrant denial of a fair trial in the requesting country".⁹²

⁸³ O'Connor [2018] I.E.S.C. 3 at [5.17].

⁸⁴ EU (Withdrawal) Bill cl.6.

⁸⁵ EU (Withdrawal) Bill cl.6(4).

⁸⁶ EU (Withdrawal) Bill cl.6(1).

⁸⁷ EU (Withdrawal) Bill cl.6(2).

⁸⁸ "UK's new supreme court chief calls for clarity on ECJ after Brexit" (5 October 2017), *The Guardian*, <https://www.theguardian.com/law/2017/oct/05/uk-s-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexit> [Accessed 9 March 2018].

⁸⁹ Equality and Human Rights Commission, *Opinion on EU (Withdrawal) Bill—EU Charter of Fundamental Rights* (5 January 2018), <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf> [Accessed 9 March 2018].

⁹⁰ EU (Withdrawal) Bill cl.5(5).

⁹¹ Extradition procedure might rise possible interferences with the Charter's art.47 on the right to an effective remedy and to a fair trial, art.48 on the presumption of innocence and right of defence, art.49 on the legality and proportionality of criminal offences and penalties, and art.50 on the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

⁹² *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 at [113]. See also Peter Langford, "Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights" (2009) 13(4) *International Journal of Human Rights* 512, 522–523.

In light of the above, the EU (Withdrawal) Bill, as it stands, presents risks for the protection of rights in the UK after Brexit. The corollary impact of this risk for the subjects of ongoing surrender procedures under the EAW system is that they might be stripped of their fundamental rights if they are surrendered to and imprisoned in the UK after the UK's withdrawal date. The legal framework for the transition period and the future arrangements between the EU and the UK on the matter *might* ensure the protection of their rights, but this is purely at the mercy of the political blinking game. Thus, the outcome of the referral might serve as a reminder on the importance of ensuring fundamental rights protection in the UK post-Brexit.

Conclusion

As of 29 March 2017, the Brexit ship sailed into uncharted waters. There is a plethora of issues to be resolved—from security to business and to immigration. This article aims to touch upon the issue of the implications of Brexit for the UK's fundamental rights landscape. It has looked at two recent CJEU referrals (as of March 2018); one on the implications of Brexit on the EU citizenship rights, and the other one on its implication on the ongoing extradition procedures. The first referral raises questions about the legal nature of EU citizenship in the EU Treaties, and tests the possible detachment of that citizenship from national citizenship. In this sense, it can be seen as inviting a resurgence of the concept of EU citizen as a commitment to the EU community. The second referral relates to the possible effect on ongoing extradition requests by the UK. In this regard, it provokes a discussion as to the extent to which the fundamental rights protection in EU law can be guaranteed in the UK post-Brexit.

The themes of both referrals have been touched upon, to some extent, in the political arena. Still, the legal uncertainty in these themes persist, and thus this makes the CJEU referrals all the more fundamental. Both referrals converge on the status of the jurisdiction of the CJEU jurisdiction post-Brexit and the potential impact of the UK's withdrawal from the EU on fundamental rights. Ironically, it has now made it the CJEU's role to determine these Brexit issues from a legal point of view, which will inevitably have effect on how they will be built into the withdrawal arrangements. These referrals are a clear lesson that the UK's withdrawal from the EU necessitates not only a political but also a thorough and complex legal analysis.

The Trade Union Act 2016, the European Court of Human Rights and the “right to strike” under Article 11 of the European Convention

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✉ Ballots; EC law; Freedom of assembly and association; Human rights; Justification; Margin of appreciation; Proportionality; Strikes; Trade unions

Abstract

The Trade Union Act 2016 adds to the regulation of industrial action by introducing several new provisions to restrict lawful picketing and implements further stringent restrictions on the organisation of strike ballots, such as by enforcing new minimum turnout and threshold requirements. This article examines European Convention principles on a trade union’s right to take strike action (now implicit within art.11) with reference to this statute—which supplements the detailed and complex requirements trade unions must already adhere to in order to call lawful industrial action. Drawing on a review of jurisprudence concerning other signatory states and the suitable application of Convention doctrines (such as the “margin of appreciation”) this article demonstrates that these highly restrictive provisions are disproportionate limitations without contemporary justification under art.11(2). This analysis is undertaken in the context of the Strasbourg Court’s inconsistent and, at times, unwarranted and dismissive approach to trade union cases concerning the United Kingdom.

Introduction

Article 11(1) of the European Convention on Human Rights provides that “Everyone has the right ... to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”. Article 11 case-law holds that protection extends beyond a mere right to join a trade union but also encompasses a number of freedoms including a right of a trade union to make representations to an employer on behalf of the membership¹; a right for trade union members not to be discriminated against by an employer² and a right to engage in collective bargaining.³ The Strasbourg Court has also now formally accepted that a “right to strike” is within the scope of trade union rights under art.11.⁴

Legal action at the European Court of Human Rights challenging the UK’s strike law as contrary to Convention rights, has however, so far yielded scant satisfaction for trade unions. The Strasbourg Court has failed to directly adjudicate on this question, arguably due to an inflexible application of the admissibility criteria, or has not effectively applied Convention principles to the UK legal framework—acknowledged

¹ *National Union of Belgian Police v Belgium* (1975) 1 E.H.R.R. 578; *Swedish Engine Drivers’ Union v Sweden* (1976) 1 E.H.R.R. 617.

² *Wilson v United Kingdom* (2002) 35 E.H.R.R. 20.

³ *Demir v Turkey* (2009) 48 E.H.R.R. 54.

⁴ *Enerji Yapı-Yol Sen v Turkey* (App. No.689591), judgment of 21 April 2009; *RMT v United Kingdom* (2015) 60 E.H.R.R. 10; *Hrvatski ljećenicki Sindikat v Croatia* (App No.36701/09), judgment of 27 February 2015.

to be the most restrictive on strike action in Europe.⁵ For example, in *NURMT v United Kingdom*⁶ (*RMT v United Kingdom*), the admissibility criteria was used in order to strike out a claim that the balloting requirements (which a union must follow prior to taking industrial action) were incompatible with art.11. The union (after earlier strike action had been subject to an injunction) had eventually complied with the strict balloting rules and had successfully called the industrial action. The Court held that as the union had been able to take action, the application was “manifestly ill-founded” pursuant to art.35(1)(b)—as it did not demonstrate a potential violation of Convention rights. The Court failed to take into account that the delay (caused by having to comply again with the detailed balloting provisions) adversely impacted on the union’s campaign and that the union incurred additional substantial financial costs—both examples of interference with the “right to strike” guaranteed by art.11.⁷

A failure to comply with procedural criteria was also the cause of rejected applications in *Roffey v United Kingdom*⁸ and *Prison Officers’ Association v United Kingdom* (*POA v United Kingdom*).⁹ In *POA v United Kingdom* a claim that an outright ban on strike action by prison officers’ was in breach of art.11 was rejected on the basis that a similar complaint had been submitted in 2004 by the POA to the International Labour Organisation’s (ILO) Freedom of Association Committee alleging the ban was a breach of ILO Convention 87. Article 35(2)(b) of the European Convention provides that an application to the European Court that is substantially the same as an earlier claim submitted to a different competent judicial international body for adjudication is inadmissible unless there is new relevant information—such as where there are new parties affected by the restriction. The complaint failed on these grounds even though the new applicants were not parties to the original ILO application and were directly affected by the measure as individual union members and employees. The Strasbourg Court took the view that, as they were also local (unpaid) officials, they were sufficiently closely associated with the earlier proceedings through their trade union links—despite the fact that the ILO action was of a purely collective nature, taken solely by the union many years earlier.¹⁰

In *Roffey v United Kingdom*¹¹ the union initiated industrial action in April 2010. The employers responded by penalising those on strike with a loss of non-contractual discretionary travel privileges. The union lodged a claim in December 2010 that the state’s failure to provide a remedy for the imposition of sanctions short of dismissal (the loss of travel benefits) during an industrial dispute constituted an unjustified violation of art.11. The Strasbourg Court found the application inadmissible on the grounds that the application was out of time—it was made after the six-month time limit contained in art.34(1)—which runs from when the date of the interference with Convention rights occurred. It determined that this was from the date when the applicants were informed of the withdrawal of their travel benefits, in April 2010, at the beginning of the main industrial action. The Court failed to take into account that the violation was not a one-off event but a continuing interference, with the travel benefits not being restored until after the settlement of the dispute in July 2011.¹²

Where an application overcomes these procedural hurdles the European Court has not always applied Convention principles consistently to *prima facie* evidence of violations of art.11. In *RMT v United*

⁵ As Tony Blair commented in an interview with *The Times* on 31 March 1997, “Let me state the position clearly, so that no-one is in doubt. The essential elements of the trade union legislation will remain. The changes we propose would leave British law the most restrictive on trade unions in the western world.”

⁶ *RMT* (2015) 60 E.H.R.R. 10.

⁷ For further analysis of this case, see C. Barrow, “RMT v United Kingdom [2014]: The European Court of Human Rights Intimidated into Timidity or Consistent in its Inconsistency” [2015] E.H.R.L.R. 277.

⁸ *Roffey v United Kingdom* (App No.1278/11), decision of 21 May 2013.

⁹ *POA v United Kingdom* (App No.5925/11), decision of 21 May 2013.

¹⁰ It was also arguable that the ILO’s Freedom of Association Committee was not a competent judicial body for these purposes (relating to an application of art.35(2)(b)) as its decisions were unenforceable and not binding on state actors.

¹¹ *Roffey* (App No.1278/11), decision of 21 May 2013.

¹² The application in *Brough v United Kingdom* (App No.52962/11), decision of 30 August 2016—alleging that the lack of statutory protection for those workers “blacklisted” by employers was a violation of art.11—was also declared inadmissible as “out of time” even though the applicant had sought to exhaust his domestic remedies during the relevant time frame.

*Kingdom*¹³ the Court had declared that although art.11 did encompass a right to strike, an absolute ban on secondary action was within the state’s “margin of appreciation” and therefore a “proportionate” restriction even though there was little evidence to justify such an extensive ban and it was not in conformity with European labour standards or with instruments of relevant international labour law.¹⁴

This rather sorry recent record of Strasbourg adjudication on UK strike law has emboldened the Conservative administration to argue that the additional limitations on industrial action introduced by the Trade Union Act 2016 are in full compliance with Convention standards.¹⁵ This statute further complicates the balloting procedure a union must undertake prior to taking strike action by, for example, introducing new stringent turnout requirements and by imposing additional restrictions on peaceful picketing; all provisions that are, *prima facie*, in violation of art.11(1). Under art.11(2) the “right to strike” may be restricted where it is “... necessary in a democratic society ... for the protection of the rights and freedoms of others”. The terminology “... necessary in a democratic society” has been interpreted to imply that intervention can only be permitted under art.11(2) if it meets a “pressing social need”—which involves a balancing of competing interests and an examination as to whether the state’s intervention goes no further than is necessary to meet that need—i.e. it is a proportionate response to the legitimate objective pursued.¹⁶ This test is met if the new restrictions are a balanced, measured and proportionate means of securing the policy objectives behind the legislation. As the provisions of the Trade Union Act 2016 plainly interfere with a trade union’s right to take industrial action under art.11(1), it is arguable that significant reasons would therefore need to be established to justify these measures.

The picketing provisions

An enduring feature of strike action is that those who are engaged in such action will seek to persuade others to support them or join them so as to enhance the effectiveness of the strike. As picketing inevitably conflicts with the interests of other parties (such as employers, working employees, and where there is disruption to public order, members of the public) picketing has always been subject to control by the criminal and civil law. Criminal charges can be brought against pickets, for example relating to obstruction of the highway or offences under the Public Order Act 1986 (relating to disorder on a picket) or under s.241 of the Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A 1992) (relating to intimidation and other miscellaneous offences). Civil liability may follow where the pickets are trespassing or committing a nuisance. The undue application of existing criminal and civil restrictions may well have implications for compliance with the requirements of art.10 (on freedom of speech) as well as art.11 of the Convention.¹⁷

Of particular relevance to industrial action is the tort of inducing breach of contract, which occurs when picketing successfully discourages workers from attending their place of work in breach of their employment contract. Picketing may also interfere with commercial contracts, where, for example, lorry drivers are persuaded not to deliver to the employer; resulting in a breach of a commercial contract of supply between the supplier of goods and the employer who is the target of the action. Trade unions and individual pickets only have immunity from these civil actions if they comply with the conditions outlined in s.220 of the TULR(C)A 1992—that the picketing relates to a “trade dispute” and the pickets attend “at or near” their workplace in order to peacefully communicate or obtain information or persuade others not to work.

¹³ *RMT* (2015) 60 E.H.R.R. 10.

¹⁴ See also *Unite v United Kingdom* (App No.65397/13), decision of 26 May 2016. This case concerned the abolition of the Agricultural Wages Board that promoted and supported collective bargaining in the agricultural sector. The application was struck out as inadmissible on the grounds that abolition did not prevent the union from exercising its right to engage in voluntary collective bargaining—even though the relevant employers had steadfastly refused to do so.

¹⁵ *The Trade Union Bill: European Convention on Human Rights Memorandum* (BIS/15/415, July 2015), pp.4–7.

¹⁶ On the interpretation of the expression “necessary in a democratic society” in the industrial context, see *Wilson v United Kingdom* (2002) 35 E.H.R.R. 20 and *ASLEF v United Kingdom* (App. No.11002/05), judgment of 27 February 2007.

¹⁷ An analysis as to what extent the picketing sanctions are in breach of art.10 goes beyond the scope of this article.

Section 10 of the Trade Union Act 2016 strengthens these conditions by inserting a new s.220A into the 1992 Act, introducing several new provisions: pickets and unions must meet before the immunity applies. A union must now appoint a “picket supervisor”¹⁸ who has responsibility for managing the picket line; with the functions of the supervisor outlined in the re-issued Picketing Code of Practice.¹⁹ The union must take reasonable steps to ensure the police are informed of the supervisor’s name and contact details and location of the picket line.²⁰ The picket supervisor (who must be an official or member of the union) should be present at the picket line or be readily contactable by the police or union to attend the picket at short notice and be in possession of a letter from the union confirming that the picketing is approved by the union.²¹ A picket supervisor is under a duty to show the relevant employer or their agent the letter on request “as soon as reasonably practicable”.²² When attending the picket the supervisor must wear “something” (such as a badge or armband) so that they are readily identifiable.²³

Should there be a failure to comply with any of these conditions then the protection of the immunities against tort action, for the union and for individual pickets, will be withdrawn. Thus, for example, if a picket supervisor is not available or if the letter of authorisation has been mislaid, or if the picket supervisor has forgotten to wear the “official” armband, the picket will be deemed to be automatically unlawful, the legal consequences of which is an injunction being granted to stop the picketing and a subsequent damages claim. Some of the conditions may be particularly difficult for unions to follow—the larger the workplace and the greater the number of entrances and exits the more supervisors will be required. It is highly unlikely that any union could meet such demands solely through their full-time officials. In such circumstances a union may need to recruit ordinary members who, if they are not familiar with the law and the Code of Practice and are not able to be present or to be nearby at all times, may well inadvertently violate the provisions of the statute. It is clear that the new conditions constrain the freedom of workers and trade unions to organise and participate in peaceful picketing and the likely impact of these new rules will be further injunctions being granted for relatively trivial reasons.

In order to ascertain if these provisions are in violation of art.11(2) safeguards, the question to be addressed is—are they a balanced, measured and proportionate means of securing the government’s objectives? The underlying policy objectives (identified in the Consultation papers published prior to the passage of the statute through Parliament) make it clear that the picket supervisors’ role is to encourage responsible behaviour on the picket line and deter intimidatory and violent conduct in order to safeguard the rights of workers, management and members of the public.²⁴ Yet, there is little substantive evidence of disorderly picketing²⁵; there is already a whole range of criminal and civil law actions available to the state or the employer to control unruly picketing; and, as noted earlier, picketing has to be peaceful for a union to enjoy the benefit of the immunities. Academic research has also demonstrated there is little need

¹⁸ Section 220A(2), (3).

¹⁹ The Department for Business, Energy and Industrial Strategy, *Code of Practice on Picketing* (March 2017) at paras 58–61.

²⁰ TULR(C)A 1992 s.220A(4).

²¹ TULR(C)A 1992 s.220A(5), (7).

²² TULR(C)A 1992 s.220A(6).

²³ TULR(C)A 1992 s.220A(8). Originally the Government proposed to legislate in order to limit general protests associated with strike action. The consultation document—Department for Business Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers* (BIS 15/415, July 2015), pp.10–12—contained proposals to require trade unions to publish a plan of intended action in advance of any protest, to limit their use of social media, to inform the Certification Officer of the picketing and protest activity and the creation of a new criminal offence of intimidation. After widespread criticism this attempt at even tighter statutory control was abandoned.

²⁴ Department of Business, Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers* (BIS 15/415, July 2015), paras 15–18.

²⁵ The Consultation paper—Department for Business, Innovation and Skills: *Consultation on Tackling Intimidation of Non-Striking Workers* (BIS 15/415, July 2015), pp.4–5—cited allegations made in *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes*, 15 October 2014, commissioned by the prime minister to investigate allegations of intimidation during picketing activities at the Grangemouth industrial dispute. The authors of the review themselves admitted there was little empirical evidence for these assertions, apart from anecdotal unsubstantiated commentary.

for this level of control. Over a 10-year period from 2005 to 2015, only five applications were made for injunctions in relation to breaches of the picketing provisions of s.220 of the TULR(C)A 1992.²⁶

It is clear that the Government has not balanced the rights of both parties when introducing these restrictions; the protection of the immunities will be withdrawn no matter how minor the breach and without regard to whether the employer has suffered economic injury or been prejudiced in any way. The consequences for trade unions and their members, however, is not just the inability to picket but also that individual pickets will also lose their protection from unfair dismissal.²⁷ These harsh penalties for a failure of complying with an organisational regulation (such as forgetting to wear an armband or misplacing a letter of authorisation) offend against the notion of “proportionality” inherent in the requirements of art.11(2) and Strasbourg case-law.

One aspect of the proportionality test outlined in Strasbourg case-law is whether the domestic law is consistent with the requirements of relevant international law and contemporary European practice. Legislation that is in violation of international and European standards cannot be said to be “proportionate”.²⁸ The International Labour Organisation (ILO) and European Social Charter (ESC) supervisory bodies recognise that the right to picket is an inherent part of the “right to strike” and any unreasonable interference is a violation of ILO Convention 87, art.3 and ESC art.6(4).²⁹ As the new restrictions impose disproportionate and discriminatory obligations on trade unions and extensive regulation of picketing it is unlikely that these provisions will be in compliance with ILO and ESC standards.

As there is no clear “pressing social need” for these new restrictions; as they are disproportionate; and as there has been no attempt to balance the interests of the relevant parties it is doubtful the government could establish a justification for these picketing initiatives. These provisions will simply hinder the organisation of legitimate picketing by trade unions and furnish employers with further opportunities to limit picketing in industrial disputes. In short, the picketing requirements in the Trade Union Act 2016, by imposing this level of state supervision of picketing without appropriate justification, are likely to be in violation of art.11.

The balloting provisions

A trade union, when taking lawful industrial action, has to comply with existing detailed and complex procedures relating to the conduct and organisation of an industrial action ballot and to the content of any subsequent strike notice.³⁰ Without full compliance with all the balloting procedures any strike is unlawful and an injunction may be granted prohibiting the industrial action. The provisions of the Trade Union Act 2016 builds on this existing structure of regulation. Section 2 of the Trade Union Act (inserting a new s.226(2)(a)(iia) into the TULR(C)A 1992) introduces a new minimum turnout requirement when a trade union is balloting for industrial action. At least 50% of union members eligible to vote must participate in the ballot, and of those that participate, a majority of those voting support the call for action. The Government’s view is that this would enhance the democratic process; that it will ensure that “... industrial

²⁶ G. Gall, “Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain 2005–2014” (2016) 54 B.J.I.R. 187.

²⁷ If there is a breach of s.220A, picketing will not be “protected industrial action” for the purposes of a claim for unfair dismissal under s.238A of the TULR(C)A 1992.

²⁸ For example, in coming to the conclusion that restrictions on collective bargaining were disproportionate the Grand Chamber in *Demir v Turkey* (2009) 48 E.H.R.R. 54 made specific reference to ILO Convention 98 (On the Right to Organise and to Bargain Collectively) and 151 (On the Right to Organise in Public Service) and art.6 of the Council of Europe’s 1961 Social Charter. In *Hrvatski Lijecnicki Sindikat v Croatia* (App. No.36701/09), judgment of 27 February 2015 the court held that a prohibition on strike action by the Croatian medical union in support of collective bargaining was a violation of art.11. In particular, Judge Pinto De Albuquerque confirmed that instruments of international law must be taken into account when assessing proportionality.

²⁹ See the Digest of Decisions and Principles of the *Freedom of Association Committee of the Governing Body of the ILO* (2006) at [651]; On ESC art.6(4) see *European Trade Union Confederation v Belgium* (App. No.59/2009), 13 September 2011 at [29].

³⁰ The laws regulating the conduct and organisation of industrial action ballots were originally developed in the Trade Union Act 1984, the Employment Act 1988 and the Trade Union Reform and Employment Rights Act 1993. These provisions and the limited reforms of 1999 and 2004 were consolidated into the TULR(C)A 1992.

action has democratic support and legitimacy within the relevant workforce³¹ and “... avoid great disruption on very old ballots secured by low turnouts”.³²

In the United Kingdom, across all national and municipal elections, an accepted principle is that a simple majority of those who voted is sufficient for a democratic mandate. The Government has, however, persistently refused, despite requests from trade unions, to countenance a switch from inefficient postal ballots (that historically produce low turnouts) to secure workplace ballots or electronic balloting—both systems that would be far more likely to yield higher levels of member participation and so guarantee a more democratic decision than an arbitrary minimum turnout condition that will, in practice, be very difficult to achieve.³³ This failure to introduce alternative and less restrictive voting methods has implications for the issue of proportionality, as other methods of fulfilling the aim of strengthening the democratic legitimacy of a ballot could have been applied.³⁴

Research has demonstrated that this new provision will have a very serious impact on the ability of trade unions to take action in support of collective bargaining—an essential element of trade union rights under art.11. In the period of investigation, between 1997 and 2015, if the 50% criteria was in place, only 85 out of 158 strike ballots would have reached this threshold—a total of 3.3 million workers would have been denied the opportunity to take strike action.³⁵ The Government’s own analysts have predicted a 65% reduction in industrial action stoppages.³⁶ This provision satisfies the stated objective of ensuring that industrial action has a very high level of democratic validity—nevertheless, in the context of its effect on trade union ability to defend the legitimate interests of their membership, it is doubtful whether this can be justified as a sufficiently balanced and proportionate constraint, particularly as alternative and less damaging voting methods could have been applied to meet the objective of strengthening the democratic legitimacy of the ballot.

In “important public services” (including the fire service, education (of those under 17) and health services, and the transport, border security and nuclear decommissioning sectors³⁷) there is an additional requirement that industrial action will require the support of at least 40% of those entitled to vote.³⁸ A simple majority (that satisfies the new 50% participation threshold) will not be sufficient in order for action to go ahead in these particular industries and any union member who abstains or forgets to return their ballot paper will effectively be deemed to be opposing the strike.

The consequences of requiring a trade union to meet both the 50% threshold and the 40% minimum level of support for public sector disputes will have a serious impact on a trade union’s capability in the public services to call for action—one of the few sectors where unions remain strong. It will compromise a trade union’s ability to organise and prosecute lawful industrial action in order to protect centralised collective bargaining and weaken trade union opposition to the erosion of pay and conditions that are often the corollary to cuts in public services. The Government’s justification for this measure is predominantly an argument based on the inconvenience strikes in the public sector cause to the general public.³⁹ However, it is not clear there has been any attempt to balance the competing interests as required under Strasbourg principles—a degree of disruption to the public is often unavoidable and temporary, yet

³¹ *The Trade Union Bill: European Convention on Human Rights Memorandum* (BIS/15/415, July 2015), p.4.

³² Trade Union Bill Deb., 15 October, col.162, per Nick Boles.

³³ The power to introduce new forms of voting for strike ballots have been available since 2004 through s.54 of the Employment Act 2004.

³⁴ The Strasbourg Court in *Glor v Switzerland* (App No.13444/04), judgment of 30 April 2009 and in *Nada v Switzerland* (App. No.10593/08), judgment of 12 September 2012 noted that a relevant consideration in determining whether a restraint is proportionate is whether there are less restrictive methods of fulfilling the aim of the measure under examination.

³⁵ R. Darlington and J. Dobson, *The Conservative Government’s Proposed Strike Ballot Thresholds: the Challenge to Trade Unions* (Institute of Employment Rights, 2015), p.27.

³⁶ Department for Business, Innovation and Skills, *Ballot Thresholds in Important Public Services Consultation Impact Assessment* (BIS/15/4181A, July 2015), para.33.

³⁷ Section 3(2), (2D) and (2E) specifies that the details of the exact services affected will be determined by regulations through the Secretary of State’s statutory instrument powers.

³⁸ Section 3(2), (2A)–(2C), amending s.226 of the TULR(C)A 1992.

³⁹ Department for Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services* (BIS 16/15, July 2015), para.4.

the impact of enforcing these provisions on trade unions, essentially undermining a trade union's bargaining position, are potentially grave.

It is also the case that any restriction on trade unions operating in the public sector must still be justified as proportionate in the context of the facts. In *Demir v Turkey*,⁴⁰ a case on restrictions on collective bargaining in the public sector, the Grand Chamber stated that such constraints on civil servants "must not impair the very essence of the right to organise" and must "... not be arbitrarily imposed".⁴¹ As noted earlier, the decisions of relevant international institutions outlining minimum labour standards are also relevant when determining the legitimacy of restrictions. The ILO Freedom of Association Committee has explicitly held that the requirement that at least 50% of relevant employees in a dispute must turn out to vote in a ballot, is an "excessive" and "unjustified" requirement that hinders the right to strike.⁴² The ILO Committee of Experts has also condemned a requirement that over 50% of voters must approve a strike in a ballot as an "unreasonable" requirement and inconsistent with ILO Convention 87.⁴³ The Government has attempted to justify the new balloting regulations in the public sector by arguing that the impact of strike action on public services justifies the additional controls.⁴⁴ The ILO does permit states to introduce a higher voting threshold in very limited circumstances—where the strike action is in "essential services".⁴⁵ The list of "important services" in the Trade Union Act 2016 includes services (such as education and transport) that do not fall within the ILO definition of "essential services" and therefore should not be restricted in this way.⁴⁶

Article 6(4) of the European Social Charter⁴⁷ establishes the right of workers to take collective action subject to the qualification contained in art.31—a restriction has to be "necessary in a democratic society" for the "protection of the rights and freedoms of others".⁴⁸ By reference to this test, the supervisory bodies of the European Social Charter have repeatedly been of the view that the detailed balloting requirements in UK law is not in conformity with art.6(4)—due to their technical and complex nature.⁴⁹ It is therefore highly likely that the additional balloting provisions in the Trade Union Act will also be denounced as a violation of art.6(4).

In addition to the threshold criteria the Trade Union Act introduces further regulation of balloting procedure. For example, s.5(2C) and (2D) also stipulates that where unions ask for support for action short of a strike, details of the actual type of action will need to be included on the ballot paper and that the ballot paper must specify the anticipated length of the industrial action. The designated purpose of this is to enable a trade union member to make an informed decision when deciding how to vote. Employers are, however, also entitled to receive a copy of the ballot paper in advance simply for the purpose of determining whether the union has complied with these (and existing) requirements and then, where there is an error, to seek an injunction to stay industrial action. The failure of the union to meet these detailed requirements will not cause the employer any practical disadvantage or inconvenience, and as they are obligations designed to protect the interests of members, not employers, it must be questioned whether, as an unnecessary requirement, they are compliant with the principles underpinning art.11(2).

⁴⁰ *Demir* (2009) 48 E.H.R.R. 54.

⁴¹ *Demir* (2009) 48 E.H.R.R. at [119]. The Court has ruled on a number of occasions that disciplinary measures taken against civil servants for participating in strike action contravenes art.11—see *Tum Haber v Turkey* (2008) E.H.R.R.19, *Kaya v Turkey* (App No.30946) judgment of 15 September 2009 and *Dogan Altun v Turkey* (App No.7152/08), judgment of 26 May 2015.

⁴² Case 2698 (Australia) (2010).

⁴³ Case 2896 (El Salvador) (2015).

⁴⁴ Department for Business, Innovation and Skills, *Consultation on Ballot Thresholds in Important Public Services* (BIS/16/15, July 2015), para.4.

⁴⁵ These are defined by the ILO as services "... the interruption of which would endanger the liberty, personal safety or health of the whole or part of the people". ILO General Survey on Freedom of Association and Collective Bargaining (1994), para.159.

⁴⁶ The ILO has reserved particular criticism for the inclusion of education and transport as "important services" where this 40% threshold must be met. *Committee of Experts (on the Application of Conventions and Recommendations)* Annual Report (2016), p.153.

⁴⁷ The Charter is part of the same human rights structure as the Convention; deriving from the same parent body—the Council of Europe.

⁴⁸ Identical to the test outlined in art.11(2).

⁴⁹ See the Committee of Experts Reports *Conclusions XV-1* (2000), p.637; *XVI-1* (2002), p.688; *XVII-1* (2004), p.516; *XVIII-1* (2006), p.509. The most recent report of the Social Rights Committee reiterated these criticisms *Conclusions XX-3* (2014), p.22.

Sections 231 and 231A of the TULR(C)A 1992 already obliges trade unions to provide, to all those members entitled to vote and relevant employers, detailed information about the number of votes cast; the number who voted yes; the number voted no; and the number of spoiled ballots. Section 6 of the 2016 Act (amending s.231 TULR(C)A 1992) now additionally requires trade unions to additionally specify how many members were entitled to vote and whether the new minimum thresholds have been met. A legislative requirement to inform the electorate of the result in broad terms may well be justifiable but compelling the union to inform their membership of the result of the ballot in such detail (with any failure resulting in injunctive relief) arguably goes beyond what is required to satisfy the democratic objective of the provision.

The Government’s consistent argument in the consultation documentation and whilst the Bill was proceeding through its parliamentary stages was that these constraints on industrial action are necessary in order to protect businesses, the economy and to avoid undue public inconvenience. Yet, the whole purpose of industrial action is to put economic pressure on employers in order to encourage settlement of the dispute and, at times, a degree of disruption to the public is an unavoidable and natural consequence of the enforcement of this right under art.11. Disruption to a business is not, on its own, a sufficient reason to unduly limit strike action as a trade union’s right to strike and so cause economic damage—in order to protect their members’ interests by forcing the employer to comply with a collective agreement—took precedence over the employer’s competing right to refuse to join the employers’ association and engage in collective bargaining.⁵⁰ Furthermore, the argument based on the damage strike action causes to the economy and to the general public, is itself weakened by the statistical data. Days lost for strike action has fluctuated over the past 25 years but has most recently has shown a decline—for example, from 1.04 million in 2007 to 170,000 in 2015.⁵¹

Conclusions

Under Convention principles it is self-evident that a government must act in good faith when devising and implementing any restrictions on a Convention right. If the motive for restrictions impacting on a Convention right is ill-intentioned then the state will clearly be in violation of the relevant article. The Grand Chamber in *Demir*⁵² reiterated this point when noting that the reasons introduced by the national authorities to justify the restrictions must be “...relevant and sufficient”.⁵³ The succession of additional hurdles (to taking lawful industrial action) introduced by the Trade Union Act 2016 suggests that the provisions may be more motivated by an ideological hostility to the trade union movement than a genuine attempt to improve industrial relations or economic efficiency; a motivation that the Strasbourg Court should take into account when assessing the validity of the aims of the legislation.

It is also relevant to note that in *Demir*⁵⁴ the Grand Chamber of the European Court not only referred to international labour standards (and associated jurisprudence) when determining the extent of art.11 rights and the disproportionality of the Turkish law but also the legal consensus amongst Contracting States to the Convention. The provisions of the Trade Union Act 2016 have developed controls on picketing and balloting far beyond regulatory requirements in Europe. Some regulation over picketing and balloting is not unusual prior to industrial action, but no member of the Council of Europe regulates these industrial activities to such an extent as the UK.

⁵⁰ *Gustaffsson v Sweden* (1996) 22 E.H.R.R. 409.

⁵¹ See <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/workplacedisputesandworkingconditions/articles/labourdisputes/2015> [Accessed 19 August 2017].

⁵² *Demir* (2009) 48 E.H.R.R. 54.

⁵³ In applying this principle the Strasbourg Court rejected the Turkish government’s broad and unsubstantiated view that the ban on collective bargaining was justified in order to limit industrial disorder.

⁵⁴ *Demir* (2009) 48 E.H.R.R. 54.

For a challenge to these provisions in the Trade Union Act 2016 to succeed at Strasbourg may depend on the European Court's current attitude to the "margin of appreciation" doctrine. In *RMT v United Kingdom*⁵⁵ the Strasbourg Court was willing to give the UK a wide "margin of appreciation" (the discretion states have in determining national law in areas of political or social sensitivity) when determining that a total ban on secondary action was not in violation of art.11. The Strasbourg Court classified secondary industrial action as an "accessory" activity rather than a "core" aspect of trade union freedom of association and held that if a restriction affects only an accessory aspect of trade union freedom, a wider margin of appreciation is permitted to signatory states when assessing whether the interference can be justified under art.11(2).⁵⁶ On this hierachal classification of strike action it is arguable that a "core" trade union activity such as primary strike action and associated picketing should attract a much narrower margin of appreciation than "accessory" secondary action.

It is undeniable, however, that the decision in *RMT v United Kingdom*⁵⁷ reflected a cautious attitude to the interpretation of art.11; mirroring a recent trend across the Convention of affording states a wide margin of appreciation in "sensitive" policy areas.⁵⁸ An alternative view is that the Court's ruling in *RMT v United Kingdom*⁵⁹ is an aberration; interrupting a more progressive line of case-law that have applied Convention doctrines to labour law violations in a more consistent and purposive manner. There have been a number of decisions at Strasbourg (not involving the United Kingdom) that have endorsed the understanding in *Demir*⁶⁰ and *Enerji Yapi-Yol Sen v Turkey*⁶¹ that strike action should be protected as an significant aspect of art.11 and that any restrictions should therefore be construed strictly.⁶² Furthermore, the Strasbourg Court in *Unite v United Kingdom*⁶³ referred to the Grand Chamber's judgment in *Demir*,⁶⁴ when confirming that the application of the "margin of appreciation" may be restricted in appropriate circumstances. Although the Court arguably failed to apply established Convention principles to the individual facts of the case (for possible "political" reasons, considered below) the Court did endorse the view that the breadth of the margin of appreciation depends on the nature and extent of the right and the applicable restrictions, the strength of the competing interests and the state's compliance with international instruments and the European consensus. By reference to these guidelines a contemporary challenge to the industrial action provisions of the Trade Union Act 2016 should be more likely to be successful—taking into account that the Strasbourg Court has unequivocally accepted art.11 protects the "right to strike", that the relevant "margin of appreciation" should be of a limited nature and that the Trade Union Act has significantly increased the level of interference—making it more difficult for the state to justify the provisions.

One major potential obstacle to an action at Strasbourg is the claim that the European Court has failed in recent years to examine cases involving the UK in a vigorous and consistent manner; aided by the absence of a system of judicial precedent. Ewing and Hendy⁶⁵ have argued robustly that that the several unsuccessful Strasbourg cases, noted earlier in this article, have created a de facto UK "opt out" of Convention protection for labour law violations; the Court has "... closed its doors to the British worker and their unions".⁶⁶ Although, in the UK context, persistent judicial, political and media criticism of

⁵⁵ *RMT* (2015) 60 E.H.R.R. 10.

⁵⁶ *RMT* (2015) 60 E.H.R.R. 10 at [87].

⁵⁷ *RMT* (2015) 60 E.H.R.R. 10.

⁵⁸ For further discussion of this theme, see M. Saul "The European Court of Human Rights' Margin of Appreciation and the Process of National Parliaments" (2015) 15 H.R.L.R. 745.

⁵⁹ *RMT* (2015) 60 E.H.R.R. 10.

⁶⁰ *Demir* (2009) 48 E.H.R.R. 54.

⁶¹ *Enerji* (App. No.68959/1).

⁶² See as examples, *Cerikci v Turkey* (App. No.33322/07), judgment of 13 October 2010; *Danilenkov v Russia* (App. No.67336/01), judgment of 10 December 2009; *Veniamin v Ukraine* (App. No.48408/12), judgment of 2 January 2015.

⁶³ *Unite v United Kingdom* (App. No.65397/13), judgment of 3 May 2016.

⁶⁴ *Demir* (2009) 48 E.H.R.R. 54.

⁶⁵ K.D. Ewing and J. Hendy, "Article 11(3) of the European Convention on Human Rights" [2017] E.H.R.L.R. 356.

⁶⁶ Ewing and Hendy, "Article 11(3) of the European Convention on Human Rights" [2017] E.H.R.L.R. 356 at 361.

“activism” in the European Court have had a malign influence on decision making at Strasbourg, if these judgments (such as *RMT v United Kingdom*⁶⁷) are perceived in the future as an attempt at appeasing UK critics of the Strasbourg Court this should weaken their authority and influence.

It remains to be seen whether the observations by the Strasbourg Court in *RMT v United Kingdom*,⁶⁸ and in other UK cases, are used as a justification to reject the argument that the industrial action provisions in the Trade Union Act are in violation of art.11. An optimist may point to the existing Strasbourg case-law, noted earlier (in decisions concerning other signatory states), that restate and apply relevant and expansive Convention principles on the nature and scope of art.11 rights in a more forceful and apt manner. Furthermore, it may be the case that the European Court will revert to a more critical and considered analysis of UK labour law once it becomes clear that their emollient decision-making has had little or no impact on political or media criticism in the UK of the Strasbourg process. If the criticism of European institutions generally becomes more strident as a consequence of conflict over the “Brexit” negotiations, the Court may come to this conclusion sooner, rather than later.⁶⁹

As a result of recent experience at Strasbourg, trade unions may well have become more reluctant to litigate at Strasbourg. Although a “test case strategy” is a dangerous course of action (as each failure can be used by government as a vindication of its legal policy) it may only be a matter of time before the European Court of Human Rights returns to the principles stemming from cases such as *Demir*.⁷⁰ When that happens the considered judgment of the Strasbourg Court is likely to be that the balloting and picketing provisions in the Trade Union Act 2016 are incompatible with the Convention and in violation of art.11 safeguards.

⁶⁷ *RMT* (2015) 60 E.H.R.R. 10.

⁶⁸ *RMT* (2015) 60 E.H.R.R. 10.

⁶⁹ An issue for future consideration is the application of the Charter of Fundamental Rights of the European Union to UK strike law. The right to associate in trade unions is included in art.12 of the Charter and essentially repeats the wording of art.11 of the Convention. Although the EU Charter is only justiciable where matters of EU law are in dispute the Charter does have domestic legal authority. This was confirmed by the Supreme Court in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 where it was held that in certain circumstances UK law can be overridden where it is in conflict with the principles of the Charter. However, a potentially promising line of enquiry on the possible impact and scope of the Charter will be severely circumscribed if the European Union (Withdrawal) Bill currently proceeding through Parliament passes without amendment as it provides that the Charter will no longer have legal effect in the UK post-Brexit.

⁷⁰ *Demir* (2009) 48 E.H.R.R. 54.

Case Analysis

Joannou v Turkey: An Important Legal Development and a Missed Opportunity

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✉ Cyprus; Delay; Enforcement; Protection of property; Right to effective remedy; Right to fair trial

Abstract

This article analyses Joannou v Turkey, the latest judgment of the European Court of Human Rights addressing the issue of forced displacement in Cyprus. Situating Joannou within the Court's forced displacement jurisprudence, which relates both to the Cypriot and other frozen conflicts, it argues that the case is an important legal development and, at the same time, a missed opportunity. On the one hand, Joannou builds on existing case-law by offering additional guidance for the development of the Immovable Property Commission, the body set up to remedy displaced Greek Cypriots. On the other, it argues that both the Court and the Republic of Cyprus missed an opportunity to use the case as a springboard for improving the procedures followed and the remedies provided by the Commission.

Introduction

On 12 December 2017, the Chamber of the European Court of Human Rights ("the Court") delivered *Joannou v Turkey*,¹ its latest judgment in the saga of Greek Cypriot forced displacement cases.² Previous case-law of the Court had found Turkey responsible for violations of property rights of Greek Cypriots in the areas not under the control of the Republic of Cyprus³ and determined that the Immovable Property Commission ("IPC" or "Commission") could provide an effective domestic remedy to these violations.⁴ *Joannou v Turkey* develops this jurisprudence by being the first case since the Court's endorsement of the Commission in 2010, to find that the IPC did not provide an effective remedy. This ruling is significant for two reasons: first, it gives rise to welcome guidance by the the Court on the practices and procedures that should be followed by a domestic remedying body, like the IPC. Secondly, it reasserts the Court's readiness to exercise a supervisory function over the implementation of this guidance and guarantee the effectiveness of the Commission. At the same time, however, *Joannou* presents a missed opportunity both on behalf of the Court and the Republic of Cyprus. On the one hand, the Court's unwillingness to examine in more detail the processes followed by the IPC has arguably encouraged the continuation of obscure practices and undermined a sense of procedural justice among the applicants. On the other, the Republic of Cyprus' refusal to intervene as a third party in this case resulted in a lost opportunity to present evidence relating to a potential substantive violation of the right to property.

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¹ *Joannou v Turkey* (App. No.53240/14), judgment of 12 December 2017 ("Joannou").

² For the Turkish Cypriot forced displacement case-law of the Court, see *Kazali v Cyprus* (App. No.49247/08), judgment of 6 March 2012 and N. Hadjigeorgiou, "Case note on Kazali and Others v Cyprus" (2013) 2(1) *Cyprus Human Rights Law Review* 103.

³ *Loizidou v Turkey (Merits)* (1997) 23 E.H.R.R. 513; *Cyprus v Turkey* (2002) 35 E.H.R.R. 30.

⁴ *Demopoulos v Turkey* (2010) 50 E.H.R.R. SE14 ("Demopoulos").

The facts of the case and decision of the Court

The applicant's central argument in *Joannou* concerned delays in the proceedings of the IPC, which allegedly constituted violations of art.6 (right to fair trial), art.13 (right to an effective remedy), art.14 (freedom from discrimination) and art.1 of Protocol No.1 (right to property, henceforth "A1P1") of the European Convention on Human Rights. In particular, Ms Joannou had submitted her application to the IPC in May 2008 and proceedings were still pending when the Court delivered its judgment nine-and-a-half years later. This delay, it was argued, was caused by the unreasonable demands of the Office of the Attorney-General, which was representing the authorities of the "Turkish Republic of Northern Cyprus" ("TRNC"), and the unwillingness or inability of the Commission to put a stop to these.

A timeline of events illustrates this argument⁵: when the applicant filed her claim with the Commission, she had included documents showing that she was the owner of 18 *döñüm* of land in the areas not under the control of the Republic, over which Turkish authorities and the IPC have jurisdiction. The documents showed that the land in question had originally belonged to her mother and aunt, who then transferred it to the applicant. When the Attorney-General responded to the applicant's claim in May 2010, he argued that Ms Joannou had not demonstrated that she was the legal heir of the original owners and that she should submit additional documents that proved this. The problem arose from the fact that the aunt's name was spelled in slightly different ways in various documents that had been submitted to the IPC, which the Attorney-General contended, prevented him from being certain about the identities of the parties. Thus, clarificatory documents of this nature were requested and submitted four more times during the period between November 2012 and April 2013. In late 2013, the Attorney-General indicated that he could make the applicant an offer for a friendly settlement, if she provided additional documents showing the dates of birth and death of the two original owners. Further delays ensued, with no substantive developments taking place, until the Court delivered its judgment in December 2017.

Turkey responded by arguing that any delays were the result of the applicant's bad communication with her lawyers and not the fault of the Commission. Rejecting this, the Court held that the applicant had adequately proven her identity and legal claim to the properties, and any delay should be attributed to the "TRNC" authorities. Specifically, much time could have been saved, had the IPC identified the controversial points from the outset of the case and gathered evidence in relation to them in a more efficient manner.⁶ Its failure to do so, meant that it "did not act with coherence, diligence and appropriate expedition", which resulted in a unanimous finding of a procedural violation of A1P1.⁷ Moreover, the majority of the Court reasoned that since the applicant's central grievance concerned her inability to be remedied for a violation of her right to property, her complaint should be examined solely under this article.⁸ Dissenting on this point, Judge Karakaş held that in addition to a violation of the right to property, an examination of the complaint under art.6 would have been more appropriate. This makes it the first time that a Turkish judge at the Court agrees with the majority that there has been a human rights violation in a Greek Cypriot displacement case.

Joannou as an important legal development

On the face of it, *Joannou* looks like a dry, procedural decision on delays in the proceedings of an obscure body, with limited wider implications. However, the importance of the case becomes clear when it is situated in, and understood as part of, the Court's more general jurisprudence on remedying displaced persons both in Cyprus and other frozen conflicts. The first such forced displacement case to have reached the Court was *Loizidou v Turkey*, in which the applicant successfully made the ground-breaking argument

⁵ This is detailed in *Joannou* (App. No.53240/14) at [7]–[38].

⁶ *Joannou* (App. No.53240/14) at [104].

⁷ *Joannou* (App. No.53240/14) at [116].

⁸ *Joannou* (App. No.53240/14) at [57].

that the presence of Turkish troops in the north of Cyprus since 1974, and the military, economic and political control that Turkey exercises in the area, rendered it—and not the Republic of Cyprus—responsible for any violations that took place there.⁹ Building on this reasoning, the Court held that preventing the applicant from accessing her property in the areas not under the control of the Republic, or using it in any way, constituted a violation of A1P1.¹⁰ Since the “TRNC” Constitution considered the relevant Greek Cypriot properties as voluntarily “abandoned”, rather than forcibly evacuated during the war, it did not allow for the provision of an effective remedy to applicants like Ms Loizidou. Exceptionally therefore, *Loizidou* gave Greek Cypriot displaced people direct access to the Court, without a need to exhaust domestic remedies.

In the early forced displacement cases against it, Turkey refused to accept any responsibility, contending that even if a violation had taken place, which it disputed, this was due to actions of the authorities of the “TRNC”, an independent and sovereign state.¹¹ Following the Court’s consistent rejection of this argument,¹² Turkey changed tactics in *Xenides-Arestis*, when it submitted that the case should be found inadmissible because the applicant had failed to exhaust the newly established domestic remedy of the IPC.¹³ The Court accepted in principle that the Commission could offer an effective remedy, but rejected the argument on the facts of the case because the IPC’s procedures, and the substantive remedies it provided, suffered from several deficiencies. In delivering this decision, the Court offered the first preliminary guidance on the procedures and safeguards that should be adopted, and remedies that should be made available, by bodies such as the Commission. It indicated that members of the IPC should not have a conflicting interest (e.g. by themselves occupying properties owned by Greek Cypriot displaced persons); that the Commission should also consist of international members, and not just Turkish Cypriots; and that it should allow applicants to ask for restitution, in addition to the remedy of compensation.

Turkey swiftly complied with this guidance by amending the IPC Law, so when the next case—*Demopoulos v Turkey*—was heard, it was held that the Commission provided an effective remedy that applicants should exhaust before resorting to the Court.¹⁴ *Demopoulos* was a game changer for Greek Cypriots who lost their direct access to the Court, but it also provided additional guidance for the IPC’s more effective operation. It indicated that it would not constitute a problem if the majority of applicants were remedied through compensation¹⁵; that the Commission should be accessible to the applicants in terms of its language of operations (which was satisfied if proceedings took place in Turkish and were translated in English)¹⁶; and that it should remain independent and impartial.¹⁷

Since *Demopoulos*, a range of cases concerning the IPC have reached the Court. In all of them, the Court endorsed the remedy that had been ordered by the IPC and confirmed the effectiveness of the remedying body.¹⁸ It also indicated that remedies that had not been discussed in detail in *Demopoulos*, like the remedy of exchange, were compatible with the Court’s jurisprudence.¹⁹ In one case, *Meleagrou v Turkey*, the Court accepted the argument that quasi-judicial bodies like the IPC were subject to the requirements of art.6, but did not find that the four-and-a-half-year period of proceedings constituted an unreasonable delay and a violation of the right to a fair trial.²⁰ Finally, in *Loizou v Turkey* the Court held

⁹ *Loizidou v Turkey (Preliminary Objections)* (1995) 20 E.H.R.R. 99 at [62].

¹⁰ *Loizidou (Merits)* (1997) 23 E.H.R.R. 513 at [63].

¹¹ *Loizidou (Preliminary Objections)* (1995) 20 E.H.R.R. 99 at [47].

¹² *Loizidou (Preliminary Objections)* (1995) 20 E.H.R.R. 99 at [62]; *Loizidou (Merits)* (1997) 23 E.H.R.R. 513 at [56]; *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 at [77].

¹³ *Xenides-Arestis v Turkey* (2011) 52 E.H.R.R. 16.

¹⁴ *Demopoulos* (2010) 50 E.H.R.R. SE14 at [127].

¹⁵ *Demopoulos* (2010) 50 E.H.R.R. SE14 at [119].

¹⁶ *Demopoulos* (2010) 50 E.H.R.R. SE14 at [126].

¹⁷ *Demopoulos* (2010) 50 E.H.R.R. SE14 at [120].

¹⁸ See, e.g. *Alexandrou v Turkey* (App. No.16162/90), judgment of 28 July 2009; *Angoulos Estate Ltd v Turkey* (App. No.36115/03), judgment of 9 February 2010.

¹⁹ *Eugenia Michaelidou Developments Ltd v Turkey* (2004) 39 E.H.R.R. 36.

²⁰ *Meleagrou v Turkey* (App. No.14434/09), judgment of 2 April 2013.

that a period of three years and seven months for the completion of the IPC proceedings was not an unreasonable amount of time and did not result in a violation of art.6 or A1P1.²¹

Thus, *Joannou*—so far the only case in which the Court found that the practices of the Commission fell short of human rights standards—is an important development, as it arguably provides the most detailed recommendations since *Demopoulos* about the procedures that should be followed by the IPC. In particular, it sets an upper time limit, which did not exist so far, over which the remedies provided by the Commission will be considered ineffective. Although the Court had previously addressed the prolonged proceedings argument in *Meleagrou* and *Loizou*, the specific facts of these cases, which did not resemble those of a typical IPC case, had not given rise to adequate recommendations on this issue. The Court has indicated in previous case-law whether delays will result in a violation:

“[M]ust be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.”²²

Since most IPC cases are similar in terms of the listed criteria, the ruling in *Joannou* can give rise to a fairly accurate indication of when delays render the Commission ineffective.

Moreover, the case is significant because it reasserts the Court’s willingness to continue scrutinising the practices of the IPC, even after it has determined that these generally result in effective remedies. The Court made it clear that its finding in this case does not impact on the general effectiveness of the Commission since:

“[I]t is perfectly possible that a remedy that is in general found to be effective operates inappropriately in the circumstances of a particular case.”²³

Thus, Greek Cypriots are still under an obligation to resort to the IPC in order to be remedied for violations of their right to property. At the same time, however, *Joannou* paves the way for the launching of other cases against the IPC before the Court. Following *Demopoulos*, concerns were raised (mostly by Greek Cypriot academics and commentators²⁴) that by endorsing the IPC, the Court had washed its hands off the Greek Cypriot displacement issue. This case suggests that the Court’s approach is, in fact, more nuanced than that. While it gave Turkey the benefit of the doubt when it recognised the effectiveness of the IPC in *Demopoulos*, it moderated this in *Joannou* by remaining vigilant that the applicants actually received what they had been promised. This was explicitly asserted when the Court noted that:

“[I]t remains attentive to the developments in the functioning of the IPC remedy and its ability to effectively address Greek Cypriot property claims.”²⁵

Finally, *Joannou* could potentially provide guidance for the establishment of remedying bodies similar to the IPC, in other frozen conflicts around Europe. While, originally, the only frozen conflict that had generated European Court of Human Rights case-law was the one relating to Cyprus, recently the Grand Chamber delivered two judgments—*Chiragov v Armenia* and *Sargsyan v Azerbaijan*—on the remedying of forced displacement in Nagorno-Karabakh.²⁶ In the merits judgments of both cases the Court made extensive references to its Cyprus case-law and emphasised the respondent States’ obligation:

²¹ *Loizou v Turkey* (App. No.50646/15), judgment of 3 October 2017.

²² *Frydlender v France* (2001) 31 E.H.R.R. 52 at [43].

²³ *Joannou* (App. No.53240/14) at [86].

²⁴ See E. Katselli-Proukaki, “The Right of Displaced Persons to Property and to Return Home after Demopoulos” (2014) 14 *Human Rights Law Review* 701; L. Loucaides, “Is the European Court of Human Rights Still a Principled Court of Human Rights after the Demopoulos Case?” (2011) 24 *Leiden Journal of International Law* 435.

²⁵ *Joannou* (App. No.53240/14) at [86].

²⁶ *Chiragov v Armenia* (2016) 63 E.H.R.R. 9; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4.

“To establish a property claims mechanism … allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.”²⁷

This obligation, was reiterated verbatim in the *Chiragov* and *Sargsyan* just satisfaction judgments, which were delivered on the same day as *Joannou*.²⁸ During the same period, Ukraine submitted two inter-state applications against Russia—*Ukraine v Russia (I)*²⁹ and *Ukraine v Russia (IV)*³⁰—that relate to the latter’s exercise of effective control over Crimea and the consequent alleged violations of several Convention rights, including A1P1. In light of the political analysis that Eastern Ukraine will, or has already, become a frozen conflict, the Court is likely to follow its established case-law on Cyprus, including the guidance it provided in *Joannou*, when responding to these A1P1 arguments.³¹

***Joannou* as a missed opportunity**

Despite its importance in developing the law, this case also created opportunities to deliver additional guidance on the way the IPC should be operating, which neither the Court, nor the Republic of Cyprus, utilised fully. Specifically, the Court missed an opening to push the IPC into adopting more transparent and accessible procedures, while the Republic of Cyprus should have intervened and provided evidence pointing to a further violation of the substantive right to property.

The first instance of a missed opportunity by the Court concerns its reluctance to address the fact that the Commission has not been complying with the IPC Law³² and the secondary legislation (“the Rules”)³³ that relate to it. According to these, the IPC operates in a similar manner to a civil court: the applicant makes a claim for the provision of a remedy, the Attorney-General responds with a defence, and after the two sides have presented their arguments and evidence, the IPC decides whether a remedy should be granted to the applicant and what this entails.³⁴ If the remedy is compensation, the Commission must determine the appropriate amount by considering a range of factors listed in the Law.³⁵ Yet the facts of *Joannou* make it clear that this was not the procedure followed by the Commission. Instead of the parties participating in proceedings that resembled a civil case, they engaged throughout the nine-and-a-half-year period in direct negotiations with each other. Eventually, the Attorney-General indicated that he was willing to make an offer to the applicant for a given amount, without any explanation of how this was calculated. Notably, this process did not take place in tandem with the procedure described in the Law, but as an alternative to it.

In principle, there is nothing wrong with opting for informal negotiations, rather than quasi-judicial proceedings. In fact, the former is likely to be less confrontational and its outcome more readily acceptable by the applicant, when compared to a judicially imposed remedy. What is problematic, however, is the fact that this process is regularly used by the Commission, without it being outlined, or its safeguards discussed, anywhere in the Law.³⁶ The IPC’s overwhelming reliance on this procedure is confirmed by

²⁷ *Chiragov* (2016) 63 E.H.R.R. 9 at [199]; *Sargsyan* (2017) 64 E.H.R.R. 4 at [238].

²⁸ *Chiragov v Armenia* (App. No.13216/05), judgment of 12 December 2017; *Sargsyan v Azerbaijan* (App. No.40167/06), judgment of 12 December 2017.

²⁹ *Ukraine v Russia* (App. No.20958/14) (pending); see also, Press Release issued by the Registrar of the Court, “European Court of Human Rights Deals with Cases concerning Crimea and Eastern Ukraine” ECHR 345 (2014), 16 November 2014.

³⁰ *Ukraine v Russia (IV)* (App. No.42410/15) (pending); Press Release issued by the Registrar of the Court, “European Court of Human Rights Communicates to Russia New Inter-State Case concerning Events in Crimea and Eastern Ukraine” ECHR 296 (2015), 1 October 2015.

³¹ International Crisis Group, “Can Peacekeepers Break the Deadlock in Ukraine?” Europe Report No.246 (Brussels/Kyiv/New York/Vienna/Washington, 15 December 2017).

³² (“TRNC”) Law No.67/2005 (“Law for the Compensation, Exchange and Restitution of Immovable Properties which are Within the Scope of Sub-paragraph (B) of Paragraph 1 of Article 159 of the Constitution”) (henceforth, (“IPC Law”).

³³ (“TRNC”) Rules Made under Sections 8(2)(A) and 22 of the Law for the Compensation, Exchange and Restitution of Immovable Properties which are Within the Scope of Sub-paragraph (B) of Paragraph 1 of Article 159 of the Constitution.

³⁴ IPC Law, s.16; Rules, ss.7 and 9.

³⁵ IPC Law, s.8(4).

³⁶ N. Hadjigeorgiou, “Remedying Displacement in Frozen Conflicts: Lessons from the Case of Cyprus” (2016) 18 *Cambridge Yearbook of European Legal Studies* 152.

official statistics, which indicate that by January 2018, 965 cases had been settled through informal negotiations and only 27 had gone through the hearing process detailed in the Law.³⁷ Ultimately, the Court found a procedural violation of A1P1 because of the “passive attitude on the part of the IPC”,³⁸ but did not acknowledge that this impassiveness was partly because of the role it had adopted in observing the negotiations between the parties, rather than actively resolving their disagreement in the way provided for by the Law.

This approach is surprising in light of contradictory case-law from the Court on the matter. The Court has indicated in the past that the requirement in A1P1 that any interference with the right to property is “provided by law”, means not only that this has a basis in national law, but also that the law is accessible, precise and foreseeable.³⁹ As a result, it has found violations of the right to property in cases where there were inconsistencies between what was described in the law and what was happening on the ground.⁴⁰ Yet, despite the existence of established case-law on this point, and clear evidence that the “TRNC” authorities did not apply the domestic legislation precisely and foreseeably, the Court allowed this practice to continue.

Further, the Court should have taken steps to enhance the IPC’s effectiveness by commenting on the standard of proof used during its proceedings. The Court referred in detail to the Attorney-General’s numerous requests for additional documents and held that it was the Commission’s responsibility to establish more efficient procedures for gathering evidence. It failed to note, however, that arguably part of the reason the IPC had not stopped the Attorney-General from making these requests is because, according to s.6(2) of the IPC Law, “the burden of proof shall rest with the applicant who must satisfy the Commission *beyond any reasonable doubt*” of his/her identity and legal claim to the property.⁴¹ The Court’s uncritical stance towards this high standard of proof is regrettable because it is neither in accordance with the civil proceedings described in the IPC Law, nor with guidance from its previous case law, namely that the remedying mechanism established by the respondent States “should be easily accessible and provide procedures operating with flexible evidential standards”.⁴²

The last missed opportunity in *Joannou* lies, not with the Court, but with the Republic of Cyprus. This concerns the alleged substantive violation of the right to property and, in particular, whether the compensation amount granted to the applicants through the IPC process constitutes an adequate remedy for the harm they have suffered. Of the 990 applicants that have been remedied by the Commission to date, 873 of them have received compensation.⁴³ This is in the mist of allegations by a wide range of Greek Cypriot stakeholders, including the Republic of Cyprus itself, that the compensation amount they receive is so low that it does not constitute an effective remedy in the first place.⁴⁴ These allegations are best illustrated by the vastly differing amounts quoted by the two parties in *Joannou*, with the applicant asking for €2,285,000 and the Attorney-General offering £60,000, approximately €80,000.

Some guidance on bridging this gap should have been welcome by all, not least the Republic of Cyprus. Yet regrettably, and uncharacteristically in light of its practices in previous Greek Cypriot forced displacement cases, the Republic refused to intervene in the case and missed the opportunity to persuade the Court to rule on this issue.⁴⁵ The Court has already provided some guidance on what is an appropriate compensation amount in *Demopoulos* when it noted that, in some instances, the valuations relied on by the applicants were exceptionally high because they included very high interest rates and were based on

³⁷ Presidency of the Immovable Property Commission, “Monthly Bulletin” Issue 98, 10 January 2018 at http://www.tamk.gov.ct.tr/dokuman/istatistik_ocak18ing.pdf [Accessed 12 March 2018] (“Presidency of the IPC, ‘Bulletin’”). These numbers do not take into account revoked cases.

³⁸ *Joannou* (App No.53240/14) at [97].

³⁹ *Carbonara v Italy* (App. No.24638/94), judgment of 30 May 2000 at [64]; *Beyeler v Italy* 33 E.H.R.R. 52 at [109].

⁴⁰ *Baklanov v Russia* (App. No.68443/01), judgment of 9 June 2005 at [46].

⁴¹ My emphasis.

⁴² *Chiragov v Armenia* (2016) 63 E.H.R.R. 9 at [199]; *Sargsyan* (2017) 64 E.H.R.R. 4 at [238].

⁴³ Presidency of IPC, “Bulletin”.

⁴⁴ *Demopoulos* (2010) 50 E.H.R.R. SE14 at [121].

⁴⁵ *Joannou* (App. No.53240/14) at [5].

unrealistic assumptions about the properties' profitability. Nevertheless, this guidance remained general because the applicants in *Demopoulos* had not actually been compensated by the IPC, since they had failed to resort to it in the first place. *Joannou* was the first case in which each side had given its preferred compensation amount, without the applicant having already accepted the Attorney-General's offer, thus giving an opportunity to the Court to choose between the two alternatives. In light of this, had the Republic of Cyprus intervened, it could have provided information, based on Land Registry records, on the valuation of specific properties and compared them with compensation amounts awarded by the IPC. In turn, this could have given the Court the perfect opportunity to provide meaningful guidance on the substance of A1P1.

Conclusion

Joannou, the latest in the saga of Greek Cypriot displacement cases, constitutes both an important legal development and a missed opportunity. On the one hand, it develops the growing jurisprudence of the European Court of Human Rights on frozen conflicts by offering guidance on the best way to ensure the effectiveness of remedying bodies, like the Commission. Moreover, the case is of interest to Cypriots more specifically, since it sends the message that the Court is willing to continue playing an active role in the protection of human rights in the area. On the other hand, *Joannou* presents a missed opportunity both on behalf of the Court and the Republic of Cyprus itself. The Court could have provided greater guidance for the effectiveness of the Commission by finding a violation due to the IPC's failure to comply with its own establishing legislation. It could have also raised as a potential problem the excessively high standard of proof used by the Commission, which makes it much harder for applicants to access the remedies the IPC was established to provide in the first place. Finally, the Republic of Cyprus should have intervened and provided evidence to support its position that the compensation amounts awarded by the IPC do not constitute an effective remedy. These missed opportunities suggest that *Joannou* is not the last of the Greek Cypriot displacement cases; important as it might be, the ground-breaking case that is to potentially determine the value of 36% of the island of Cyprus, is yet to come.

Case and Comment

Selected decisions from the European Court of Human Rights from November and December 2017

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Negligent medical treatment

Post-operative care—negligence—procedural limb—substantive limb—medical treatment—delays—right to life—art.2

☞ Clinical negligence; Death; Delay; Duty to undertake effective investigation; Portugal; Right to life

Lopes de Sousa Fernandes v Portugal (Application No.56080/13)

European Court of Human Rights (Grand Chamber): Judgment of 19 December 2017

Facts

The applicant in this case, Ms Maria Isabel Lopes de Sousa Fernandes (the applicant) who is a Portuguese national, was the wife of Mr António Rui Calisto Fernandes (the deceased). The case concerned the negligent mistreatment of the applicant's husband at a variety of hospitals over the course of several years. The deceased was first admitted to the hospital of Vila Nova de Gaia (CHVNG) where he was to undergo a nasal polypectomy. After having been discharged, the deceased began to suffer from severe headaches. Having returned to hospital he was diagnosed with a psychological disorder and was prescribed tranquillisers. It was recommended that the deceased should leave the hospital, but the applicant objected and the next day the deceased was re-examined by a new medical team who diagnosed him with bacterial meningitis. Accordingly, the deceased was transferred to intensive care until 5 December 1997 upon which time he was transferred to the general medicine department and examined by Doctor JV. The deceased was discharged from hospital on 13 December 1997 it being thought that his health was stable. However, his pain persisted, and he returned to the hospital three times resulting in being re-admitted twice. On 3 February 1998 Doctor JV authorised his release, however, after his pain continued to worsen he was

re-admitted on the 17 February 1998 to the general hospital of Santo António in Oporto. It was there that he died on 8 March 1998.

Following her husband's death, the applicant sent a letter to the Inspector General for Health in 2000 who subsequently ordered an investigation. The investigation issued two reports, one in 2002 and, following an appeal by the applicant against the findings of the 2002 report another was issued in 2005, both of which concluded that the deceased had been treated properly. This led the Inspector General to close the case. However, the applicant objected and new assessments, conducted in 2006, found that Doctor JV had failed to act in an appropriate and adequate manner when he decided to discharge the deceased on 13 December 1997.

In the meantime, in 1998, the applicant also contacted the Portuguese Medical Association. As a result, Doctor JV was subject to disciplinary procedures before the Medical Association however, in 2001, it concluded he had acted appropriately.

In 2002 the applicant also filed a complaint with the Oporto criminal investigation and prosecution department for the charge of manslaughter. Following the complaint, Doctor JV was charged with manslaughter but was acquitted by the District Court, in 2009, on the ground that there was no evidence to show he had been responsible for the death of the deceased. In 2003 the applicant then filed a new complaint with the District Court for damages following the losses she had sustained as a result of her husband's death. In 2012, these claims were dismissed on the grounds that her husband had undergone medical treatment which was adapted to his clinical situation and subsequently no damages could be sought. The applicant appealed that decision to the Administrative Supreme Court which dismissed her appeal on 26 February 2013. Finally, the applicant brought a claim to the European Court of Human Rights (the Court) alleging that her husband's right to life had been violated by the Portuguese Government (the Government) as the hospitals at which her husband had been treated were negligent in their diagnosis of a hospital-acquired infection. Her application also complained of prolonged delays in providing the deceased with treatment, the length of domestic procedures and the fact she was not informed as to why her husband's death had deteriorated so quickly. Although the applicant also brought her claim under arts 6 and 13 of the Convention the Court found that it was appropriate to examine the complaint solely under the heading of art.2.

Held

- (1) In reversing the judgment of the Chamber, the Court found that there had been no violation of the substantive element of art.2 (15 votes to two).
The Court reiterated that the only circumstances under which a Contracting State may be found to have violated the substantive element of art.2 in cases of alleged medical negligence is when the following cumulative conditions are met. First, the actions by the medical professionals which are subject to the complaint must go beyond a mere error or a situation of medical negligence and must be of such severity so as to amount to circumstances where it can be said that the patient was denied lifesaving treatment; second, the dysfunction complained of must be of a structural nature so as to engage the positive obligation of the state and cannot simply comprise of individual instances of procedures going badly; third, there must be a causal link between the systematic dysfunction complained of and the harm caused to the patient; fourth the dysfunction complained of must have occurred as a result of the state's failure to ensure the effective functioning of a regulatory framework. In applying these criteria to the facts of the case, the Court held that there were no circumstances or any expert evidence which would conclusively indicate that the state had failed to meet its positive obligation to provide and maintain a regulatory framework.
- (2) The Court found that there had been a violation of the procedural aspect of art.2 (unanimous).

The Court stated that in order for a Contracting State to be regarded as being in compliance with its procedural obligation the procedures to which applicants have access must not merely exist in theory but must also function effectively in practice. Further, the domestic system must be entirely independent from those who are implicated by the events in question. The Court also held that to be in compliance with the procedural limb of art.2 the proceedings must be completed within a reasonable time frame. The Court emphasised that completion within a reasonable time frame is even more essential in cases concerning alleged medical negligence as it is only through resolution of domestic proceedings that hospitals within the Contracting State will be able to examine their internal workings and address any procedural problems which arise as a result of the domestic proceedings. Building on this point, the Court opined that lengthiness of proceedings in medical cases is a strong indicator that the Contracting State has failed to meet the procedural requirements of art.2. In applying the above to the present case, the Court found that there was no suggestion that the domestic procedures were not independent or theoretically effective. Dealing first with proceedings before the Inspector General for Health (IGH) the Court criticised the process for taking two years to simply open an investigation, a further year to appoint an inspector to head it and as a result the applicant's first opportunity to present evidence was not until three years and six months after she had contacted the IGH. The Court therefore found that on these facts alone the investigation lacked promptness and failed to meet the procedural requirements of art.2.

The Court then dealt with the proceedings which were brought before the Portuguese Medical Association (MA). The Court found that the MA had responded promptly to the applicant's letter and had convened a panel of experts to examine the case quickly. However, with regards to the overall length of the proceedings the Court found that although the four years and five months for which they were ongoing is not an unreasonable amount of time per se, the Court still found the length of time unreasonable owing to the fact that the proceedings heard no evidence and consisted merely of examining written evidence. The proceedings before the MA subsequently failed to satisfy the procedural limb of art.2.

Finally turning to the criminal proceedings, the Court first stated that although the criminal proceedings began in 2002 when the actual investigation began it was solely based on the report which was compiled by the IGH in 2006 and, as such, the proceedings were too narrow in scope to be regarded as effective. Second, the Court found that the proceedings where neither prompt nor was their overall length reasonable given that they lasted in total for six years and eight months. The Court subsequently found that the criminal proceedings also failed to meet the procedural requirement of art.2.

Cases considered

Arskaya v Ukraine (App. No.45076/05), judgment of 5 December 2013

Asiye Genç v Turkey (App. No.24109/07), judgment of 27 January 2015

Bajić v Croatia (App. No.41108/10), judgment of 13 November 2012

Calvelli v Italy (App. No.32967/96), judgment of 17 January 2002

Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania (App. No.47848/08), judgment of 17 July 2014

Dodov v Bulgaria (2008) 47 E.H.R.R 41

Glass v United Kingdom (2004) 39 E.H.R.R 15

Oyal v Turkey (2010) 51 E.H.R.R. 30

Ramsahai v Netherlands (2008) 46 E.H.R.R 43

Powell v United Kingdom (2000) 30 E.H.R.R 152
Vo v France (2005) 40 E.H.R.R 12

Commentary

The present decision did little in terms of crafting new legal principles but is instead a good example of the Court reaffirming and clarifying previously established jurisprudence. The finding of the Court that the substantive element of art.2 is not engaged in cases concerning the medical negligence of one practitioner is in keeping with previous jurisprudence. Also, the clarity with which the Court set out the criteria which must be breached in order to engage the substantive limb of art.2 is undoubtedly welcome to legal practitioners and provides a clear position from which future cases before the Court can be judged.

However, in contrast to the above, the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque criticises the criteria for violating the substantive limb set out by the majority for being too narrow in its scope. Judge Pinto de Albuquerque contended that the authorities cited by the Court and its previous jurisprudence did not support the interpretation which was offered by the majority and suggested that the majority ought to have found a violation of the substantive limb as, in his view, the failing was of a systematic nature.

This is a view which was also shared by Judge Serghides who argued that the view of the majority, namely that in order to trigger the substantive limb of art.2 the dysfunction must be systematic or structural, is incorrect. Judge Serghides reached this position by reasoning that in no other situation in which the substantive limb of art.2 is triggered does the jurisprudence of the Court require the problem at fault to be systematic or structural. Accordingly, Judge Serghides argued that the Court had missed an opportunity to abandon the *Powell* principle and realign the jurisprudence relating to medical cases with the jurisprudence relating to art.2 in its entirety.

Adoption and right to respect for family life

Adoption—best child's interest—duty to facilitate family reunification—margin of appreciation of national authorities on children's best interests—parental rights—right to respect for family life—art.8

Adoption; Children's welfare; Foster care; Margin of appreciation; Norway; Proportionality; Right to respect for private and family life

Strand Lobben v Norway (Application No.37283/13)

European Court of Human Rights (Fifth section): Judgment of 30 November 2017

Facts

The present case concerns the right to respect for family life in the context of forced removal of parenting rights and subsequent authorisation to adopt a child in care by foster parents. The applicants were the mother of the child, Ms Strand Lobben, her son, X—subjected to the previous measures—her daughter, Y—sibling of the latter—and the maternal grandparents, each one individually considered. They claimed that the removal of the mother's parental authority over X and the subsequent authorisation of X being adopted violated their rights as guaranteed in art.8 of the Convention.

The conflict regarding Ms Strand Lobben's parental rights dates to her pregnancy in 2008, when she requested a late abortion. The hospital referred the case to child welfare authorities, which began intervening

before she gave birth to her son. She agreed to stay for three months after her child was born at a family centre. During her stay at this centre, she was joined by her mother. The staff became concerned about Ms Strand Lobben's parenting abilities as X lost considerable weight and showed signs of late development. The mother withdrew her consent to stay at the family centre because she had not been allowed to take her son home after her stay as she had demanded before moving to the centre. Her withdrawal led to compulsory care of X by putting him in a foster home and arranging visits from the mother, usually accompanied by the grandmother and sometimes also by the grandfather. Ms Strand Lobben appealed against this decision claiming that she could live with her son at her parents' house who were willing to help her. Considering the negative reports coming from the family centre staff and other experts, her subsequent appeals were rejected in consideration of her psychological and physical neglect towards her son. After this decision, the authorities were granted a care order, which was appealed by the mother. She submitted that the authorities had not tried less drastic interventions and that the decision was based on insufficient evidence. The care order was overturned, but a readjustment period was ordered before reunifying X with his family. During this period the mother was granted increased visiting rights, although throughout these visits she and her parents were considerably hostile to the foster parents, all of which distressed X. The authorities successfully appealed the previous decision, confirming the compulsory care order as the Norwegian High Court found that the care order was necessary for the child's welfare and that assistance measures for the mother were insufficient to allow her son to stay with her.

Almost a year after the previous litigation came to an end, in 2011 the child welfare authorities requested that the mother should be deprived of her parental responsibility over X and to grant X's foster parents permission to adopt him. Alternatively, the authorities proposed removing the mother's contact rights. Conversely, the mother applied for the termination of the care order or alternatively an extension of her contact rights. That same year she had given birth to Y and got married. The child welfare authorities considered that the mother was still incapable of giving X adequate care, deciding that the adoption would be in X's best interests. The applicant appealed against this decision, contending that there had been a wrongful evaluation of the evidence, stressing that her situation had changed considerably, having a good support system in her husband and extended family and was willing to accept help from the child welfare authorities. The decision was upheld. The judgment contrasted the situation of Y, where parenting abilities could improve with help from the authorities, with that of X, who was portrayed as a vulnerable child, easily stressed, and his mother was not able to demonstrate she understood his special care needs to the extent that it would create considerable risk of abnormal development to him. The mother had also vented her story on the internet, posting serious accusations against the child welfare authorities and the foster parents, which she admitted in court were untrue. The court granted the deprivation of parental responsibility and permitted the foster parents to adopt X. Both the High Court and the Supreme Court did not grant leave to appeal to the mother, therefore exhausting domestic remedies.

Held

- (1) The Court unanimously declared admissible the complaints of the first (the mother) and second (X) applicants and the other three (Y, the grandmother and grandparent) inadmissible (unanimous).
The Court dismissed the government's objection of a conflict of interests between the minor's and the natural mother's interests, disqualifying the latter to apply on the child's behalf too, as X's complaint concerns the decision to sever his ties with his biological mother and the proceeding in that regard. With respect to the remaining applicants, the Court stated that the right to respect for family life in the case of grandparents refers to the right of having reasonable contacts to maintain a normal grandparent–grandchild relationship, access which is normally at the discretion of the child's parents. Nonetheless, the Court did not take a

- stand on this matter as it sufficed to declare inadmissible the complaints because of the failure of these applicants to exhaust domestic remedies.
- (2) There had been no violation of art.8 (four votes to three).
 The Court considered that there was no positive development in the first applicant's competence throughout the three years in which she had had rights to access her son. With respect to the decision-making process before the national authorities, the Court considered it had been a fair process. With respect to the assessment of exceptional circumstances justifying the measures in question, the Court had in due regard the fact that the domestic authorities had the benefit of direct contact with all the persons concerned and reasoned that their decisions to deprive the mother's parental rights and to permit the child's adoption had been motivated by an overriding requirement pertaining to X's best interests.
 To evaluate the fairness of the decision-making process, the Court retorted to elements of procedural justice: if there were enough number of instances where the applicants could exercise their rights and impugn adverse decisions; if the applicants had legal representation; and the time dedicated to evaluating arguments and evidence before adopting a decision. The Court concluded affirmatively to the existence of fair procedures.
 Finally, with respect to the removal of parenting rights and authorising the adoption of X, the Court agreed with the conclusion of the national authorities that the social ties between X and his mother were very limited and that by permitting X adoption by his current foster parents would strengthen his sense of belonging with those whom he regarded as his parents. The Court also considered the distress suffered by X during his mother's visits. For the Court, this last element would play a relevant role as, in accordance to its own jurisprudence, adoption becomes an exceptional measure against parental rights in situations where there is still a latent conflict which could erupt into challenges to a child's particular vulnerability and need for security. In the present case, the Court stated that conflict has been a recurring theme, where the mother has played a relevant part, including her lack of regard on the harmful consequence for X in the long term caused by the public exposure and legal proceedings. Even though the Court addressed the improving situation of the applicant, also acknowledged by the national authorities, it concurred with the latter regarding to the applicants' fundamental limitations and absence of empathy and understanding towards her son.

Cases considered

- Anayo v Germany* (2012) 55 E.H.R.R. 5
Aune v Norway (2012) 54 E.H.R.R. 3
Gnahoré v France (2002) 34 E.H.R.R. 38
Görgülü v Germany (App. No. 74969/01), judgment of 26 February 2004
Johansen v Norway (1997) 23 E.H.R.R. 33
K v Finland (2001) 36 E.H.R.R. 18
Mandet v France (App. No. 30955/12), judgment of 14 January 2016
R v United Kingdom (2012) 54 E.H.R.R. 2
Scozzari v Italy (2002) 35 E.H.R.R. 12
TP v United Kingdom (2002) 34 E.H.R.R. 2
YC v United Kingdom (2012) 55 E.H.R.R. 33

Commentary

The case of *Stranden Lobben* is illustrative of the challenging task of balancing children's rights and parents' rights. The Court initiated its assessment focusing on the proportionality of the contested measures, which are the most extreme possibilities as they irreversibly sever parental rights. The Court calibrated the intensity of scrutiny required to assess the alleged violations to the Convention, distinguishing between initial measures, such as taking a child into care, from further limitations. In the case of initial measures, the Court should leave the major margin of appreciation for national authorities, whereas with respect to further limitations, it must assess them using stricter scrutiny as they may curtail family relations. Nonetheless, the Court established that care orders should always be temporary measures and states have a positive duty towards facilitating the reunification of the natural parents with the child. The latter must be balanced against the child's best interests. Far-reaching measures, such as adoption, should only be put forward under exceptional circumstances and motivated by an overriding requirement pertaining to the child's best interests. The Court emphasised that a child's interest in cases involving care measures and restrictions to contact must come before all remaining considerations. Therefore, it is in a child's best interests to keep ties with their natural families unless they have proven particularly unfit to ensure a child's development in a sound environment. Thus, art.8 does not entitle a parent to get rid of measures adopted towards achieving that end. Before applying the previous criteria, the Court self-restrained by announcing it must take into account the national diversity on the regulation of these matters, such as the role associated to the family, the appropriateness of the state intervention on family affairs as well as the availability of resources.

However, the judgment was not without strong dissent, announced by the tight voting. For the dissenters, the complaint cannot focus solely on the child's adoption measures without scrutinising the previous placement decisions. The time lapse became detrimental to the reunification of the family unit, influenced the assessment of the child's best interest and placed the mother in a position of conflict with the authorities and the foster parents. The dissenting judges criticised the allocation of responsibility solely on the mother with respect to the decreasing and degradation of social ties with her son during the process. Their contention extends to the Norwegian legislation's restrictive access rights as they would have been proven to be detrimental to a child's early living stages. Norway's preference of adoption over long-term foster care and the assumption that adoption is considered in the best interests of the child, was also questioned in the dissenting opinion. Similarly, the dissenters opted for a hard-look review on the domestic authorities' decisions, underscoring several evidentiary gaps. They questioned why having subsequent children without questioning of the mother's parental skills—the investigation regarding Y found no shortcomings—was not considered as favourable evidence. No reasons from the experts can be found with respect to severing ties with X's sibling and his grandparents. Finally, they also criticised the lack of repertoire used by the children welfare authorities to tackle the foreseeable conflicts between natural and foster parents, as the authorities did not explore alternative arrangements to reduce the existing hostility between them.

In sum, the Court attempted to strike a delicate balance between a robust stance on the child's best interests without excessive intervention at the domestic level, proceeding in a context-sensible way, open to extra-legal factors such as national idiosyncrasies and elements of legal realism such as effective enforcement of decisions in accordance with the available resources. The dissenters, on the other hand, criticised the Court for delivering a procedural assessment without enough consideration of substantive aspects which, paraphrasing its authors, risks reducing the Court's role to that of a bystander of the disintegration of familial relationships and the destruction of roots by virtue of the principle of subsidiarity.

Recognition of same-sex marriages

Same-sex marriage—recognition—legal protection—right to private life—art.8—right to marry—art.12—right to freedom from discrimination—art.14

☞ Italy; Marriage; Right to respect for private and family life; Same sex partners; Treaty interpretation

Orlandi v Italy (Applications Nos 26431/12; 26742/12; 44057/12 and 60088/12)

European Court of Human Rights (First Section): Judgment of 14 December 2017

Facts

The applicants are six same-sex couples comprised of one Canadian and 11 Italian nationals. All couples, accepted to be in stable and committed relationships, had previously been legally married in either Canada, the Netherlands or the United States. Upon return to Italy the applicants had sought to have their marriages registered, but the Italian courts held that marriages registered in foreign countries between same-sex partners would not be recognised by Italian law. The Italian Ministry of Internal Affairs provides that the Civil Status Registry only recognise marriage between a man and a woman in order to preserve internal public order.

The applicants complained that in failing to register their marriage or provide legal recognition of their family union, the Italian government discriminated on the basis of sexual orientation. The court was to establish if Italy had violated art.8 (the right to respect for private and family life) and art.14 (freedom from discrimination) in conjunction with arts 12 (right to marry) and 8. *Orlandi* bears similarities to *Oliari v Italy* (2015), in which the Court found that Italy has an obligation under art.8 to provide legal protection for same-sex couples. However, *Orlandi* is first concerned with the refusal to register the foreign same-sex marriages of the applicants as a violation of the Convention. If not, the Court is to decide if the applicants were without legal protection prior to *Oliari* and its legal effects in Italy.

Held

- (1) The application was declared admissible by majority.
- (2) There was a violation of art.8 (by five votes to two).

The Court reaffirmed that states are authorised to restrict access to marriage under art.12 as well as under art.14 in conjunction with art.8, citing both the *Schalk* and *Chapin* cases. However, the Court reaffirmed *Oliari* in that same-sex couples are in need of legal protection of their relationship. The Court noted that following *Oliari*, the Italian law had indeed provided for same-sex civil unions through Law No.76/2016, providing those who had contracted marriage abroad as a means to register their union under Italian law. *Oliari* was deemed sufficient to satisfy Convention standards that “civil unions provide an opportunity to obtain a legal status equal or similar to marriage in many respects” and “give more or less the same protection as marriage with respect to the core needs of a couple in a stable and committed relationship”. Therefore, the scope of the judgment was restricted to a determination that the respondent state’s refusal to register the applicant’s foreign same-sex marriage in any form was a violation of rights under the Convention, as well as if the

applicants were left in a legal vacuum without any protection (prior to *Oliari*) and if it amounted to a violation of rights under art.8.

The Court noted that Italy's refusal to register the applicant's marriage under Italian law by reason of "public order" is not provided as a legitimate interest under art.8 in which a state may interfere with the rights of the applicants. However, the court recognised the legitimacy of the respondent state's aim to prevent *public disorder*, insofar as recognition of a foreign marriage *as a marriage* was not provided for in domestic law and would represent a circumvention of the legislative prerogatives of the state. In balancing the interest of the applicants against that of the community, the Court held that the state enjoyed a wide margin of appreciation given that the case raised sensitive moral and ethical issues. Further, there was no consensus within the Council of Europe states on the issue of legal recognition of same-sex marriage. Therefore, given that recognition of same-sex marriage was within the authority of the state, the refusal to register the applicant's marriage did not deprive the applicants of any rights recognised in Italy.

Concerning the violation of rights under art.8 as a result of the applicants being left in a legal vacuum prior to *Oliari* and Italian Law No.76/2016, the Court held that the respondent State had failed to legally recognise the respondent's union, *de facto* or *de jure*, resulting in no legal protection and undue obstacles in daily life. The Court held that, as in *Oliari*, the state insufficiently put forward a prevailing community interest and thus failed to strike a fair balance between the interests of the applicants and those of the community. Therefore, there has been a violation of art.8 of the Convention.

- (3) There was no need to examine the complaint under art.14 in connection with arts 8 and 12 (unanimous).
- (4) The respondent State was ordered (by five votes to two) to pay each applicant:
 - (a) €5,000 in non-pecuniary damage.
 - (b) €9,000 in respect of costs and expenses.
- (5) Dismissed the remainder of the applicants' claims for just satisfaction (unanimous).

Cases considered

Chapin v France (App. No.40183/07), judgment of 9 June 2016

Dadouch v Malta (2014) 59 E.H.R.R. 34

Dickson v United Kingdom (2008) 46 E.H.R.R. 41

Gas v France (2014) 59 E.H.R.R. 22

Green v Malta (App. No.38797/07), judgment of 6 July 2010

Hämäläinen v Finland [GC] (App. No.37359/09), judgment of 16 July 2014

Jeunesse v Netherlands (2015) 60 E.H.R.R. 17

Oliari v Italy (2017) 65 E.H.R.R. 26

Schalk and Kopf v Austria (2011) 53 E.H.R.R. 20

Sheffield v United Kingdom (1999) 27 E.H.R.R. 163

Wagner v Luxembourg (App. No.76240/01), judgment of 28 June 2007

Commentary

Like *Oliari*, the *Orlandi* case concerns the contentious issue of legal equality for same-sex relationships and presented a possible avenue for the recognition of same-sex marriage by the Court under art.12 of the Convention. In *Orlandi*, the Court did not deviate from *Oliari* in an interpretation of the Convention which recognised that same-sex couples are entitled to legal status in some form that is equal or similar to

marriage, but that the Court would not force states to recognise same-sex marriage on equal terms. This follows from recognition that a narrow majority of Member States (24 out of 47) had legislated towards legal recognition of same-sex relationships (thus the applicants were entitled to such protection), but that the full recognition of same-sex marriage lacked consensus in Europe. As such, the margin of appreciation remained in favour of the state.

The concurring opinion of Judge Koskelo noted that while there was a violation of art.8, the reasoning adopted by the majority was incoherent at a moment when the Court could have offered “straightforward” conclusions. On the first issue of refusal to register foreign same-sex marriages as marriages, Judge Koskelo finds that faced with recognition of a foreign status, the Italian legal order followed a normal exercise of *lex fori* in private international law. The Italian Court of Cassation legitimately deemed that a foreign same-sex marriage “is incapable of producing the legal effects attaching to a marriage” because the Italian legal order did not accommodate for it. Thus, Koskelo concludes that there was no violation of art.8 on the grounds of refusal to register. However, Judge Koskelo holds that there was a violation of art.8 because prior to legislative amendments following *Oliari*, there was no specific legal framework for recognition and protection of same-sex union. Therefore, the applicant’s foreign same-sex marriages could not have been recognised in any form. Judge Koskelo also asserted that the majority reasoning focusing on refusal of registration “unnecessarily confuses” the case because they conflated the absence of registration as a cause instead of a consequence of a violation of art.8. This amounts to an unnecessary “detour” before concluding simply that the failure of the respondent State is not in the refusal to register, but the failure to provide a framework for the recognition and protection of same-sex unions. In other words, there was little need to deviate from a clear application of *Oliari*.

The dissenting opinions of Judges Pejchal and Wojtyczek are based on the majority failure to adequately apply the methodology of treaty interpretation. The dissenting judges first invoked the Vienna Convention on the Law of Treaties, stating that the Convention must be interpreted in accordance with internal law. The preamble to the Convention, taken in relation to the Universal Declaration of Human Rights, stipulates that the Convention is meant to protect a limited number of rights. As such, the dissenting judges suggest that the mandate of the Court, as defined in art.19, is to act as “the servant, not the master, of the Convention”. According to Pejchal and Wojtyczek, under arts 8 and 12, the state not only enjoys a wide margin of appreciation on the issue but should retain complete autonomy because it does not fall within the mandate of the Convention. Thus, the majority have imposed positive obligations that do not logically follow from the Convention and is only possible by the High Contracting Parties within the principle of “no social transformation without representation”. The dissenting opinions also question the notion implied by the majority that the court intends to revise the assumption that states are free to exercise the authority to choose to recognise same-sex marriage.

Altogether, the majority remain cautious in moving beyond the understanding that in order to protect the rights of same-sex couples under the Convention, legal recognition and protection is sufficient and legalisation of same-sex marriage remains the prerogative of the state. While the concurring opinion found an issue with the coherence of the judgment on an issue requiring clarity, the dissenting views take issue with the fundamental application of treaty interpretation and scope of the Court on an unsettled social issue within the domestic sphere.

Fair trials and the principle of *ne bis in idem* in criminal proceedings

Reasons for a verdict—terrorism—criminal proceedings—right to a fair trial—art.6—principle of ne bis in idem—art.4 Protocol No.7

✉ Criminal procedure; Double punishment; France; Reasons; Right to fair trial; Terrorist offences; Verdicts

Ramda v France (Application No.78477/11)

European Court of Human Rights (Fifth Section): Judgment of 19 December 2017

Facts

The applicant, Rachid Ramda, is a former member of the Islamic Salvation Front. He entered the UK in 1993 under a fake identity. From July to October 1995, eight attacks were committed on the French territory. The applicant was suspected of having financed the attacks from London, and of being one of the leaders of the Armed Islamic Group (GIA) in the UK. He was arrested and put into detention pending extradition to France under four International Arrest Warrants. The High Court opposed his extradition until 2005, when he was given back to the French authorities and put into pre-trial custody.

The applicant was sentenced to 10 years' imprisonment and a permanent exclusion from the French territory for participating in a criminal association established with the aim to prepare one or more acts of terrorism. The correctional tribunal held that the material evidence confirmed the use of different pseudonyms by the applicant and the transfer of money that had been used to prepare some of the attacks. The police also found several documents confirming his important role within the direction of the newspaper *Al Ansar*, used by the GIA to claim responsibility for the attacks. The financing and propaganda that he had undertaken had made the realisation of the attacks possible. The Court of Appeal confirmed the judgment and added that the GIA intended to overthrow the Algerian government through the establishment in Europe of an external structure that would target the institutions and populations of countries supporting the Algerian regime. The applicant had knowingly played a significant role in the realisation of the GIA's goal. This judgment became final when the Court of Cassation rejected the applicant's appeal.

In parallel proceedings, the Assize Court of Paris condemned the applicant of complicity in attempted murders and damage to property by an explosive substance that resulted in mutilations or disabilities. The court relied on the three judgments held by the Indictment Division of the Court of Appeal of Paris, in which the judge underlined the intermediary role played by the applicant between the GIA and the perpetrators of the terrorist attacks. The applicant challenged the verdict on the grounds of art.4 of Protocol No.7 to the European Convention on Human Rights and the case of *Serguei Zolotoukhine v Russia* arguing that, under the principle of *ne bis in idem*, he could not be convicted a second time for identical material facts. His claim was rejected by the Assize Court, which said that the applicant was sentenced under the criminal procedure for a criminal behaviour. Sixty-three questions were asked during the proceedings before the Assize Court. They specifically addressed the alleged facts, where and when they had been committed, the names of the victims and the harm they suffered and, more precisely, the premeditated aspect of the crime and the role of the applicant in the commission of the attacks. The Court of Cassation dismissed the applicant's claim that the judgment was in breach of art.6 of the Convention. It also rejected the claim that the Assize Court's conviction was in violation of the principle of *ne bis in idem*.

Mr Ramda addressed two complaints to the European Court of Human Rights pertaining to the violation of art.6(1) and art.4 of Protocol No.7 to the Convention.

Held

- (1) The two complaints were admissible (unanimous).
- (2) The Court considered there had been no violation of art.6 (1) (unanimous). It reiterated its jurisprudence that juries are not required to provide reasons for their verdict. However, professional magistrates have a duty to give the reasons that led them to convict or acquit someone. One of the essential guarantees against arbitrariness is to make sure that the defendant has understood the verdict. Moreover, the duty of providing reasons for a conviction contributes to the right of a defence, as well as to the impartiality and transparency of the judicial system. In the context of legal proceedings before professional magistrates, the domestic courts must clearly explain the grounds on which they relied to make their decision. Yet, the extent of this duty may vary and, therefore, must be assessed in the light of the specific circumstances of the case. Each judgment held by the Indictment Chamber concerned a different attack and was examined and justified on the basis of the alleged facts. Moreover, the proceedings before the Assize Court allowed the applicant to know what the charges against him were, and the judges were asked detailed and specific questions. The applicant therefore knew of the reasons of his conviction and he could understand the verdict against him.
- (3) The Court held that there had been no violation of art.4 of Protocol No.7 to the Convention. It considered that, in the present case, the question was not whether the constitutive elements of the offence in the correctional and criminal proceedings were identical, but whether the alleged facts in the two proceedings referred to the same criminal behaviour. The Court examined whether the facts for which the applicant had been convicted by the Court of Appeal final judgment and those for which the proceedings had been maintained before the Assize Court were identical or substantially the same. Most of the evidence invoked before the Court of Appeal and mentioned in the three judgments of the Indictment Chamber were distinct and addressed different behaviours. The Court added that it was legitimate for states to act with firmness regarding those who contribute to terrorist acts and that the Court would not condone such acts. Moreover, the applicant had been convicted by the Assize Court for facts distinct from the ones that were the object of the first sentencing, and for the crimes of complicity of murder and attempted murder.

Cases considered

A v Norway [GC] (2017) 65 E.H.R.R. 4

A v United Kingdom [GC] (2009) 49 E.H.R.R. 1442

Agnelet v France (App. No.61198/08), judgment of 10 January 2013

Boldea v Romania (App. No.19997/02), judgment of 15 February 2007

Daoudi v France (App. No.19576/08), judgment of 14 September 2011

Hadjianastassiou v Greece (1993) 16 E.H.R.R. 219

Grande Stevens v Italy (App. Nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10), judgment of 4 March 2014

Ibrahim v United Kingdom [GC] (App. No.50541/08), judgment of 13 September 2016

Ismoilov v Russia (2009) 49 E.H.R.R. 42

Kapetanios v Greece (App. Nos 3453/12, 42941/12 and 9028/13), judgment of 30 April 2015

Lhermitte v Belgium [GC] (App. No.34238/09), judgment of 29 November 2016
Matis v France (App. No.43699/13), judgment of 6 October 2015
Margus v Croatia [GC] (2016) 62 E.H.R.R. 17
Oulahcene, Fraumens, Legillon and Voica v France (respectively App. Nos 44446/10, 30010/10, 53406/10 and 60995/09), judgment of 10 January 2013
Papon v France (2004) 39 E.H.R.R 10
Ruiz Torija v Spain (1995) 19 E.H.R.R. 553
Sergueï Zolotoukhine v Russia [GC] (2012) 54 E.H.R.R. 16
Simeonovi v Bulgaria [GC] (2018) 66 E.H.R.R. 2
Suominen v Finland (App. No.37801/97), judgment of 1 July 2003
Tatishvili v Russia (2007) 45 E.H.R.R. 52
Van de Hurk v Netherlands (1994) 18 E.H.R.R. 481

Commentary

The Court relied on its earlier jurisprudence on jury trials and reiterated that the lack of reasons for verdicts by the jury is not in itself a breach of the right to a fair trial but has to be compensated by sufficient procedural safeguards against arbitrariness. Professional judges have an additional duty to make sure that the defendant and the public understand the judgment. Their decisions have implications that go beyond the defendant's case and affect the democratic foundations of the society. In *Agnelet*, the Court acknowledged the fact that the new legislation passed in France in 2011, which requires the Assize Court to explain the reasons of its decisions, appeared to "significantly strengthen the safeguards against arbitrariness". In *Ramda*, the Court went further in praising the application of this legislation to cases tried before the Assize Courts comprised of professional magistrates. The Court clarified its stance regarding the compatibility of the French legislation with art.6 and seemed to consider that the law now provides an adequate protection against arbitrariness in criminal proceedings.

The present case arises within a very sensitive context, where France has been the recent target of deadly terrorist attacks and is under the threat of upcoming ones. This is particularly significant in the Court's finding that there had been no violation of the principle of *ne bis in idem*. The Court relied on objective elements to conclude that there had been no violation. Nevertheless, it acknowledged the legitimacy of states' firmness in handling terrorism cases. A finding of a violation would have nullified the criminal proceedings sentencing Ramda to life imprisonment, whilst there was overwhelming evidence of his central role in the attacks. This would have certainly affected the legitimacy of the French judiciary in effectively condemning acts of terrorism as well as serving justice.

Housing distribution and the right to residence

House permits—planning—social and economic policies—income requirements—discrimination—right to freedom to choose one's residence—art.2 of Protocol 4

☞ Discrimination; Freedom of movement; Housing management; Local housing authorities' powers and duties; Netherlands; Residential tenancies

Garib v Netherlands (Application No.43494/09)

European Court of Human Rights (Grand Chamber): Judgment of 6 November 2017

Facts

A Dutch national, Ms R Garib, moved into the Tarwewijk district in the city of Rotterdam in May 2005. In 2007, she entered into an arrangement with her landlord whereby she and her two young children would move to a larger property also in the Tarwewijk district, so that the landlord could renovate her original property for his own use.

In June 2006, the Inner City Problems (Special Measures) Act came into force over the Tarwewijk district, meaning that households moving into the district required a housing permit to do so. The applicant requested a housing permit for her family to move to the second property, but this was refused, as she did not comply with the statutory requirements. These required that she have been a resident of Rotterdam for six years or meet an income requirement which would exempt her from the residence requirement.

The applicant objected to the decision by the city administration (the Burgomaster and Aldermen) but they employed an advisory opinion by their Objections Advisory Committee which defended the housing permits on the basis that there was the possibility to move to an area not considered a “hotspot”, and the need to ensure a balanced and equitable distribution of housing. The applicant then appealed to the Regional Court and then the Council of State, arguing that her freedom to choose her residence, under art.2 of Protocol No.4 of the European Convention on Human Rights and art.12 of the International Covenant of Civil and Political Rights (ICCPR), had been violated. Additionally, she argued that the requirement of six years’ residence as applied to her constituted discrimination according to income, relying on art.26 of the ICCPR.

The applicant’s appeals were dismissed in both courts. The interference with her right to freely choose her residence was held to be justified by the need to ensure quality of life in districts of major cities, and that the measure taken under the Inner City Problems Act was not disproportionate, as the restriction was temporally limited and there was a sufficient supply of housing outside of the Tarwewijk district. Additionally, they noted an exemption “hardship clause” which applies only where the current residence is an untenable living situation, but that this did not apply to the applicant. On the matter of discrimination, an indirect discrimination was found but the income requirement was also found to be necessary and proportionate for the legitimate aim of improving the quality of life. The applicant then appealed to the European Court of Human Rights, alleging a violation of her freedom to choose her residence under art.2 of Protocol No.4.

Held

- (1) There had been no violation of art.2 of Protocol No.4 (by 12 votes to five).

It was undisputed between the parties that there had been an interference with the applicant’s right to choose her residence under art.2(1) of Protocol No.4, so the Court looked to paras 3 and 4 of the article, which provide for justifications for such an interference which is proportionate and in pursuit of a legitimate aim. The applicant argued that the fourth paragraph should be applied only in “exceptional situations” in line with its drafting history and previous case-law. However, the Grand Chamber rejected this interpretation and sided with the Chamber finding that para.4 is to be applied, on the basis that the restriction was limited in geographical scope, thereby opening it to broader justification “by the public interest”. The Court accepted that the restriction was properly enacted in law and that the intention of the legislation had been to “reverse the decline of impoverished inner-city areas and to improve quality of life generally”, which it considered a legitimate aim serving the public interest.

With respect to the proportionality between the means employed and the legitimate aim, the Court considered first whether the legislation and policy itself was proportionate, and secondly

whether the individual situation of the claimant outweighed the public interest. For the former, the Court was satisfied that the close scrutiny of the legislative framework by Parliament, and the resulting safeguard clauses, created adequate protection for the rights and interests of persons affected. The government did thereby not exceed its margin of appreciation in pursuit of the public interest under the article.

The Court held that the applicant was not herself able to prove that her being unable to move within Tarwewijk had created a situation of hardship or risk for her or her family. Her preference to do so could not provide a justification for her personal interest to override the legitimate aim pursued by the government with the policy, and its consistent application.

Cases considered

- Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21
- Ayangil v Turkey* (App. No.33294/03), judgment of 6 December 2011
- Chapman v United Kingdom* (2001) 33 E.H.R.R. 399
- Golder v United Kingdom* (1979) 1 E.H.R.R. 524
- Hatton v United Kingdom* (2003) 37 E.H.R.R. 611
- Hutten-Czapska v Poland* (2007) 45 E.H.R.R. 52
- James v United Kingdom* (1986) 8 E.H.R.R. 123
- K v Finland* (2003) 36 E.H.R.R. 255
- Landvreugd v Netherlands* (2002) 36 E.H.R.R. 1039
- Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329
- Noack v Germany* (App. No.46346/99), judgment of 25 May 2000
- Olivieira v Netherlands* (2003) 37 E.H.R.R. 693
- Scoppola v Italy* (No.2) (2010) 51 E.H.R.R. 12
- Ward v United Kingdom* (App. No.31888/03), judgment of 9 November 2004

Commentary

The Grand Chamber in this case granted a wide margin of appreciation to states in policy addressing the management and development of large cities, which the judgment refers to as “necessarily involv[ing] consideration of complex social, economic and political issues”. While they acknowledge that a legislative intervention in this area is not beyond the scrutiny of the Court, they show deference to the decision-making process both at policy level and with respect to the applicant. The dissenting opinion of Judges Tsotsoria and de Gaetano considers that the disproportionate burden on those reliant on social-security benefits as income—a vulnerable group—warrants a closer scrutiny. Considering the applicant’s residence in Tarwewijk prior to the introduction of the legislation, the dissenting judges view the refusal of a permit as tantamount to a forced eviction from the area, which, considering the applicant’s vulnerability as a single mother to two children, is a disproportionate interference. This was taken further in the dissenting opinion of Judge Pinto de Albuquerque, who considered the aim of “deghettoising” Tarwewijk as, in fact, part of a larger effort of removing underprivileged inhabitants from the area, stemming from a conflation of poverty with threats to public order, and representing “real phobia of the poor”.

It is notable that the Grand Chamber refused to consider whether the income requirement waiving the residence requirement constituted a discrimination under art.14 on the basis of income status. This was raised in the domestic courts but was not considered by the Chamber. Despite third-party support for an examination of the legislation with respect to art.14, the Grand Chamber refused to consider this, arguing that the scope of the case before them was limited to those grounds on which the Chamber had ruled on the admissibility. The dissenting opinions each lament the missed potential of an examination under art.14

on these facts, Judge Pinto de Albuquerque, in particular, notes the potential for discussion of intersectional discrimination, as yet unexamined by the Court despite increased recognition in international courts.

University disciplinary measures

Kurdish students—Turkey—university petitions—disproportionate disciplinary measures—victim status—costs awarded—right to education—art.2 of Protocol No.1—right to freedom of expression—art.10

☞ Disciplinary penalties; Freedom of expression; Language; Remedies; Right of individual application; Right to education; Turkey; Universities

Cölgeçen v Turkey (Application Nos 50124/07, 53082/07, 53865/07, 399/08, 776/08, 1931/08, 2213/08 and 2953/08)

European Court of Human Rights (Second Section): Judgment of 12 December 2017

Facts

The case concerned an application by eight students of Kurdish origin who were studying at various faculties of Istanbul University. In 2001 the students petitioned the university requesting that Kurdish language classes be introduced as an optional module. Upon receiving the petitions, the university began disciplinary proceedings against the students, resulting in the applicants either being suspended for two semesters or expelled from the university. Following the sanctions, the applicants claim they were branded as terrorists, had their names put on notice boards around the university and some were even subjected to criminal investigation. Upon notification of the disciplinary sanctions, the applicants lodged separate actions with the Istanbul Administrative Court requesting a stay of execution of the disciplinary decisions. In decisions given between May and June 2002 the Istanbul Administrative Court suspended the execution of the applicants' disciplinary sanctions on the ground that the sanctions in question were unlawful and their application would cause irreparable damage to the applicants. Following notification of the decision, the university re-enrolled all of the applicants between 25 June and 23 July 2002, enabling the applicants to take missed exams. On 12 and 19 December 2002 the Istanbul Administrative Court examined the merits of the cases and annulled the disciplinary sanctions against the applicants on the ground that they were unlawful. The university unsuccessfully challenged these decisions before the Supreme Administrative Court. Subsequently the applicants launched actions for compensation with the Istanbul Administrative Court pursuant to art.13 of the Administrative Procedure Act, claiming they had sustained psychological damage as a result of the disciplinary punishment. Between September 2004 and January 2005 the Istanbul Administrative Court awarded compensation to the applicants as they had been denied their right to education and their honour and dignity had been adversely affected by the accusations. However, between March 2007 and March 2008 the Istanbul District Administrative Court quashed these judgments and dismissed the actions, holding that, as the university had re-enrolled the students and enabled them to re-sit their exams, the conditions for awarding non-pecuniary damage had not been met. The applicants subsequently applied to the European Court of Human Rights alleging violations of art.2 of Protocol No.1 read in the light of art.10 due to the imposition of the disciplinary sanctions and a failure to provide for education of their mother tongue.

Held

- (1) The complaint concerning alleged denial by the authorities of the applicants' right to education on account of the disciplinary sanctions imposed on them was admissible (by a majority). Concerning the admissibility of the alleged violations resulting from the disciplinary sanctions, the respondent State argued that the applicants were not victims within the meaning of art.34. This was based on the fact that the university sanctions against the applicants had been dismissed by the domestic courts and that, subsequently, the applicants had been able to effectively attend their courses and sit their exams. They also considered that the applicants had abused the right of petition because they had failed to mention the latter fact in their application forms. The applicants rejected these arguments. Submitting that the effects of the sanctions, on their relationships with friends and family and in causing them to graduate a year later than their colleagues, had violated the Convention. The Court noted, with regards to the applicants' victim status, that a favourable domestic decision is not enough to deprive the applicants of this status "unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention". The afforded redress is required to be appropriate and sufficient. The Court found that the domestic decisions of 12 and 19 December 2002 could be regarded as a sufficiently clear acknowledgement in substance that there had been an unjustified interference with the applicants' right to education. However, the Court held that the possibility of sitting repeat exams was not sufficient to deprive the applicants of victim status and that adequate redress in the present case would have been to award the applicants compensation. Having regard for the domestic decisions between March 2007 and March 2008 to dismiss the applicants' claims for compensation the Court dismissed the respondent State's objection, finding that the applicants can still claim to be victims of the alleged violations. Regarding the suggested abuse of the right to petition the Court admitted that the applicants had failed to submit all of the relevant information in their applications, though found that this was not done with any intention to mislead the Court and thus dismissed the objection.
- (2) There had been a violation of art.2 of Protocol No.1 to the Convention (five votes to two). With regards to the merits of the first claim the Court reiterated that "access to any institution of higher education existing at a given time is an inherent part of the right". The Court noted that this right is not universal, though any restrictions imposed should be foreseeable for those concerned and pursue a legitimate aim. With the Court noting that, although disciplinary measures are not excluded by this right, any disciplinary measures "must not injure the substance of the right or conflict with other rights enshrined in the Convention". In analysing the facts, the Court found that the disciplinary measures afforded to the applicants constituted a restriction of their right to education and that the key issue was whether the measures were proportionate. The Court observed that the applicants had not resorted "to violence or breach or attempt to breach the peace or order in the University" when petitioning the university and were subject to the disciplinary measures simply for submitting their petitions. As a result, the Court in agreement with Istanbul Administrative Court found that neither the views expressed nor the means by which they were expressed warranted disciplinary sanctions. In coming to this finding, the Court specifically noted that although the sanctions imposed by the university had subsequently been annulled domestically, this had failed to address the applicants' grievances concerning the impact of the measures on them academically.
- (3) The remainder of the application was inadmissible (unanimous).

The Court then analysed the admissibility of the applicants' second claim, which concerned an alleged violation of art.2 of Protocol No.1 read in the light of art.10 for a failure to provide for education in their mother tongue. The Court analysed this claim's admissibility with regards to the six-month rule for introducing applications, noting that it had jurisdiction to consider admissibility via the six-month rule of its own motion whether the respondent State had raised the objection or not. Additionally, the Court highlighted the interrelated nature of the six-month rule with the need for exhaustion of domestic remedies for admissibility under art.35(1). On the facts of the case, the Court noted that having not received an official response to their original petitions, the applicants had not brought administrative proceedings with the relevant national authorities after their petition had received a tacit refusal. Even if bringing such a case had a remote chance of success the Court asserted that doing so would not be futile as it would have postponed the beginning of the six-month period for admissibility. Having failed to continue the case, the six-month rule came into effect, for this claim, six months after the "tacit refusal" of their original petition. As a result, for the claim to be admissible under art.35(1), the application would need to have been made in 2001, with this leading the Court to unanimously reject this part of the application as it had been introduced out of time. The applicants also had three additional complaints unanimously rejected concerning degrading treatment under art.3, an interference with their private and family life under art.8 and discrimination as a result of their Kurdish ethnic origin in violation of art.14.

Cases considered

- Campbell v United Kingdom* (1982) 4 E.H.R.R. 293
- Centro Europa 7 S.r.l. v Italy* [GC] (App. No.38433/09), judgment of 7 June 2012
- Hoffman Karlakov v Denmark* (App. No.62560/00), judgment of 20 March 2003
- Hüttner v Germany* (dec.) (App. No.23130/04), judgment of 9 June 2006
- İrfan Temel and Others v Turkey* (2010) 51 E.H.R.R. 5
- İzzettin Doğan v Turkey* [GC] (2017) 64 E.H.R.R. 5
- Kurić v Slovenia* [GC] (2013) 56 E.H.R.R. 20
- Sabri Güneş v Turkey* [GC] (2013) 56 E.H.R.R. 34
- Şahin v Turkey* [GC] (2007) 44 E.H.R.R. 5
- Tarantino v Italy* (2013) 57 E.H.R.R. 26
- Williams v United Kingdom* (App. No.32567/06), judgment of 17 February 2009

Commentary

The case generated some important discussions concerning both the characterisation of the successful claim and the admissibility of that claim, visible within the judgment's dissenting opinion. Regarding the characterisation of the case, two of the judges rejected the majorities' decision to examine the complaint under art.2 of Protocol No.1 read in the light of art.10. In their opinion, the case should have been characterised solely under art.10 and concerning the applicants' right to freedom of expression. This was based on their opinion that "the disciplinary sanctions were imposed first and foremost because of the opinion expressed in the applicants' petition" and that, though the impact of their punishments indirectly affected their right to education, the direct effect of the punishments was on the applicants' right to freedom of expression. In their dissenting opinion, the judges noted that they did "not think that these repercussions are sufficient to consider that this complaint must be examined under art.2 of Protocol No.1". The dissenting opinion seems to suggest that the characterisation of a case might influence the articles under which a

complaint can be assessed. The dissenting judges also challenged the admissibility of the applicant's claim under art.2 of Protocol No.1. In their dissent, the judges concurred with the Istanbul District Administrative Court that, having been re-enrolled and able to sit missed exams along with having the disciplinary measures dropped, the applicants had lost their victim status and been adequately redressed. It is noticeable that the Court's finding of a violation focused on the disciplinary measures being disproportionate to the applicants' actions of petitioning for Kurdish language classes, whereas the applicants' prior domestic claim for damages was based on both the social and psychological damage resulting from the disciplinary actions along with denial of their right to education. Though the Court explicitly stated that "appropriate and adequate redress in the present case would have been to award the applicants compensation", it is arguable that what warranted such redress was the damage resulting from the disciplinary actions rather than the actual disciplinary measures. The dissenting judges themselves noted that the deprivation of university access focused on by the Court "was not the kind of damage for which the applicants were claiming compensation before the domestic courts". Deciding to examine the case predominantly under art.2 of Protocol No.1 could be seen as leading the Court to focus on compensation for the disciplinary measures themselves rather than the social and psychological effects the applicants had argued in the domestic case.

Prompt investigations and the right to life

Murder—racist attack—racial motive—prompt investigation—victim's relatives—right to life—art.2

☞ Criminal investigations; Criminal proceedings; Delay; Duty to undertake effective investigation; Greece; Murder; Racially aggravated offences; Right to life

Gjikondi v Greece (Application No.17249/10)

European Court of Human Rights (First Section): Judgment of 21 December 2017

Facts

The applicants, Ana Gjikondi, Sefit Berdellima, Violeta Berdellima and Ana Gjikondi, are Albanian nationals and are the relatives of Luan Berdellima who was killed on 25 August 2004 in Athens by an unidentified individual.

On 11 August 2004, Luan Berdellima and two other Albanian nationals, VD and IS, while drinking beers outside a pizzeria in Athens, had a verbal altercation with IL who then left. Later in the day, Luan Berdellima returned to the pizzeria to meet again with his friend VD. Luan Berdellima was about to enter the pizzeria when an unidentified man dismounted from a motorbike and hit him in the face. The unidentified man left him lying unconscious on the ground. Luan Berdellima died of his injuries a few days later in the hospital.

Following the death of Luan Berdellima, VD lodged a complaint against IL and the unidentified man with the prosecutor of the Criminal Court, accusing them of having organised and committed the killing of his friend. He alleged that during the verbal altercation, IL had threatened the three Albanian nationals that he would make them regret to have ever set a foot on the Greek territory. On 30 August 2004, the Sub-Directorate on Offences against Life and Property characterised the acts as homicide committed by two unidentified persons. The case was then transmitted to the prosecution which ordered an investigation to identify the perpetrators of the homicide. On 23 June 2005, the applicants applied to join the proceedings as civil parties. In December 2007, the Indictments Division of the District Court decided to proceed with

the trial of IL. IL appealed against this decision before the Court of Appeal and the Cassation Court which both upheld the decision. The applicants allege that these decisions were never notified to them. On 15 and 21 January 2008, hearings were held before the Assize Court in the absence of the applicants as well as VD and IS, who, according to the applicants, had been intimidated and had decided to leave Greece and return to Albania. On 12 February 2010, IL was acquitted due to a lack of evidence against him.

In the meantime, three procedures had also been initiated: a procedure concerning alleged flaws in the main proceedings, an investigation into a police officer's involvement in the crime, and an investigation into alleged omissions by the judges responsible for the case. All of them were either discontinued or classified.

The applicants complained before the Court that art.2 (right to life), art.6 (right to a fair hearing), art.13 (right to an effective remedy), and art.14 (prohibition of discrimination) had been breached.

Held

- (1) There had been a violation of art.2 (unanimous).

The Court found it unnecessary to consider the complaints under arts 6, 13 and 14.

First, the Court analysed whether the investigation satisfied the procedural requirements of art.2. The Court reiterated that it is essential, in the event of deaths in contentious situations, that the investigation be prompt. In the present case, the proceedings lasted five-and-a-half years and, in particular, the preliminary phase lasted four years and eight months. The Court noted that between 2005 and 2006, no investigative measures were taken by the competent authorities. Moreover, IL, one of the principal suspects in the case, was only interrogated two years after the events. Even though the present investigation was complicated and involved the testimony of witnesses living in Albania, the length of the preliminary phase—including one year of inaction—was considered to have jeopardised the effectiveness of the investigation.

In any case, the Court reiterated that the victim's relatives must have been involved in the procedure insofar as it is necessary to protect their legitimate interests. The Court noted that the applicants had not been properly informed on the progress of the case while it was the authorities' obligation to do so. In the present case, the applicants had declared their intention to join the proceedings as civil parties. However, none of them were present during the proceedings before the Assize Court. Even though the Assize Court had summoned one of the applicants to appear in court, the Court considered that, due to the seriousness of the crime, the Assize Court should have double-checked whether the applicant had lost interest in the matter and waived the right to be heard. The Assize Court also did not refer in its judgment to the applicants' request to join the proceedings as civil parties. Moreover, the applicants' demands to obtain copies of various files concerning the case—notably files relative to the involvement of a police officer—were dismissed.

Concerning the allegation that the crime had a racist motive, the Court noted that, from the outset, the authorities had been informed of this possibility since VD had mentioned it in his complaint. However, no actions had been undertaken by the competent authorities to investigate a possible racial crime. The Court noted in particular that IL had not been questioned on this matter and the authorities had not investigated whether he had in the past been involved with extremist or racist groups. The Court considered that a detailed investigation on a possible racial motive should have been carried out by the authorities.

- (2) The Court found that Greece did not fail its obligation under art.34 (unanimous).

The Court considered it had already ruled on the applicants' right to access the file concerning the present case and that there is no evidence to conclude that the state had failed in its obligations under art.34 (right of individual application).

Cases considered

- Anguelova v Bulgaria* (2008) 47 E.H.R.R. 7
- Bekos v Greece* (2006) 43 E.H.R.R. 2
- Edwards v United Kingdom* (2002) 35 E.H.R.R. 19
- Güleç v Turkey* (1999) 28 E.H.R.R. 121
- İlhan v Turkey* [GC] (2002) 34 E.H.R.R. 36
- Iorga v Moldova* (App. No.12219/05), judgment of 23 March 2010
- LCB v United Kingdom* (1998) 27 E.H.R.R. 212
- MC v Bulgaria* (2005) 40 E.H.R.R. 20
- McKerr v United Kingdom* (2002) 34 E.H.R.R. 20
- Menson v United Kingdom* (2003) 37 E.H.R.R. CD220
- Natchova v Bulgaria* [GC] (2006) 42 E.H.R.R. 43
- Ognyanova v Bulgaria* (2007) 44 E.H.R.R. 7
- Osman v United Kingdom* (2000) 29 E.H.R.R. 245
- Ramsahai v Netherlands* [GC] (2008) 46 E.H.R.R. 43

Commentary

In the present case, the Court decided to consider the complaints solely under art.2, and especially under the procedural limb of the article. The need of a prompt investigation when a death occurs in contentious circumstances is essential. Indeed, the Court explained that the time elapsed between the crime and the investigations inevitably eroded the quantity and quality of available evidence, and the lack of diligence of the authorities in that matter casts doubts on the good faith of the investigation. Secondly, the victim's relatives must always be involved in the proceedings insofar as it is necessary to protect their interests. However, art.2 does not automatically entail a right for the victim's relatives to have access to the case file throughout the whole investigation. Article 2 does not impose an obligation on the authorities to satisfy every investigation request of the victim's relatives either. Finally, the Court reaffirmed that when a violent crime is alleged to have racial motives, the state is obliged to take all necessary measures to establish whether the crime was indeed racially motivated. This obligation, while it is one of means, is nonetheless essential for the protection of human rights against racist attacks.

Harassment of a Roma Muslim family

Threats to physical and psychological integrity—Roma—Muslims—discrimination—right to family—art.8

☞ Duty to undertake effective investigation; Gypsies; Islam; Montenegro; Race discrimination; Right to respect for private and family life

Alković v Montenegro (Application No.66895/10)

European Court of Human Rights (Second Section): Judgment of 5 December 2017

Facts

The applicant, Mr Rizo Alković, is a Muslim national of Montenegro of Romani origin born in 1960, who currently resides in Belgium. At the time of the events relevant to the case, he resided in Podgorica, Montenegro. He was living in an apartment building specifically for socially disadvantaged families since 2006. Following attacks against the building in which his apartment and car sustained damage, he installed a camera.

On 26 May 2009, the applicant's next-door neighbour and another neighbour were watching a match between Montenegrin and Bosnian boxers. When the Bosnian was on screen with his coaches of Muslim faith, the applicant claims his next-door neighbour said he would slaughter one of them, to which the other neighbour responded with a derogatory comment regarding the boxer's Turkish background. The neighbour later left his apartment and retrieved a gun from his car, to which the applicant's next-door neighbour said "turn it to the left"—the direction of the applicant's terrace. Approximately 10 gunshots were fired whilst the next-door neighbour shouted insults about Mr Alković's "Turkish mother". Both neighbours' families later collected the empty gun cartridges.

On 9 September 2009, three neighbours, one of whom was the wife of Mr Alković's next-door neighbour, were talking on the terrace, a conversation the applicant overheard. The applicant heard that "cockroaches, frogs, nits and lice" brought in by "those dirty gypsies". V also said they could use a "hammer and pruning knife and an axe" to which one neighbour retorted that her people "carried swords". V said the axe would be fine but the neighbour interjected again to say "no, no, he is a Muslim, I have a sword", to which V loudly stated "an axe, a sledgehammer, like the one used on pigs".

During an argument on 15 September 2009 with another neighbour, Mr Alković's next-door neighbour was heard to have made remarks "dirty gypsy" and "trash" as he gestured towards the applicant's apartment. The case-file does not specify whether the applicant witnessed the argument or was informed of the comment by somebody else who was present.

On 22 September 2009, the applicant was celebrating the religious holiday Ramadan Bayram, or Eid-al-Fitr. A cross had been drawn on Mr Alković's door with the message reading "move out or you'll bitterly regret it". The police were called, who took photographs of the message and Mr Alković filed a criminal complaint against the families who had previously discriminated against him. In October 2009, all families were interviewed by the police, along with two other neighbouring families who had been present or involved with the incidents occurring between May and September.

Regarding the conversation and gunshots fired during the boxing match, both neighbours denied they had watched the match together and insisted everything said was aimed towards the Bosnian boxer. The neighbours said they also heard gunshots but were not privy to who fired them and the children picked up the spent cartridges simply to play with them, not to hide anything. With reference to the conversation on 9 September, one neighbour denied being in V's apartment where V claimed they were discussing how they would go about defending themselves should they come into contact with a perpetrator of attacks who the police were seeking at the time.

Held

- (1) The application was admissible (unanimous).
- (2) There had been a violation of art.8 in conjunction with art.14 (unanimous).
The Court used its previous judgments to deduce that art.8 includes a person's physical and psychological integrity, as well as ethnic identity. The Court reiterated that its task is not to take the place of the competent domestic authorities in determining the most appropriate methods of protecting individuals from attacks on their personal integrity, but rather to

review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

In the present case, the Court found that the police did not carefully and promptly examine the complaints brought by the applicant. The Court found that the prosecutor omitted the incident where gunshots were fired, despite it being confirmed by several sources. The police failed to collect the spent bullets for analysis, which were available, so they could investigate who fired the shots and why.

The Court also noted that Montenegro has legislation in place that protects against discrimination. According to the national Criminal Code, “whoever publicly encourages violence or hatred … on the basis of race, skin colour, religion, origin, or nationality shall be sentenced” (art.370) and “whoever violates someone’s fundamental human rights and freedoms on the basis of their race, skin colour, nationality, ethnic origin or other personal characteristic, shall be sentenced” (art.443). However, the Court found that the applicant due to his ethnic and religious background could not be afforded effective protection under the laws of the state, and the state therefore was expected to step up its efforts to protect the applicant.

Cases considered

- Aksu v Turkey* (2013) 56 E.H.R.R. 4
- Aquilina v Malta* (App. No.25642/94), judgment of 29 April 1999
- Balázs v Hungary* (App. No.15529/12), judgment of 20 October 2015
- İlhan v Turkey* (2002) 34 E.H.R.R. 36
- Hajduová v Slovakia* (2011) 53 E.H.R.R. 8
- Hoffmann v Austria* (1994) 17 E.H.R.R. 293
- Jovanović v Serbia* (2015) 61 E.H.R.R. 3
- Lepočić v Serbia* (2008) 47 E.H.R.R. 56
- MC v Bulgaria* (2005) 40 E.H.R.R. 20
- Nachova v Bulgaria* (2006) 42 E.H.R.R. 43
- S v United Kingdom* (2009) 48 E.H.R.R. 50
- Šećić v Croatia* (2009) 49 E.H.R.R. 18
- Škorkanec v Croatia* (App. No.25536/14), judgment of 28 March 2017
- Tavli v Turkey* (2009) 48 E.H.R.R. 11
- Von Hannover v Germany* (2006) 43 E.H.R.R. 7
- Vučković v Serbia* (2014) 59 E.H.R.R. 19

Commentary

The Court’s decision was unanimous, and the Court had no difficulties in finding a violation of art.8 in conjunction with art.14 on the basis of the facts. However, the stance of the Montenegrin Government is rather surprising as they did not only fail to respond to the applicant’s complaints in first instance but also argued before the Court that the applicant’s evidence was unlawful. More specifically, when the applicant tried to rely on the footage of the camera installed outside his apartment to convince the police of the threats against him and his family, including amongst others an attack against the applicant’s daughter which resulted in her being hospitalised, the government insisted that any footage collected by the applicant was unlawfully obtained and therefore invalid. Of interest is also the intervention of the European Roma Rights Centre (ERRC), which presented before the Court reports showing an increase in violence against Roma in Europe. Evidence also showed that up to 43.5% of the people who participated in a survey in

Montenegro responded that they prefer not to have a neighbour or colleague of Roma origin or for there to be no Roma even in the country at all. While the approach of the Court is to be welcome, the case also makes it clear that more is needed to tackle discrimination against Roma in Europe.

Book Review

Theory and Practice of the European Convention on Human Rights, 5th, by Pieter van Dijk (ed.), Fried van Hoof (ed.), Arjen van Rijn (ed.) and Leo Zwaak (ed.), (Intersentia, 2018), 1,230 pages, hardback, £166, ISBN: 978-1-78068-493-2.

I must confess to being very interested in this latest edition. The second edition of the text had been my first serious introduction to the law of the European Convention on Human Rights and I had found it a little intimidating (that was only 657 pages long, around half the length of this update). This is the fifth edition and the volume now has four editors and 28 contributors—with at least 27 PhDs, mostly professors, but I am glad to say with also a smattering of practising lawyers. It is a weighty tome but an expensive purchase, at £166 for a hardback (with paperback copies, only available to students, at £52).

The text is very accessible and the book's structure is sensibly constructed with each chapter having its own detailed list of contents with an index of over 15 pages. It is very easy to find your way around and to get specific answers to particular questions. In my opinion the book is worth purchasing just for its first two chapters, which, at over 271 pages, provide an excellent overview and detailed guide to the process and procedure of the European Court of Human Rights. It is also helpful to have such a detailed description of the role of the Committee of Ministers in Chapter 3 (including the more obscure role of the Secretary General of the Council of Europe). The only obvious competitor with these sections is “Taking a case to the European Court of Human Rights” by Phillip Leach, fourth edition published in August last year (and reviewed by Simon Creighton at [2017] E.H.R.L.R. 629).

There is always the danger that new editions of old books are never really re-written (I have been guilty of this) and can suffer from sections that need to be removed rather than having new extensions and annexes bolted on. I am glad to say that in the main this edition feels really fresh. Obviously very occasionally I had some differences of opinion with the authors—perhaps because some text has been updated and not rewritten. For instance, I am not sure that the importance, from 2014, of the new rules requiring those making an application to the Court to use its own application form and providing all the details and background papers before the six-month deadline (soon to be four months) rather than using an old style introductory letter is stressed sufficiently.

Having a chapter specifically on how the Court has interpreted the restrictions on the non-absolute rights is helpful to understand how arts 8–11 etc work in practice—prescribed by law; legitimate aim; and necessary in a democratic society etc. The danger of this approach (not a fault of the authors) is that it suggests a greater clarity of thought by the Court than may be justified, particularly because often the approaches by the Court to these issues appear to vary from qualified article to article. There is no easy answer to this except by covering these subjects both in a general chapter as well as in an article-by-article analysis—not an approach that can easily be justified in a single textbook.

In fact, what impressed me most about this text was the article-by-article chapters. The descriptions of articles 2 and 3 were really excellent and easy to read and understand. Only a tiny point but in relation to the “investigatory duty” there was no reference to the duty in art.3 being derived from the duty found by the Court in art.2 (*Assenov v Bulgaria* at [102]).

Inevitably, comparisons with other textbooks designed for similar audiences will be made and there are now quite a few alternatives to choose from, all of which are very good, for instance: Schabas (*The European Convention on Human Rights: A Commentary*), the most recently published competitor; Harris, O’Boyle and Warbrick (*Law of the European Convention on Human Rights*) (now 2014 but very inexpensive); Reid (*A Practitioner’s Guide to the European Convention on Human Rights*); or Jacobs, White and Ovey (*The European Convention On Human Rights*).

The numbers of cases that emanate from the European Court of Human Rights every year makes it very difficult to keep up to date with the law of the ECHR, finding something that is accurate, has the very latest cases and is accessible is not easy. This is despite the fact that the HUDOC website is now very impressive and can even be used to search for specific words across the whole of the jurisprudence.

This book also helps in that struggle. In practice, many lawyers who specialise in this area will buy more than one of these guides. It helps with keeping up to date because the publication dates for these guides are often unintentionally staggered and, hopefully, at least one of the guides on your shelf will only be a year or so out of date. My vote is still for Harris, O'Boyle and Warbrick—if you can only afford one of them. On a spot check between the two publications on art.5 this new book has a clearer structure but Harris et al. has 82 pages on the subject and 755 footnotes compared with 56 pages and only 291 footnotes. However this new book's chapter on art.6 is twice as long as the Harris text—so even an arithmetical assessment is difficult.

Being up to date though is obviously important—and the Harris book is now several years old. I was pleased to see some consideration of all the recent and important cases coming out of the Court in this edition. To take an example close to my heart: *Ibrahim v United Kingdom* (2016) and *Simeonovi v Bulgaria* (2017) which involve restrictions on access to lawyers in police stations are included. In my opinion both these cases undermine the very protections I thought were intended to be included by art.6(3) and the Court's interpretation of them in *Salduz v Turkey* [GC]. In my view the Court took a wrong turning with these recent cases and they are analysed accurately by the editors of this volume. However, there appears to be no authorial comment, despite the fact that that there is considerable disquiet about these cases and the Court's direction of travel, see, for instance, one of the dissents in the case of Ibrahim itself:

“the Court itself waters down rights, by failing to adhere to the guarantees of Article 6 as interpreted in its own well-established case-law, and without expressly stating it, *de facto* departs from that earlier well-established case-law, which has been widely applied by the national courts. This is most disappointing. A human-rights court must not relinquish a level of protection that it has already granted”(Dissenting Opinion of Judges Sajó and Laffranque at [2]).

I am sure some lawyers prefer their textbooks free of comment but I am afraid I do not.

In other sections, the authors are helpfully critical. For instance, in commenting on the ability of the Court to reject cases before they are properly considered, on the basis that they are “manifestly ill-founded”, the authors state:

“For a proper discharge of that function no more is needed than the power to reject those applications the ill-founded nature character of which is actually *manifest*. In several cases, however, the Commission (sic) has used this competence in a way which clearly went beyond this”(p.168).

A great book that needs to be on your shelves but it remains difficult to justify the expense if you already have the latest version of one of its competitors.

John Wadham

Opinion

The Airspace Tribunal: Towards a New Human Right to Protect the Freedom to Exist Without Physical or Psychological Threat from Above

Nick Grief

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✉ Airspace; Human rights; International law; Tribunals

Abstract

Over the last century, humans have radically transformed airspace: chemically, territorially, militarily and psychologically. Technological developments mean that this transformation is accelerating and growing in complexity. There is widening disparity in the global landscape of power, with civilians increasingly subject to expanding commercial and military exploitation of technology in airspace and outer space and to the consequences of environmental change. The associated threats are not adequately addressed by the contemporary legal framework. There is an urgent need for new thinking. One aspect of airspace requiring development is the human rights dimension. The Airspace Tribunal will consider the case for and against the recognition of a new human right to protect the freedom to exist without physical or psychological threat from above. Drawing on wide expertise and experience, it will engage the public in discussion and seek to challenge the narrow terms by which airspace is represented and defined in law.

Later this year, a people's tribunal will begin to consider the case for and against the recognition of a new human right to protect the freedom to exist without physical or psychological threat from above. The hypothesis that this new right demands recognition will be tested at the Airspace Tribunal, a series of international public hearings beginning in London with further hearings anticipated in locations around the world. The Tribunal will invite representations from experts across a broad range of disciplines, sectors and lived experience, such as human rights, contemporary warfare, new media ecologies, environmental change, neuropsychology, conflict and forced migration. These representations will engage the public in dialogue and debate about the rapidly changing composition and nature of airspace, consider future pressures/impacts and interrogate and challenge the narrow terms by which airspace is currently defined and represented in law.

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The current regime of airspace and why it needs reimaging

Established legal frameworks for defining airspace rely on an older Cartesian model where airspace is viewed as open and empty and is mapped out in territorial zones: “Airspace is a concept used to signify the spatial dimension where States exercise their jurisdiction or control for aviation and defence … Airspace refers to a domain, an area-based approach”.¹ However, this does not account for the complex and diverse ways in which the sky is utilised, impacted on or exploited, or for how it is valued, understood and experienced across different cultures. Furthermore, in the context of accelerating geopolitical, technological and environmental change, we need to radically reassess how we perceive airspace in the legal sense.

Under international law as recognised by art. I of the Chicago Convention on International Civil Aviation 1944,² every state has complete and exclusive sovereignty over the airspace above its territory. For a coastal state like the UK, this means sovereignty over the airspace above its land territory and territorial waters.³ Beyond the territorial sea are other maritime zones with specific legal regimes but the general principle is that the legal status of airspace reflects that of the subjacent land or sea.⁴ Over the high seas, which are open to all states, the freedom of aviation prevails.⁵ However, it is generally recognised that in international airspace states can establish temporary restricted or danger areas for peaceful (i.e. non-aggressive) purposes⁶ subject to the requirement of reasonableness in terms of extent and time.⁷ Beyond airspace is outer space which, as declared by art. II of the Outer Space Treaty 1967,⁸ is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The boundary between airspace and outer space has not yet been defined but the resolution of that issue is less urgent than how we protect individuals’ health and wellbeing in the space above our heads, regardless of the latter’s legal status.

A key aspect of the legal framework of airspace in need of further development is the human rights dimension. The Universal Declaration of Human Rights 1948⁹ and regional instruments such as the European Convention on Human Rights¹⁰ marked the inception of modern international human rights law.¹¹ Since then, human rights have continued to evolve but gaps remain. One such gap relates to airspace. In short, there is a human right to the peaceful enjoyment of possessions¹² but there is not yet a human right to the peaceful enjoyment of airspace, protecting us from physical or psychological threat from above. It should be noted that what is being proposed is not an absolute right but a qualified one; i.e. a right the enjoyment of which can be restricted provided that the limitation is prescribed by law and necessary in a democratic society for the achievement of a legitimate aim such as national security, public safety or to protect the rights and freedoms of others.¹³ While it might be argued that what is advocated here is already covered by the right to life or the right to respect for private life,¹⁴ there are compelling reasons for specifically recognising this proposed new human right.

There is precedent for human rights which were once subsumed within broader rights or freedoms becoming specifically identified and explicitly protected as thinking evolves, such as freedom of the arts

¹ UN General Assembly, Doc A/CN.4/667, International Law Commission, First Report on the protection of the atmosphere prepared by Mr Shinya Murase, Special Rapporteur, paras 80 and 81 (footnotes omitted), <http://legal.un.org/docs/?symbol=A/CN.4/667> [Accessed 25 May 2018].

² 15 UNTS 295 (Chicago Convention).

³ Chicago Convention art.2. See also the UN Convention on the Law of the Sea 1982 (UNCLOS) art.2

⁴ See, e.g. Nicholas Grief, *Public International Law in the Airspace of the High Seas* (Dordrecht: Martinus Nijhoff, 1994).

⁵ UNCLOS art.87(1)(b).

⁶ UNCLOS art.88 provides: “The high seas shall be reserved for peaceful purposes.” Given the reference to “the Purposes and Principles of the United Nations” (UNCLOS, preamble, 7th recital) and in the light of state practice, it is clear that in this context “peaceful” means non-aggressive rather than non-military.

⁷ Grief, *Public International Law in the Airspace of the High Seas* (1994), pp.58–61.

⁸ 610 UNTS 205.

⁹ UN General Assembly resolution 217 A, 10 December 1948.

¹⁰ ETS No.5.

¹¹ Vaughan Lowe, *International Law* (Oxford: OUP, 2007), pp.11–12.

¹² ECHR art.1 of Protocol 1.

¹³ Rosalind English and Philip Havers QC (eds), *An Introduction to Human Rights and the Common Law* (Oxford: Hart Publishing, 2000), pp.19–26.

¹⁴ ECHR arts 1 and 8.

and sciences.¹⁵ So too with the freedom to look up and not feel threatened, which is fundamental to health and life. During armed conflict, moreover, this new human right would provide a clearer reference point for the operation of international humanitarian law and help to determine the latter's content. If the freedom to look up and not feel threatened were specifically recognised in international human rights law, this might enhance protection under the law of armed conflict, the *lex specialis* which regulates the conduct of hostilities,¹⁶ and help to make that law more effective.

Over the last century, humans have radically transformed airspace's composition: chemically, territorially, militarily and psychologically. With current and anticipated technological developments, this transformation is accelerating and gaining in complexity. This represents a rapidly growing disparity in the global landscape of power, where civilians—including unprecedented numbers of displaced people—are increasingly subject to expanding commercial and military exploitation of technology in airspace and outer space and to the consequences of environmental change. The associated threats are not adequately accounted for by the legal framework defined by the contemporary international law of airspace.

This disparity has grown significantly since the early 20th century, which saw a radical shift in the terms of conflict with the first full-scale deployment of airborne chemical warfare at the Second Battle of Ypres on 22 April 1915.¹⁷ Thirty years later, Hiroshima and Nagasaki were destroyed by atomic bombs. From 1946 to 1958, while administered by the US under UN trusteeship, the Marshall Islands was the location of repeated nuclear weapons testing by the US. During that period, 67 nuclear weapons were detonated there and the devastating impact of those nuclear substances and wastes continues to this day.¹⁸ What the Marshallese people lost included the freedom to look up and not feel threatened. In his poignant opening statement to the International Court of Justice in *Marshall Islands v Pakistan* on 8 March 2016,¹⁹ the Marshall Islands' Co-Agent and ex-Foreign Minister, Tony de Brum, recalled how, as a nine year old boy, he had seen children playing in the radioactive dust that fell from the skies:

“Yesterday was a beautiful morning here in The Hague that featured a picture-perfect snowfall. As a tropical state, the Marshall Islands has experienced ‘snow’ on one memorable and devastating occasion, the 1954 Bravo test of a thermonuclear bomb that was one thousand times the strength of the Hiroshima bomb. When that explosion occurred, there were many people, including children, who were a far distance from the bomb, on our atolls which, according to leading scientists and assurances, were predicted to be entirely safe. In reality, within five hours of the explosion, it began to rain radioactive fallout on Rongelap. Within hours, the atoll was covered with a fine, white, powdered-like substance. No one knew it was radioactive fallout. The children thought it was snow. And the children played in the snow. And the children ate the snow. So one can understand that snow, while beautiful, has a tragic and dark history in the Marshall Islands.”

There has been a rapidly increasing trajectory of large-scale human vulnerability to the weaponisation of airspace, pervasive transformation of its composition and use, and significant environmental impacts. The scale and dimension of these impacts also require new thinking. For example, Svetlana Alexievich has identified the Chernobyl disaster as “a catastrophe of time”²⁰:

¹⁵ Charter of Fundamental Rights of the European Union art.13.

¹⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, para.25.

¹⁷ Peter Sloterdijk, *Terror from the Air* (Los Angeles, CA: Semiotext(e), 2009). On p.14, Sloterdijk describes this attack as a radical shift towards “targeting no longer the body, but the enemy’s environment”.

¹⁸ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu; Addendum, Mission to the Marshall Islands (27–30 March 2012) and the United States of America (24–27 April 2012); 3 September 2012, Doc.A/HRC/21/48/Add.1, paras 1–19.

¹⁹ See <http://www.icj-cij.org/files/case-related/159/159-20160308-ORA-01-00-BI.pdf> [Accessed 25 May 2018]. This was one of three cases in which the Marshall Islands contended that nuclear-armed India, Pakistan and the UK are in breach of obligations concerning good faith disarmament negotiations. On 5 October 2016 the Court controversially decided that it could not proceed to the merits.

²⁰ Svetlana Alexievich, *Chernobyl Prayer* (London: Penguin Modern Classics, 2016, new translation by Anna Gunkin and Arch Tait), p.24.

“The image of the adversary had changed. We’d acquired a new enemy. Or rather enemies. Now we could be killed by cut grass, a caught fish or game bird. By an apple. The world around us, once pliant and friendly, now instilled fear. Elderly evacuees, who had not yet understood they were leaving forever, looked up at the sky: ‘The sun is shining. There’s no smoke or gas, nobody is shooting. It doesn’t look like war, but we have to flee like refugees.’ A world strange yet familiar.”²¹

In 2013, the International Law Commission decided to include “The Protection of the Atmosphere” in its programme of work and appointed a Special Rapporteur with a view to producing a set of draft articles on the topic.²² In his first report, the Special Rapporteur distinguishes between airspace and the atmosphere: “Airspace refers to a domain, an area-based approach; the atmosphere, in contrast, is a natural resource that flows through national boundaries … Thus, the atmosphere is a fluid, single and non-partitionable unit, whereas airspace is a static—and separable—spatial domain”.²³ Nevertheless, recognising that states may want reassurance that their “complete and exclusive sovereignty” over the airspace above their territory will not be compromised, he proposes the inclusion of a saving clause to the effect that nothing in the draft guidelines shall affect the legal status of airspace provided in other conventions.²⁴

The relationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including human rights law, is also addressed. Draft guideline nine (“Interrelationship among relevant rules”) provides that states should “to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner”,²⁵ and that “special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation”. It adds: “Such groups may include, inter alia, indigenous people, people of the least developed countries and people of small-island and low-lying States affected by sea-level rise”.²⁶ So there are interesting connections between the ILC’s ongoing work on the protection of the atmosphere and the Airspace Tribunal initiative to develop and recognise a new human right to protect the freedom to exist without physical or psychological threat from above. Even though the Special Rapporteur is emphasising the domain or area-based approach to airspace and safeguarding the sovereignty principle reaffirmed by the Chicago Convention, it will be important for the proposed new human right and the new rules of international law on the protection of the atmosphere to be developed “in a harmonious manner” and with particular regard to especially vulnerable individuals and groups.

Another of the ILC’s current topics, “The protection of the environment in relation to armed conflicts”,²⁷ recognises that during the 20th century “technological development placed the environment at a greater risk of being permanently destroyed through destruction caused by nuclear weapons or other weapons of mass destruction, but also through destruction caused by conventional means and methods of warfare”.²⁸ Such developments and the associated risks continue unabated. In February 2018 the Pentagon announced that “[e]xpanding flexible US nuclear options now, to include low-yield options, is important for the preservation of credible deterrence against regional aggression”.²⁹ Soon afterwards came Russia’s announcement that it had developed new nuclear delivery systems capable of evading US defences.³⁰ At the same time, the space above us is the location of increasingly complex weapons systems trials, advances

²¹ Alexievich, *Chernobyl Prayer* (2016, new translation by Anna Gunin and Arch Tait), p.28.

²² Doc.A/CN.4/667, para. 4,

²³ Doc.A/CN.4/667, para.81 (footnotes omitted).

²⁴ Doc.A/CN.4/667, para. 83.

²⁵ Doc.A/CN.4/667, para 2.

²⁶ Doc.A/CN.4/667, para 3.

²⁷ See http://legal.un.org/ilc/summaries/8_7.shtml [Accessed 25 May 2018].

²⁸ Doc.A/66/10, Annex E, para.4.

²⁹ US Department of Defense, *Nuclear Posture Review* (February 2018), Executive Summary, p.XII: <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF> [Accessed 25 May 2018].

³⁰ “Russia’s Putin unveils ‘invincible’ nuclear weapons”, BBC News, 1 March 2018, <http://www.bbc.co.uk/news/world-europe-43239331> [Accessed 25 May 2018].

in geotracking, surveillance and satellite warfare. At this critical juncture, expertise from across a range of disciplines is required to respond to these developments and ensure adequate representation for those whose rights are affected. In advocating the development and recognition of this new human right, the Airspace Tribunal will facilitate new dialogues, stimulate new critical thinking and propose new approaches to deal with the current and future pressures on airspace. It will also examine the efficacy of current forms of representation within the legal framework, seeking to ensure agency and voice across a wider constituency of experience and expertise.

Contexts and scenarios demonstrating the need for new thinking

The following contexts and scenarios demonstrate the need for radical new thinking in this area:

1. Each year, vast areas of airspace over the north of Scotland and extending out over the North Atlantic are occupied by NATO Member States for military exercises (e.g. Operation Joint Warrior)³¹ and by commercial organisations for weapons testing (e.g. Operation Unmanned Warrior).³² While the expansion and use of these “Danger Areas” have far-reaching consequences, public consultation has only addressed their economic and environmental impacts and then only in very narrow terms.³³ The scope of such consultation needs to be commensurate with the complexities and reach of the impacts.
2. The psychological impact of aerial bombardment and of the fear of attack from above, whilst acknowledged, is not yet adequately understood. The advent of such bombardment a century ago “created hopelessly unequal new power relationships between warrior high above and victim below … The dread of random death from above became a psychological weapon in itself … Each technological breakthrough intruded war’s terror deeper into the anxieties and fantasies of civilians”.³⁴ With the significant shift to the weaponisation of airspace and outer space, and the rapid development of technology allowing the maintenance of airborne threats indefinitely, the impact on civilian populations of sustained threat of attack from the air (e.g. through drone warfare, chemical weapons and anti-satellite weapons systems) and its longer-term psychological and physical consequences require greater understanding and recognition in the legal context, including new approaches to the gathering and presentation of evidence.

This is especially crucial for the growing numbers of civilians who are displaced and disenfranchised through war, conflict or environmental disaster. In a 12-month period between 2015 and 2016, over 1.2 million people applied for asylum in the EU alone. This was the largest movement of people in Europe since the Second World War.³⁵ The majority had been displaced by war and conflict in which large civilian populations had been subject to attack from the air. As Alison Abbott has observed, although the crisis has attracted global attention and sparked political tension, “[w]hat hasn’t been widely discussed is the enormous burden of mental-health disorders in migrants and refugees”.³⁶ Citing work published by the American Psychiatric Association, Emily Holmes makes a related point: “Even once in a

³¹ See <http://www.gov.scot/Resource/0052/00525162.pdf> [Accessed 25 May 2018].

³² See <https://www.royalnavy.mod.uk/news-and-latest-activity/operations/uk-home-waters/unmanned-warrior> [Accessed 25 May 2018].

³³ Demonstrated by Sneddon Economics, *MOD Missile Test Range Uists, Economic Impact Assessment*, 19 August 2009, report commissioned by Highlands & Islands Enterprise (HIE) on behalf of the Hebrides Range Task Force, and by the CAA Decision Letter, <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294972710> [Accessed 25 May 2018].

³⁴ From “The Unconscious Life of Bombs”, *BBC Radio 4*, 11 December 2017, presented by Daniel Pick (Birkbeck).

³⁵ Alison Abbott, “The Troubled Mind of Migrants” (2016) 538 *Nature* 158.

³⁶ Abbott, “The Troubled Mind of Migrants” (2016) 538 *Nature* 158.

- safe country, refugees are often plagued by vivid mental images of traumatic events—called ‘*intrusive memories*’—that repeatedly spring to mind unbidden”³⁷. Of particular importance, and currently unknown, is whether there are any special psychological features of suffering attack from the air. Perhaps the frequency of generalised anxiety disorder (GAD) and post-traumatic stress disorder (PTSD) is more common following such attacks compared to other types of attack? Currently, we simply do not know. The rapid expansion of the weaponisation of airspace could lead to distinctive psychological conditions requiring new therapeutic interventions. Recognition of this proposed new human right could help to stimulate new knowledge in this field. A better understanding of the psychological impacts is also critical to more effective representation within the legal context.
3. A review of the human rights dimension of airspace is further necessitated by the transformations in proximity and distance in contemporary warfare. As new technologies facilitate a “militarized regime of hypervisibility”,³⁸ enabling an increasingly remote means of locating and killing enemies, the co-presence of journalists and others charged with documenting the threats and effects of warfare is increasingly compromised. Reflecting on his work as a landscape photographer recording the aftermath of conflict, Simon Norfolk has highlighted the challenge of using more traditional methods to document contemporary forms of war: “How do you photograph a drone flying over Yemen at 40,000 feet and firing a missile into a car in the middle of nowhere? You can’t photograph it. How do you photograph satellite warfare or submarine systems, or cyberwarfare? That’s how the war of the future is being fought, that is where the money is being spent … I don’t know how to photograph any of that stuff”.³⁹ Against this background, developing forensic practices across interdisciplinary teams of expertise, such as those exemplified by Forensic Architecture,⁴⁰ to gather, analyse and present evidence in the complex domain of contemporary and future conflict will become increasingly necessary, as will the legal framework to consider this.
4. A human right to protect the freedom to exist without physical or psychological threat from above also needs to accommodate the risk posed to individuals by their inadvertent exposure as targets. For instance, geolocation features pervasive in smartphones and increased search engine power in sifting and mapping geotagged photographs reveal a person’s “patterns of life”. A recent example was the release in November 2017 of Strava’s data visualisation map of uses of the company’s fitness tracking app used on a variety of devices (smartphones and fitness trackers). More than 1 billion activities uploaded to Strava were suddenly made available on its global heatmap comprising more than 3 trillion individual data points. Early in 2018 it became apparent that the jogging routes of foreign military personnel and the internal layouts of their bases in Afghanistan and Syria had been revealed, in a new risk to their operational security.⁴¹

The Airspace Tribunal process

Conceived by Grief and Illingworth, the Airspace Tribunal will draw together a wide range of expertise and lived experience to argue the case for and against the recognition of this new human right. The hearings

³⁷ Emily A. Holmes et al., “‘I Can’t Concentrate’: A Feasibility Study with Young Refugees in Sweden on Developing Science-Driven Interventions for Intrusive Memories Related to Trauma” (2017) 45 *Behavioural and Cognitive Psychotherapy* 97.

³⁸ Derek Gregory, “From a View to a Kill: Drones and Late Modern War” (2011) 28 (7)–(8) *Theory, Culture & Society* 193.

³⁹ Simon Norfolk in conversation with Andrew Hoskins, Open Eye Gallery, Liverpool, 3 May 2012.

⁴⁰ See <http://www.forensic-architecture.org> [Accessed 25 May 2018]. Forensic Architecture is an independent research agency led by Eyal Weizman and based at Goldsmiths, University of London.

⁴¹ Alex Hern, “Fitness tracking app Strava gives away location of secret US army bases”, *The Guardian*, 28 January 2018, <https://www.theguardian.com/world/2018/jan/28/fitness-tracking-app-gives-away-location-of-secret-us-army-bases> [Accessed 25 May 2018].

will consider the changing environmental, cultural, social, psychological, political, military and historical definition, perception and composition of airspace. Its members ('judges') will be an invited cross-section of the general public who will be involved as participants in this initiative, challenging the traditional state-centric view of how international law is created.⁴² At the inaugural hearing in London there will be short representations from 10 key speakers/experts.

The process will be led by Counsel to the Tribunal, who will question each of the experts after they have delivered their statements and then invite and facilitate comments and questions from the floor—both from invited participants and from the wider audience. The hearings will be recorded and transcribed in order to document the drafting history of this proposed new human right. The Tribunal is part of and will inform the development of *Topologies of Air*, a major new body of artwork by Illingworth, commissioned by The Wapping Project,⁴³ that will be exhibited at The Power Plant, Toronto in 2020 and provide further opportunity for public debate.

Conclusion—and an invitation to contribute

In sum, an intensifying dialectic of fear between ground and space, of pervasive mass human vulnerability of being tracked, surveilled and targeted from above, requires similarly radical rights in response. This is why we are proposing not only a new and urgent debate on a scale commensurate with these emergent risks, but a unique forum—the Airspace Tribunal—whose documented proceedings will help to constitute the drafting history of this new human right and signal a critical cultural change in scholarly intervention, through interdisciplinary public dialogue and debate. We invite and welcome contributions to this project in the form of comments, criticism, suggestions and/or expressions of interest in attending the London session of the Airspace Tribunal.⁴⁴

⁴² Barbara Woodward (ed.), *Global Civil Society in International Lawmaking and Global Governance* (Leiden: Brill Nijhoff, Queen Mary Studies in International Law, 2010), pp.105–106.

⁴³ See <http://thewappingproject.org/> [Accessed 25 May 2018]. The Wapping Project is a platform for the continuous development of ideas, thoughts and people. The London hearing of the Airspace Tribunal is supported by The Wapping Project and by the University of Kent's Public Engagement with Research Fund.

⁴⁴ Further information about the Tribunal and its developing work can be found at www.airspacetribunal.org [Accessed 3 June 2018].

Point of View

The Copenhagen Declaration: How Not to “Reform” the European Court of Human Rights

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Shirley Pouget**

✉ European Court of Human Rights

My organisation, the Open Society Justice Initiative, litigates and undertakes legal advocacy to advance human rights and the rule of law around the globe. But we have deep roots in, and an unshakeable commitment to, the human rights system in Europe, where Open Society Foundations was born.

We are not only ardent supporters of the European Convention on Human Rights, we are also active users of the European Court and have litigated a number of its most important cases. We are invested in the Court’s independence, effectiveness and long-term well-being. We believe that the strength of the Court, while dependent upon many factors, derives in large part from the quality of its judgments—and the extent to which they are implemented. For this reason, we have insisted on the importance of execution, and have advocated for strong supervision mechanisms within the Committee of Ministers and robust execution efforts at the national level.

The future of the European Human Rights Convention system has been the subject of continuous, intense intergovernmental scrutiny, with four official declarations and two new Protocols adopted in eight years. In each case, with the exception of the Brussels Declaration, legitimate efforts to strengthen the Court and the Convention system have coincided with over-reach—that is, inappropriate attempts by some to use the language of “reform” as a mask to narrow the Court’s role.

The process leading up to this year’s Copenhagen Declaration under the Danish chairmanship of the Council of Europe has exhibited a similar dual tendency. On the one hand, many states have admirably focused on the necessary and laudable aim of assuring the “sustainable functioning of the control mechanism of the Convention”, including by guaranteeing the Court the necessary resources to continue its progress in reducing the backlog of cases. But, on the other hand, there were attempts in the course of the past several months to insert language into the Declaration that would have compromised the Court’s independence, unduly constrained its remit and wrongly signalled that it was “unrealistic” for the Court to address large-scale rights violations or that the Court should “avoid intervening” in most asylum or immigration cases.

We and other civil society actors and academics objected to these proposals. We warned that efforts to expand the notion of “dialogue” between Member States and the Court beyond the many fruitful opportunities for interaction that currently exist risked “politicising” the Court and infringing on its judicial authority and independence. And we observed that some suggestions to expand the principle of subsidiarity were misguided, insofar as they improperly inserted into a political Declaration guidance for how the Court should interpret concepts such as the “margin of appreciation,” and in doing so, failed to clarify

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that states do not always have a margin of appreciation and that the scope of the margin, if any, is to be determined by the Court, not states.

It should be noted that civil society raised these concerns even though most of its representatives were not generally privy to inter-state discussions, and were not given the opportunity to comment on several of the draft declarations that emerged. Thankfully, many of the most problematic proposals provoked consternation among Council of Europe members as well.

Thus, a coalition of 19 states expressed serious reservations about the way one earlier draft during the negotiations downplayed the Court's supervisory functions, questioned its independence and authority, revisited well-established principles of dynamic interpretation of the Convention, and undermined the principle of universality of human rights.

As a result, the final Copenhagen Declaration adopted this April is in far better shape than some had feared. While brief, the Declaration includes two paragraphs noting the importance of the execution of judgments at the national level, and reinforces the responsibilities of states as first responders in safeguarding, preventing and addressing violations of the Convention. And while the Declaration clearly points to the need for improved Court functioning (through greater clarity and consistency of judgments, addressing the large caseload and ensuring the highest quality judges), it also recognises the Court's ultimate authority to determine whether the Convention has been violated. The Declaration helpfully affirms the "shared responsibility" of the Court and Member States to fully and effectively implement the Convention at the national level.

However, given that examination of the Court and the Convention system more broadly will continue after Copenhagen—the Brussels Declaration envisions an analysis, by the end of 2019, of the prospects of obtaining a balanced caseload—all parties might benefit from reflection now on how that process could be improved. Here are three areas where we can do better.

First, efforts by some states to diminish the Court's authority have been "politically" motivated—they were designed to appeal to surging nationalist currents among domestic constituencies. It is no secret that human rights are on the defensive across much of Europe—and in the world at large. In the face of such pressure, it may be tempting to parrot the fabrications of populist figures, such as that rights are an elitist invention for terrorists and immigrants, but not for everyone else.

But the past few years have taught that, rather than succumb, political leaders combat populist nationalism most effectively when they stand up for the core principles of the Convention—including the rule of law, tolerance of difference and equal opportunity. The most successful politicians are able to explain to their citizens in plain terms why rights matter for all.

Just look at the experience of court systems outside Europe. Several years ago, the Southern African Development Community Tribunal came under withering attack for some of its initial decisions. No state defended it—and it collapsed.

By contrast, continent-wide regional mechanisms in Africa and Latin America have experienced severe blowback in recent years. But in both cases, a number of governments have pushed back and in the process secured broader support for the institutions and political benefit for themselves. Similarly, when, a little over a year ago, the International Criminal Court faced a wave of threatened withdrawals, several states, backed by civil society, spoke up in defence of the Court and its mission. Although challenges remain for each of these bodies, they have survived to fight another day.

Conversely, when governments who have been longstanding rights champions falter, other states notice—and the impacts resonate across borders. Several years ago, Kenya's leadership seized upon Britain's vocal criticism of the European Court to justify their own self-interested attacks on the ICC.

The lesson is clear—defending rights and the institutions which protect them demands political dedication and courage, not cowardice.

A second insight is that the Copenhagen process might have built more effectively on the Brussels Declaration, which, despite its excellent language, has had little practical impact thus far. The Copenhagen Declaration might have proposed concrete measures to improve the execution of judgments. Thus, it might have encouraged the Court to craft judgments identifying specific measures and a timeframe for executing judgments; or urged the Committee of Ministers to develop a set of progressive actions to respond to non-execution of judgments, such as public hearings, referring non-implemented cases to the Parliamentary Assembly for debate, *in situ* missions, and greater use of infringement proceedings under art.46(4); or noted the possibility of financial sanctions for failure to execute judgments. Post-Copenhagen reviews should consider taking up these points.

Finally, any future examination of the European Convention system should ensure that civil society is considered an indispensable partner. The Copenhagen Declaration (at para.33) makes clear that “civil society should be involved” in the ongoing dialogue between States Parties and the Court on their respective roles in implementing the Convention system. But going forward, the commitment to engage civil society as a full and equal actor must be translated into concrete measures. So, for example, consultations on new procedures and working methods should involve, not only the Registry and government agents (as para.37(c) of the Declaration notes), but representatives of applicants and NGOs as well. Last-minute, token invitations to a few NGOs to attend, but not speak at, government-dominated conferences will not suffice. More generally, follow-on efforts to achieve full implementation of the Convention must be seen as a “shared responsibility” of not only the Council of Europe and its Member States, but of civil society organisations as well.

In short, the Copenhagen process, which once threatened to pose a real challenge to the Court, has ended in a relatively positive place. But rather than offering congratulations, it is essential to take stock of what could have gone better, and of how to ensure that the next round of this recurring examination of the Convention system is aimed more clearly at preserving and strengthening the jewel of regional judicial bodies.

Bulletin: European Court of Human Rights and Council of Europe

The Court issued, inter alia, judgments and decisions in the following cases in February-March 2018:

Article 2 of the Convention and Rule 39 of the Rules of Court

- *Haastrup v United Kingdom*, refusing a request for an interim measure to stop the withdrawal of ventilation from a 12-month old baby on life support since birth and rejecting the application as inadmissible;
- *RŠ v Latvia*, finding no violations, substantive or procedural, where the applicant, injured while travelling on a private plane, had been unsuccessful in obtaining compensation as the domestic courts had acquitted the owner of the company operating the plane and found the accident had been caused by human error, namely the pilot who had died in the crash.

Articles 2 and 3

- *Evans v United Kingdom*, declaring inadmissible and refusing request for interim measures as regards issues raised by the parents of Alfie Evans, a young child on life support which may be withdrawn following a court order.

Article 3

- *VC v Italy*, finding a violation in that the authorities had failed to protect the minor applicant from a child-prostitution ring;
- *Portu Juanenea and Sarasola Yarzabal v Spain*, finding substantive and procedural breaches arising from the ill-treatment of the applicants as suspected terrorists detained by the Guardia Civil and from the inadequate judicial response;
- *Ebedin Abi v Turkey*, finding a violation arising out of the failure of the prison authorities to provide the applicant prisoner, a diabetes sufferer with heart problems, with the appropriate diet;
- *Ireland v United Kingdom (revision)*, rejecting a request by the Irish Government to revise the 1978 *Ireland v United Kingdom* judgment, primarily to find that the treatment of prisoners amounted to torture, not just inhuman and degrading treatment.

Articles 3 and 5(5)

- *Selami v Macedonia*, finding in respect of circumstances where a man who had been tortured during unlawful detention and died during proceedings for compensation, that only his son, the heir who had taken over the litigation, could claim “victim status” and that there was a procedural breach of art.3 and of art.5(5) in that the compensation awarded for the torture during unlawful detention was too low.

Articles 3 and 34

- *MA v France*, finding a breach of art.3 in that the applicant, a convicted terrorist, was sent back to Algeria where he was at risk of ill-treatment and a breach of art.34 in that the applicant’s expulsion took place at such short notice as to prejudice his ability to seize the Court.

Article 5(1)

- *X v Russia*, finding a violation where the applicant had been detained in a mental hospital after allegedly harassing a teenager, without due consideration of whether he presented a danger requiring detention and giving undue attention to the fact that he liked dressing up in women's clothing.

Articles 5(1), 6 and 10

- *Butkevich v Russia*, finding violations where the applicant journalist was arrested at an anti-globalisation protest, detained for two days and convicted of an administrative offence.

Article 5(1), (4) and (5) and Article 10

- *Altan v Turkey* and *Alpan v Turkey*, finding, in respect of two journalists arrested and detained after the July 2016 attempted coup, breaches of art.5(1) arising out of the continued detention of the journalists even after a finding by the Constitutional Court in their favour, no breach of art.5(4) and (5); and a breach of art.10 as the measures penalised the journalists for exercising their freedom of expression.

Article 5(3) and (4)

- *Pouliou v Greece*, rejecting the complaints about pre-trial detention that lasted six months and finding a violation of sub-para.4 for lack of promptness in the hearing of the applicant's bail application, which took 35 days.

Article 6(1)

- *Tsezar v Ukraine*, finding no lack of access to court for the applicants, pensioners living in the occupied Eastern Ukraine, that they had to go to the Government-controlled area to bring their claims about suspension of their pensions;
- *CM v Belgium*, finding a lack of access to court where the applicant did not receive effective assistance from the authorities in enforcing the judgment requiring his neighbour to demolish a building in compliance with urban planning regulations;
- *Vilches Coronado v Spain*, finding no violation as the the proceedings, where the applicants were convicted on appeal after first instance acquittal, were fair;
- *Nait-Liman v Switzerland* (Grand Chamber), finding no violation arising out of the complaints of the applicant that the domestic courts refused to hear his claims about alleged torture in Tunisia.

Article 8

- *MK v Greece*, finding no violation where the applicant, a mother living in France, was unable to have her custody rights enforced in respect of her son, living in Greece with her ex-husband, as the Greek courts took into account the son's wishes to remain with his father;
- *Ben Faiza v France*, finding a violation in respect of a geolocation device attached to the applicant's car as an investigative measure, due to the lack of clarity in the law; and finding no violation in respect of a court order to a mobile telephone operator for accessing the applicant's calls and for tracking his location;
- *Ivashchenko v Russia*, finding a violation where the customs authorities copied the files on the applicant journalist's portable computer;

- *Libert v France*, finding no violation where the applicant, a SNCF worker, was dismissed after his employer found pornographic material and forged certificates on his work computer; the Court found that the French law and the domestic courts' assessment of the issues was in conformity with art.8, in particular as it was provided that employers could not open computer files clearly marked "personal" unilaterally but only in the presence of the employees;
- *Calancea v Republic of Moldova*, rejecting as inadmissible complaints about a high voltage line over the applicants' homes due to lack of substantiation that the electric field constituted a health risk;
- *Wetjen v Germany, Tlapak v Germany*, finding no violation arising out of the measures taken by the courts, partially withdrawing parental responsibility and placing some children in care, in respect of members of the Twelve Tribes Church who carried out the practice of punishing children by caning.

Article 10

- *Meslot v France*, rejecting as inadmissible the complaints of the applicant that he was fined for contempt of court for aggressively critical statements that he had made, during his electoral campaign, against a judge, who had brought charges against him for electoral fraud;
- *Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v Turkey*, finding a breach where the applicants were refused a national security certificate, the precondition to obtaining a licence to broadcast radio, in procedures with inadequate judicial supervision;
- *Alpha Doryforiki Tileorasi Anonymi Etairia v Greece*, finding, where the applicant TV company had filmed, without his knowledge, a politician going into a gambling arcade and their later discussions with him about his conduct and then broadcast the footage, that fines imposed on the company were in breach of art.10 only in respect of the footage taken in public in the gambling arcade where the politician could have expected to have been under telesurveillance in any case;
- *Stern Taulats and Roura Capellera v Spain*, finding a violation where the applicants were convicted for insult to the Crown for burning a photograph of the King and Queen, and sentenced to two years' imprisonment, changed on appeal into a fine.

Article 10 and Article 6

- *Smajic v Bosnia and Herzegovina*, finding no violation where the applicant lawyer was convicted for putting insulting posts about Serbs on an internet forum.

Article 14 in conjunction with Article 8

- *Bonnaud and Lecoq v France*, finding, for a same-sex couple where each female partner had a biological child, that the refusal by the domestic court to grant delegation of parental responsibility to the other partner for each child, did not disclose any difference of treatment on ground of sexual orientation and rejecting the complaints as inadmissible.

Article 14 in conjunction with Article 2 of Protocol No.1

- *Enver Şahin v Turkey*, finding a violation where a paraplegic was unable to attend university due to the lack of adequate facilities.

Article 35

- *Bencheref v Sweden*, rejecting for abuse, the applicant's complaints detention pending expulsion where he had claimed to be Moroccan and had not informed the Court that he was in fact from Algeria.

Article 1 of Protocol No.1

- *Cacciato v Italy* and *Guiso and Consiglio v Italy*, rejecting as inadmissible complaints that the applicants had to pay 20% tax on the compensation received for expropriated property;
- *Galea v Malta*, finding a violation where the applicants had not been able for over 45 years to bring proceedings to challenge the expropriation of their land in 1960 and claim compensation.

Article 1 of Protocol No.1 and Article 6

- *Kristiana Ltd v Lithuania*, finding no violations where the applicant company, which had bought former military property in a national park area, was unable to develop the land;
- *Radomilja v Croatia* (Grand Chamber), finding no violation arising out the applicants' complaints about the rejection of their adverse possession claims.

Article 2 of Protocol No.4

- *Balta v France*, rejecting as inadmissible the complaints of the applicant, a Romanian Roma, about a prefectoral decision requiring him to remove his illegally parked caravan.

The Court held hearings in the following cases in February–March 2018:

- *Murtazaliyeva v Russia* (Grand Chamber), concerning the complaints of the applicant, a Chechen woman convicted for terrorist offences, under art.6(3)(b) and (d) that she was unable to challenge surveillance evidence or have a police officer and attesting witnesses called for examination at trial;
- *Fernandes de Oliveira v Portugal* (Grand Chamber), concerning the complaints by the applicant under art.2 in relation to the death by suicide of her son who had absconded from a mental hospital;
- *Lekić v Slovenia* (Grand Chamber), concerning the complaints of the applicant under art.1 of Protocol No.1 that he had been held liable as director for the debts of a company;
- *Güzelyurtlu v Cyprus and Turkey* (Grand Chamber), concerning the complaints under arts 2 and 13 of the Convention raised by relatives of three victims shot dead in Cyprus by gang members who then fled to northern area under the control of the Turkish Republic of Northern Cyprus; issues arise as alleged failings in cooperation between the Cypriot and Turkish authorities in investigating the incident and the lack of remedies in that regard.

CPT

In February–March 2018, the CPT made the following visits: a 12-day visit to Romania; a nine-day visit to the Slovak Republic.

It issued reports on its 2016 visit to Belgium, calling inter alia for improved conditions for psychiatric detainees, better prison conditions and strengthened protection against police brutality; and on its 2016 visit to Imrali prison, Turkey where Abdullah Ocalan and three others are held, finding improvements in many areas but noting a deterioration in opportunities for outside contact.

Council of Europe

The Council of Europe issued new guidelines to the 47 Contracting States on media pluralism and transparency in media ownership as well as on the role and responsibilities of internet intermediaries.

Signatures and ratifications

The Council of Europe Convention against the Trafficking of Human Organs entered into force, with five ratifications.

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during February–March 2018 (all Articles refer to the EU Charter, unless otherwise specified):

Articles 7, 16 and 17

- *Pari Pharma v European Medicines Agency (EMA)* (T-235/15), 5 February 2018, in which the claimant's competitor, Novartis, had market authorisation for its medicinal product TOBI. The claimant applied for market authorisation for a competing product, Vantobra. The EMA granted authorisation to the claimant, and Novartis requested access to documents for their application. Held that there was no breach of fundamental rights because the documents were not confidential, they were not difficult to obtain and there were no specific details as to how other competitors would be able to enter the market if the documents were disclosed.

Articles 12 and 21

- *Paulini v ECB* (T-764/16), 28 February 2018, appeal by the claimant, who because of being on sick leave for some time, was denied salary increments based on the 2015 Annual Salary and Bonus Review (ASBR) guidelines. The argument was that the ASBR guidelines were illegal. The appeal was rejected in its entirety with no breach of non-discrimination.

Article 16

- *Kim and Others v Council and Commission* (T-533/15), 14 March 2018, individuals working for the Korea National Insurance Cooperation (KNIC) from the Democratic People's Republic of Korea (DPRK) were subject to sanctions based on UN Security Council Resolution 2094 to prevent the DPRK from advancing their nuclear proliferation programme. They sought annulment of the contested decision as it restricted their ability to deal with their property and affected their business dealings, arguing it was disproportionate because they did not generate revenue for the DPRK. The claim was rejected.

Articles 17, 41, 47, 48 and 52

- *Klyuyev v Council* (T-731/15), 21 February 2018, appeal against T-341/14 *Klyuyev v Council* (see Murphy & Yong, “Bulletin: EU Charter of Fundamental Rights” [2016] E.H.R.L.R 494, 495) on maintaining sanctions against certain persons in view of the situation in Ukraine. The appeal was based on the allegedly stereotypical nature of the statement of reasons and on infringements of the right to property, but the claim was rejected in its entirety.

Article 41

- *Vakakis kai Synergates v Commission* (T-292/15), 28 February 2018, concerning a conflict of interests between the author of the terms of reference and the forerunning candidate for a tender of contract of services to establish a National Food Authority in Albania. It was held that there was a sufficiently serious infringement of the obligation of due diligence and of the principle of sound administration because of the EU delegation’s failure to check the existence of any conflicts of interest;

- *Philip Morris Brands v EUIPO – Explosal (Superior Quality Cigarettes FILTER CIGARETTES Raquel)* (T-105/16), 1 February 2018, an appeal by Philip Morris Brands to contest the registration of a trademark for Raquel that the Board of Appeal originally rejected because there was a very low degree of similarity between the marks. On the principle of sound administration, EUIPO should have considered the decision in “*SUPER ROLL*” which confirmed the substantial reputation of Philip Morris Brands’ Marlboro brand. The appeal was upheld;
- *Stavytskyi v Council* (T-242/16), 22 March 2018, on sanctions against the former Minister for Energy and the Coal Industry of Ukraine. It was held that the statement of reasons was sufficient, so complaints of illegality, disproportionality and lack of legal basis were rejected in their entirety;
- *Institute for Direct Democracy in Europe (IDDE) v Parliament* (T-118/17), 8 February 2018, in which the claimant submitted a successful application for funding from the general EU budget in 2015 but due to supposed fraudulent donations that it received, Parliament suspended its final payment of 2015 and forthcoming payments for 2017. Its claim was based on the ground of illegality, because of the composition of the Bureau of Parliament who made the decision and on the ground that there was too short a time in which to respond. Both grounds were unsuccessful.

Article 42

- *CEE Bankwatch Network v Commission* (T-307/16), 27 February 2018, the National Nuclear Energy Generating Company of Ukraine (Energoatom) were granted a Euratom loan in support of the Ukraine safety upgrade program of nuclear power units. The claimant sought access to five documents and were either granted only partial or no access to them. They argued that their claims were not sufficiently considered by the contested decision but the Court held there was no breach of the Charter.

Articles 42 and 47

- *Edeka-Handelsgesellschaft Hessenring v Commission* (T-611/15), 5 February 2018, the claimant requested access to documents for a decision concerning a cartel between banks in the euro interest rate derivatives sector (EIRD), which was rejected. They contested this decision on the grounds that there were not adequate reasons stated, especially for refusing access to the table of contents. The claim was rejected as the documents were protected under a general presumption of confidentiality.

Article 47

- *POA v Commission* (T-74/16), 8 February 2018, the claimant requested access to documents concerning registration of halloumi cheese as a protected designation of origin and was granted only partial access. It was held that sufficient reasons were given for the refusal of full access and the appeal was dismissed.

The Court of Justice of the European Union

The Court issued, inter alia, judgments and decisions in the following during February–March 2018 (all Articles refer to the EU Charter, unless otherwise specified):

Articles 17 and 47

- *SEGRO* (C-52/16), 6 March 2018, the claimant acquired rights to usufruct over two parcels of land in Hungary which were registered on the property register, but later deleted. The claimant argued that this was against the free movement of services, capital, the right to property, and the right to a fair trial. It was held that restrictions on the free movement of capital could not be justified, so fundamental rights did not need to be considered.

Article 21

- *Stollwitzer* (C-482/16), 14 March 2018, the claimant worked for the predecessor of ÖBB-Personenverkehr AG and their scheme of advancing pay scales did not take into account periods of time worked before the age of 18. When rules changed to eliminate age discrimination, they were retroactively applied. The claimant sought this lost payment but had no proof of service, so his claim was dismissed. It was held that allowing only experience acquired with other undertakings operating in the same economic sector to be taken into account for retroactive claims was acceptable.

Article 47

- *Associação Sindical dos Juízes Portugueses* (C-64/16), 27 February 2018, Portuguese law allowed the temporary reduction of salaries to eliminate excessive budget deficits, which also affected judges. They argued salary reductions for a Member States' judiciary was against the principle of judicial independence. It was held that the salary-reduction measures did not impair the independence of the members of judiciary in question;
- *Schenker and Deutsche Bahn and others v Commission* (C-263/16 P and 264/16 P), 1 February 2018, in which appeals by air freight forwarder cartels against the Commission for not considering the disproportion between the turnover achieved by the cartels and the turnover on the international air freight forwarding market, were rejected;
- *LL v Parliament* (C-326/16 P), 21 February 2018, an appeal against a General Court decision where a parliamentary assistance allowance of EUR 37,728 had been wrongly paid to the appellant, whose repayment was now being sought by Parliament. The case was not brought out of time, so the General Court had to instead decide on the appeal's outcome;
- *Astellas Pharma* (C-557/16), 14 March 2018, the claimant was granted market authorisation (and data exclusivity) for its medicinal products Ribomustin by the German Federal Institute in 2005, and Levact by the French Republic in 2010. Helm sought market authorisation in 2012 from the Finnish Medicines Agency for Alkybend, a generic product whose reference product was Levact, but stated that Ribomustin should be the reference product for the applicable data exclusivity period. Alkybend was granted the authorisation with Ribomustin as the reference product. The claimant contested this decision, and it was held there was jurisdiction to determine the period of data exclusivity as concerns which reference product.

Articles 47 and 48

- *Sporting Odds* (C-3/17), 28 February 2018, the claimant offered online games in Hungary but did not have a licence to do so there. A fine was imposed by the Hungarian Tax Authority for not having this licence without informing Sporting Odds of their investigation. This law was held to be a discriminatory decision against operators who were established in other Member States with rules which were not necessarily discriminatory, but were applied in a non-transparent manner, or with rules that were implemented in such a way as to prevent or hinder applications from operators in other Member States.

Article 50

- *Garlsson Real Estate and Others* (C-537/16), 20 February 2018, an administrative fine was issued on Mr Ricucci, Magiste International and Garlsson Real Estate for the market manipulation of the price of securities. Mr Ricucci himself was then subject to additional criminal proceedings. The question was whether this was against the *ne bis in idem* principle. It was held that if the criminal conviction was such as to punish the original offence in an effective, proportionate and dissuasive manner, then it is against the *ne bis in idem* principle to also bring administrative proceedings (such as the fine);
- *Di Puma* (C-596/16 and 597/16), 20 March 2018, the claimant was fined for insider dealing and appealed against this fine of a criminal nature because of an acquittal that had already been delivered for the same proceedings. It was held that the *ne bis in idem* principle did not preclude national legislation that did not allow administrative fines after a final judgment where that final judgment did not establish any infringement of other national legislation.

European Court of Human Rights

The European Court of Human Rights did not refer to the Charter in the dispositive of its judgments in February–March 2018.

UK Appellate Courts

The appellate courts in the United Kingdom issued, *inter alia*, judgments and decisions in the following during February–March 2018 (all Articles refer to the EU Charter, unless otherwise specified):

Article 24

- *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2018] UKSC 9 (14 February 2018), in which the Supreme Court considered the situation of a third country national child placed in the care of EU nationals under the system of “kefalah” in his state of origin. The Court referred three questions to the Court of Justice of the EU under the preliminary reference procedure;
- (and Article 7): *Secretary of State for the Home Department v Robinson (Jamaica)* [2018] EWCA Civ 85, in which the Court of Appeal considered an appeal by the Secretary of State against a decision of the Upper Tribunal to revoke a deportation order made in relation to the respondent. The Court considered recent case-law on whether or not the *Zambrano* principle was absolute. The case was remitted to the Upper Tribunal for a rehearing on the merits;
- (and Article 21): *O v The Advocate General for Scotland and N v The Advocate General for Scotland, Petitions for Judicial Review* [2018] ScotCS CSOH_7 (01 February 2018), in which the petitioners were single parent asylum seekers with one or more dependent children who sought to challenge a reduction in state benefits available to them. The petitions failed.

Some Reflections on Protocol No.16

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Advisory opinions; Courts’ powers and duties; European Court of Human Rights

Abstract

Protocol No.16 to the European Convention on Human Rights will enter into force on 1 August 2018, which will extend the advisory jurisdiction of the Court, allowing it to provide advisory opinions, at the request of identified courts of the State Parties to the Protocol, on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”. This article will focus on some key issues relating to the entry into force of the Protocol, the nature and effects of future advisory opinions and some procedural questions to which they may give rise. We will first touch briefly on the history and origins of Protocol No.16 (Section II), the aims which this new advisory procedure is meant to achieve (Section III), before proceeding to distinguish between the characteristics of the new procedure (Section IV) and procedural issues relating to their future treatment within the Court (Section V).

I. Introduction

On 12 April 2018, France became the tenth High Contracting Party to the European Convention on Human Rights to deposit its instrument of ratification of Protocol No.16 to the Convention. As a consequence, Protocol No.16 will enter into force on 1 August 2018.¹ As most readers will be aware, Protocol No.16 will extend the advisory jurisdiction of the Court, allowing it to provide advisory opinions, at the request of identified courts of the State Parties to the Protocol, on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”². It should come as no surprise that the Court has for some time been engaged in the necessary preparatory work for the Protocol’s entry into force. As a result of this process, the Court’s plenary has already adopted both the necessary amendments to the Court’s Rules of Procedure as well as non-binding Guidelines on the implementation of this new procedure. The latter Guidelines are intended to offer practical assistance to those courts and tribunals with competence to submit a request for an advisory opinion on the initiation of the request and the procedure to be followed.

* We are very grateful to Caoimhe Tierney, lawyer at the Court’s Registry, for her invaluable help with this article. The views expressed article are purely personal to the authors.

¹ Article 8(1) of Protocol No.16. The other nine states which have so far ratified the Protocol are Albania, Armenia, Estonia, Finland, Georgia, Lithuania, San Marino, Slovenia and Ukraine. A further nine states have signed it. Press reports suggest that the ratification procedures in the Netherlands and Iceland are also at an advanced stage. Article 6 emphasises that acceptance of Protocol No.16 is optional (see further below) and the latter does not have the effect of introducing new provisions into the ECHR for those High Contracting Parties that do not accept it.

² See below for further discussion of this criterion. Provision for advisory opinions is of course already made in arts 47–49 of the Convention but both those who can request such opinions (the Committee of Ministers), and the scope of what they may cover, are restricted. Two such requests were made up until 2008 and only one was accepted by the Court.

This article will focus on some key issues relating to the entry into force of the Protocol, the nature and effects of future advisory opinions and some procedural questions to which they may give rise. We will first touch briefly on the history and origins of Protocol No.16 (Section II), the aims which this new advisory procedure is meant to achieve (Section III), before proceeding to distinguish between the characteristics of the new procedure (what the Explanatory Report refers to as “key parameters”) (Section IV) and procedural issues relating to their future treatment within the Court (Section V).³

As serving judges, we do not perceive our role as being in any way to applaud or, on the other hand, criticise the Protocol. It is clear that it is for the High Contracting Parties to decide whether and when to sign and ratify the latter. When it comes into force it will be for the Court to apply it.

Finally, by way of an introductory note, we are aware that it may be tempting, when reflecting on the effects of Protocol No.16, to compare it with the preliminary reference procedure which is the CJEU’s main judicial engine. However, it is important, in this context, to bear in mind the conclusion reached by the Group of Wise Persons in its 2006 Report. Working under the chairmanship of Mr Gil Carlos Rodríguez Iglesias, previously President of the CJEU, the Report noted that:

“In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court’s workload.”⁴

So while the two procedures may bear some similarities, and there is no doubt that the procedural and judicial lessons learned with reference to the established Luxembourg procedure may be useful when developing the Strasbourg one, the two procedures are by no means identical, nor were they intended to be. Cross references to the Luxembourg procedure should not be interpreted as an indication to the contrary.

II. History

Before considering the detail of the substantive provisions of the Protocol, it may help to take a brief look at the origins and the major steps in the history of the idea of empowering the Court to give advisory opinions at the request of national courts.

The aforementioned Report of the Group of Wise Persons to the Committee of Ministers first suggested that:

“.... it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the Protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court’s ‘constitutional’ role.”⁵

That 2006 Report went on to suggest at paras 84–86 that:

“84. to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.

³ Note that preliminary draft amendments to the Rules of Court were submitted to Governments and interested NGOs in 2015, inviting them to comment by the end of November 2015. Comments were received by two governments and from certain NGOs in a collective response.

⁴ Report of the Group of Wise Persons to the Committee of Ministers, Document CM(2006)203, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893 [Accessed 25 May 2018], para.80.

⁵ Report of the Group of Wise Persons to the Committee of Ministers, para.81.

85. The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court's workload and resources, since the requests for opinions and the member states' observations would also need to be translated. In addition, providing such opinions would not be the Court's principal judicial function. Accordingly, the Court's new advisory jurisdiction should be subject to strict conditions.
86. It is proposed in this connection that:
- a) only constitutional courts or courts of last instance should be able to submit a request for an opinion;
 - b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the Protocols thereto;
 - c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal."

The next step appears to have been a joint proposal by the Dutch and Norwegian experts in January 2009 to extend the Court's jurisdiction to give advisory opinions⁶:

- "a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.
- b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
- c. It should always be optional for the national court to make a request.
- d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
- e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
- f. Requests should be given priority by the Court.
- g. An advisory opinion should not be binding for the State Party whose national court has requested it.
- h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 of the Convention.
- i. Extension of the Court's jurisdiction in this respect would be based in the Convention."

In February 2012, in preparation for the Brighton Conference in April that year, the Court issued a Reflection Paper on the proposal to extend its jurisdiction to provide such advisory opinions.⁷

The Brighton Declaration of 20 April 2012 stated that:

"... the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional Protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it."⁸

⁶ Summarised in document CDDH(2012)R74 Addendum I, Appendix V, http://www.coe.int/t/dghl/standardsetting/cddh/Meeting%20reports%20committee/74_Final_Report_en.pdf [Accessed 25 May 2018].

⁷ See http://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf [Accessed 25 May 2018].

⁸ Paragraph 12(d) of the Brighton Declaration, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805caa07> [Accessed 25 May 2018].

The proceedings of the Brighton Conference record the head of the Dutch delegation as stating that:

“We are particularly pleased to see a reference to an optional Protocol on advisory opinions. We believe this will strengthen the dialogue between the Court and domestic legal orders and reinforce the principle of subsidiarity. By introducing advisory opinions, we aim to alleviate the Court’s work load in the long term.”⁹

The drafting of the Protocol having been completed, on 6 May 2013 the Court adopted its “Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention”¹⁰ and Protocol No.16 was opened for signature on 2 October 2013.

III. Aims and objectives of the advisory opinion procedure

The extension of the Court’s advisory jurisdiction is, according to the preamble of Protocol No.16, to enhance the interaction between the Court and national authorities with a view to reinforcing the implementation of the ECHR in accordance with the principle of subsidiarity.¹¹ As can be seen from its history and origins, the advisory opinion procedure, when it enters into force, is intended to be a further, concrete manifestation of that principle.

Subsidiarity is of course a two-sided principle. The Court’s supervisory role is subsidiary because it is the primary responsibility of the Member States to protect human rights within their jurisdiction. Advisory opinions are thus intended to provide assistance to Member States so as to avoid future violations, facilitate the correct interpretation of the Convention within national legal orders and, in this context, enhance judicial dialogue. In the process, it is hoped advisory opinions might alleviate the Court which, despite a remarkable decrease in its stock of cases in recent years due to the introduction of new procedures and working methods,¹² is confronted by an untenable number of individual applications and decreasing financial resources to deal with them.

The aim of the procedure is not to transfer the national dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when it subsequently determines the case before it. This is reflected in the procedural requirements discussed further below. Presumably, it is thought that if superior courts follow the advisory opinion of the Court, the interpretation of the Convention provided by the latter will gain more traction within the domestic legal system as lower courts will be bound (whether as a matter of fact or law) to follow the lead of their superior courts.

IV. Key parameters of the advisory opinion procedure

Articles 1 and 5 of the Protocol establish what the key parameters or characteristics of the procedure will be.

1. Which courts can request an advisory opinion?

Advisory opinions can be requested by the “highest courts or tribunals … as specified by [the High Contracting Party] under Article 10”.¹³

⁹ See <http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Brightonproceedings.pdf> [Accessed 25 May 2018].

¹⁰ See http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf [Accessed 25 May 2018].

¹¹ Note that, with Protocol No.16 entering into force before Protocol No.15, this would mean that the first explicit reference to subsidiarity in the ECHR will derive from the former and not the latter and be the consequence of ratification by a reduced number of Contracting States.

¹² Numbers (rounded up) of cases allocated to a judicial formation of the ECHR: 150,000 in 2011; 65,000 in 2015; 80,000 in 2016; and 57,000 as of 28 February 2018.

¹³ See art.1(1) of Protocol No.16. According to art.10(2) of the Protocol, the declaration designating courts or tribunals for the purposes of art.1(1) may be modified by the High Contracting Party at any later date.

Use of the term “highest”, as opposed to “the highest”, as well as enabling/requiring High Contracting Parties to specify the domestic courts who may request an advisory opinion from the Court suggest a more generous approach than initially envisaged (whereby limiting such a right to “national courts against whose decision there is no judicial remedy under national law” had been envisaged). The intention appears to have been to permit the inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the “highest” for a particular category of case. The idea was also to allow the necessary flexibility to accommodate the particularities of 47 different national judicial systems.

By restricting the courts which can request advisory opinions, the intention is not only to reflect the exhaustion of domestic remedies rule but also to avoid a proliferation of requests and to identify the appropriate level at which the intended judicial dialogue should take place. As the declarations lodged thus far reveal, High Contracting Parties vary considerably in their approach. Finland, for example, has declared that the Supreme Court, the Supreme Administrative Court, the Labour Court and the Insurance Court may all request advisory opinions.¹⁴ In contrast, Estonia and the Ukraine have declared that only their Supreme Courts may request advisory opinions,¹⁵ while Romania, which has signed but not ratified the Protocol, has designated 15 courts of appeal, the High Court of Cassation and Justice and the Constitutional Court.

2. Optional nature of the advisory opinion procedure—request and withdrawal

Relevant courts or tribunals *may* request the Court to give an advisory opinion.¹⁶

Several interesting questions may develop despite the optional nature of the procedure. Could, for example, the highest court with jurisdiction to refer a request be obliged to reason any refusal to do so if one of the parties to the domestic proceedings had explicitly urged the national court to request an advisory opinion? An analogy which could be drawn is with the Court’s art.6 case-law requiring national courts whose decisions were not open to appeal under domestic law to give reasons, based on the applicable law, and the exceptions laid down in CJEU case-law, for their refusal to refer a preliminary question on the interpretation of EU law.¹⁷ However, there are of course important distinctions—not least the obligatory nature of the EU preliminary reference procedure for courts of last resort (subject to certain well-defined exceptions) or the importance of the preliminary reference procedure in the context of the presumption of equivalence which the Strasbourg Court operates in relation to the protection of fundamental rights in the EU.¹⁸

The advisory opinion procedure is not only optional but the requesting court may, according to the Explanatory Report, withdraw its request. Rule B(2.3) of the Rules of Court provides that it must notify the Registrar in the event of withdrawal, upon receipt of which the Court shall discontinue the proceedings.

¹⁴ Declaration contained in the instrument of ratification deposited on 7 December 2015.

¹⁵ Declarations contained in the instrument of ratification deposited on 31 August 2017 (Estonia) and 22 March 2018 (Ukraine) respectively.

¹⁶ See art.1(1) of Protocol No.16 and Rule B(1) of the Rules of Court. This is the first and major difference to be noted with the EU preliminary reference procedure. See, in particular, the judgment in *Cilfit* (283/81) [1982] E.C.R. I-03415 at [21]: “In accordance with the third paragraph of Article 267 TFEU, a court or tribunal against whose decisions there is no judicial remedy under national law is *required*, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt”. In addition, preliminary references on the validity of EU legislation must be referred: “courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. ... On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. ... where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice” (*Foto Frost* (314/85), 22 October 1987 at [14], [15] and [17]). On withdrawal of a preliminary reference, see below for a temporal restriction.

¹⁷ See, variously, *Ullens de Schooten and Rezabek v Belgium* (App. Nos 3989/07 and 38353/07), judgment of 20 September 2011; *Dhahbi v Italy* (App. No.17120/09), judgment of 8 April 2014; *Schipani v Italy* (App. No.38369/09), judgment of 21 July 2015 and *Baydar v the Netherlands* (App. No. 55385/14), judgment of 24 April 2018.

¹⁸ See, in particular, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 E.H.R.R. 1 at [160]-[165]; *Michaud v France* (2014) 59 E.H.R.R. 9 at [112]-[115]; and *Avotinš v Latvia* (2017) 64 E.H.R.R. 2 at [110].

There is no indication whether a request must be withdrawn within a specific time-limit. For example, if the Court has set a date for the pronouncement of an advisory opinion could a requesting national court withdraw its request at that late stage?¹⁹ One approach would be, by analogy with contentious proceedings before the Court, that withdrawal should be possible at any stage until pronouncement by the Grand Chamber. Time alone will tell if a restriction on the entitlement to withdraw after a certain time-limit becomes necessary.

Withdrawal also raises issues regarding notification of the discontinuance of the advisory procedure by the Court under Rule B(2.3). Should the Court be responsible for notifying the Member State from which the request originated, the parties, the third party interveners etc.? Will a specific type of order or act, announcing a strike out or discontinuance be required? If so, its form and language will have to be worked out. These may seem mundane questions but considering the Court's docket and increasingly limited resources they may be of some considerable administrative relevance depending on the judicial "traffic" which the new Protocol generates.

3. What type of questions fall within the scope of the advisory opinion procedure?

As indicated previously, pursuant to art.1(1), advisory opinions may be requested on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto". The language of the latter provision reflects that of art.43(2) of the ECHR on referral to the Grand Chamber although the two procedures are, of course, very different.

The definition of what comes within the scope of the advisory opinion procedure will be a matter for the Court, and in particular the Panel established under art.2(1) of the Protocol, when deciding whether to accept a request for an advisory opinion. It is to be expected that a line of case-law will develop—on the basis of the Panel's reasons for refusal of such requests—on criteria for determining what questions fall within and outwith the scope of Protocol No.16. This is certainly what has occurred at the level of the CJEU, where there is extensive case-law both on questions of the limits to the jurisdiction of the CJEU and the admissibility of requests for preliminary references.²⁰ It should be noted, however, that the Court itself envisaged in 2013 that "such reasons [for refusal] will normally [not] be ... extensive".²¹

The development of such case-law may also be of subsequent interest for those applying to the Grand Chamber referral panel under art.43(2) and for the work of the referral panel itself. As the latter does not give reasons when it accepts or refuses a referral request,²² there is no established case-law on what constitutes, within the meaning of art.43(2), "a serious question affecting the interpretation or application of the Convention or Protocols thereto, or a serious issue of general importance". Guidance on this issue has so far had to be deduced from the type of cases accepted by the panel for referral (insofar as possible) and from the Explanatory Report on Protocol No.11, which refers to important questions on the interpretation and application of the ECHR, to cases where there may be a reason to revise well-established case-law and to cases raising an important matter of general interest.

¹⁹ The Rules of Procedure of the CJEU were amended in 2012 to avoid this possibility—see art.100(1): "The withdrawal of a request [for a preliminary ruling] may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons".

²⁰ See the digest of relevant CJEU case-law (in French), accessible at https://curia.europa.eu/common/reddoc/reperoire_jurisp/bull_3/tab_index_3_04.htm [Accessed 25 May 2018].

²¹ European Court of Human Rights, *Opinion of the Court on Draft Protocol No.16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention*, Strasbourg, 6 May 2013, para.9, http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf [Accessed 25 May 2018].

²² See para.105 of the Explanatory Report to Protocol No.11.

4. When can an advisory opinion be requested?

An advisory opinion can only be made in the context of a case pending before the requesting court or tribunal.²³ The procedure is not intended to allow for abstract review of legislation.

The question arises whether, again drawing from the TFEU preliminary reference procedure, the Strasbourg Court will have to develop case-law to “police” this requirement. In the context of a procedure designed to enhance judicial dialogue and based, implicitly, on a principle of loyal cooperation, albeit not a formally established principle, a high degree of confidence will have to be accorded to the requesting court. However, even the existence of a recognised principle of loyal cooperation under EU law has not prevented the Luxembourg Court on some, albeit rare, occasions from refusing to provide a preliminary ruling in circumstances where it considered the pending case to be fictitious or where a dispute was not really pending.²⁴ In addition, since the 1990s, that court has developed an extensive line of case-law examining whether the admissibility requirements in art.267 of the TFEU, the Statute and the Rules of Procedure have been fulfilled. In short, just as the CJEU has insisted on its right and its duty to control the limits of its own jurisdiction, once Protocol No.16 is in force, the Strasbourg Court will need to consider—no doubt over time and informed by practical experience—whether and how far it needs to “police” compliance with this requirement and how far it can rely on a (if not express) at least implicit equivalent principle of loyal cooperation.

On the exclusion of requests involving abstract review of legislation from the scope of Protocol No.16, the debate in France in the context of preparation for ratification of the Protocol may be of some interest. The draft law authorising ratification of the Protocol was put before the *Assemblée nationale* on 20 December 2017. It designates the *Conseil d’État*, the *Cour de Cassation* and the *Conseil Constitutionnel* as the three highest courts which can seize the Strasbourg Court by virtue of Protocol No.16. The designation of this latter court, whose task is to control the conformity of legislation with the French constitution has given rise to questions relating to whether a request for an advisory opinion by the *Conseil Constitutionnel* would comply with the criterion established by the Protocol requiring a request for guidance in a concrete case, excluding abstract review.²⁵ The answer to this question is no doubt to be found in domestic law. However, the debate reveals the extent to which views on which domestic courts should be able to refer is likely to vary considerably from one state to the next.

5. The nature and jurisprudential effects of an advisory opinion

As is clear from art.5 of the Protocol, advisory opinions are not binding.

In the context of the judicial dialogue in which they are handed down, it is the requesting court which decides on the effects of the advisory opinion in the domestic proceedings pending before it.

²³ Article 1(2) of Protocol No.16.

²⁴ See, e.g. *Foglia v Novello* (244/80) [1980] E.C.R. 745 at [18]-[20]: “the duty assigned to the Court by Article [267] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [EU] law which do not correspond to an objective requirement inherent in the resolution of a dispute. . . Whilst the spirit of cooperation which must govern the performance of the duties assigned by Article [267] to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court’s proper responsibilities, it implies at the same time that the national court, in the use which it makes of the facilities provided by Article [267], should have regard to the proper function of the Court of Justice in this field”. See also the judgment of the ICJ in *The Case concerning the Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* judgment [1963] ICJ Reports 15, 37 where the Court indicated that “. . . even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, . . . that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so”. For a recent expression of the EU principle of sincere cooperation see *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (C-64/16), 27 February 2018.

²⁵ See, e.g. P. Cassia, “Le Conseil Constitutionnel et la procédure d’avis devant la Cour de Strasbourg”, 9 January 2018, <https://blogs.mediapart.fr/paul-cassia/blog/080118/le-conseil-constitutionnel-et-la-procedure-d-avis-devant-la-cour-de-strasbourg> [Accessed 25 May 2018]. For discussion in a recent Strasbourg case of the type of review exercised by the Conseil Constitutionnel see *Charron and Merle Montet v France* (App. No.22612/15), decision of 16 January 2018 at [26]-[29].

In addition, the handing down of an advisory opinion would not prevent a party to the case subsequently exercising their right of individual application under art.34 of the ECHR. Where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it could be expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out. It is also possible, however, that the approach the Court would take with regard to such an application may be different, since the individual application is likely to address the challenged national interpretation of the Court's advisory opinion rather than the Court's interpretation of the Convention as such. This question remains open of course for the time being.

However, and here we signal quite personal views, the introduction of the advisory opinion procedure presents the Court with both tremendous opportunities and tremendous challenges.

On the one hand, it has the possibility, given the more "constitutional" nature of the new procedure,²⁶ to express, clarify or develop general principles in a context broader than the individual facts of an individual case may permit. The art.34 individual applications vehicle is subject to the risk—in certain cases, in certain circumstances and with reference to certain Convention questions—of obfuscating those general principles given the degree to which the relevant judicial formation concentrates on their application in the circumstances of a concrete case.²⁷

The challenges posed by Protocol No.16 will, in our view, be many, but two in particular are worth highlighting.

- (a) The Court will first hand down an advisory opinion setting out the general principles to be applied as regards the interpretation and application of the ECHR but, in any subsequent individual application following the conclusion of the same case at national level, it will have to remain coherent and consistent both in terms of the expression of those same principles and their application to the facts of the case. A good example of the difficulties which may arise is provided in the *Schatschaschwili v Germany* case on the inability to examine absent witnesses, whose testimonies carried considerable weight in the applicant's conviction. As is clear from the joint dissenting opinion, the minority judges who were in favour of finding no violation agreed, however, with the majority as regards the general principles the judgment established. They only parted company with the majority as regards the application of the relevant principles to that case.²⁸ One is also reminded in this context of the formula oft-used by the Court, in particular, in art.10 cases, where it states that "the Court would require strong reasons to substitute its view for that of the domestic courts".²⁹ It remains to be seen whether this will also be the preferred approach in such double adjudication situations, either in relation to certain Convention articles or across the board.
- (b) The second challenge goes to the legitimacy and standing of the Court in the eyes of its national interlocutors. If national superior courts consistently or regularly decide not to follow the terms of an advisory opinion, the resulting problems are obvious.

As regards the jurisprudential value of advisory opinions, they will form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention contained in such advisory opinions would, one imagines, be analogous in its effect to the interpretative elements set out by the Court, sitting in a Grand Chamber formation, in judgments and decisions. This would mean, however, that even if an advisory opinion does not bind the requesting national Court when resolving the

²⁶ References to the Court's so-called "constitutional" role are absent from most official documents relating to Protocol No.16. See, however, the reference to such a role in the 2006 report of the Group of Wise Men where the origins of the proposal leading to Protocol No.16 can be traced.

²⁷ See, in this regard, the comments by our colleague, Judge Koskelo in XXVI FIDE conference, Copenhagen, 2014, p.152.

²⁸ *Schatschaschwili v Germany* (App. No.9154/10), judgment of 15 December 2015; see also *Merabishvili v Georgia* (App. No.72508/13), judgment of 28 November 2017.

²⁹ See, e.g. *Von Hannover v Germany* (No.2) (2012) 55 E.H.R.R. 15.

case before it, the interpretation of the Convention provision(s) provided by the Court is nevertheless an authoritative one. In addition, even for those Member States which decide not to ratify Protocol No.16, it is difficult to avoid the conclusion that any opinions handed down on that basis will carry equal weight in cases involving individual applications against them.³⁰

An alternative view, if other Member States are not or do not involve themselves in the procedure, would be that the resulting advisory opinion is addressed only to the requesting court. However, Member States (and the public in general) are already alerted via the Court's *Hudoc* database of all communicated cases. A decision not to intervene when informed of a pending advisory opinion procedure should not detract from the generality of the guidance provided by the Court. Both the formation chosen to provide advisory opinions and the nature of the questions which can be the subject of requests suggest that limiting the value of the opinion handed down to the requesting court only is to misconstrue the nature and intent of the Protocol and the procedure it provides for.

Given that they are decided by the Court sitting in Grand Chamber formation, the question will inevitably arise whether advisory opinions should not equally be given higher precedential value than judgments of chambers and committees, despite their non-binding nature for the national requesting court.³¹

V. Procedural issues

1. The content of a request for an advisory opinion

The procedural requirements which a request for an advisory opinion must fulfil are set out in art.3(1) of Protocol No.16 which provides that the requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

As the Explanatory Report highlights, these requirements serve two purposes:

- the requesting court or tribunal must have reflected upon the necessity and utility of soliciting an advisory opinion of the Court, so as to be able to explain its reasons for doing so.
- the requesting court or tribunal must be in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto. In its Opinion on the draft Protocol the Court stressed:

“... the need to allow the Court to focus on the question of principle before it. The Court should not be called upon to review the facts or the national law in the context of this procedure.”³²

As regards the legal and factual background, according to Rule B(2.1) of the Rules of Court, the request for an advisory opinion should include³³:

- the subject matter of the domestic case and its relevant factual and legal background³⁴;
- the relevant domestic legal provisions;

³⁰ Especially as art.46(1) of the Convention, by definition, does not apply to advisory opinions under Protocol No.16. See below under Hearings and Interventions on the right of other States Parties to intervene.

³¹ A related issue is how to cite advisory opinions so that they can be easily distinguished from individual and interstate applications.

³² Opinion adopted by the Plenary Court on 6 May 2013.

³³ The detail derives not from the Protocol itself but from the amended Rules of Court and, previously, from the *Explanatory Report to Protocol No.16 to the ECHR*, CM(2013)31, 2 April 2013. The similarity between this list and that in art.94 of the CJEU's Rules of Procedure which details what a request for a preliminary ruling must contain, are striking. The amended Rules of Court reproduce the detail in the Explanatory Report; detail which is given further flesh in the Guidelines discussed below.

³⁴ The wording of the relevant part of the Explanatory Report and Rule B(2.1)(a) differs. Rule B(2.2) specifies that the requesting court or tribunal shall also “submit any further documents of relevance to the legal and factual background of the pending case”.

- the relevant Convention issues, in particular the rights or freedoms at stake;
- if relevant, a summary of the arguments of the parties to the domestic proceedings on the question;
- if possible and appropriate, a statement of the requesting court or tribunal's own views on the question, including any analysis it may itself have made of the question.

The overarching aim must be that the requesting court or tribunal places the Court in the most informed position possible in order to enable it to respond meaningfully to the concerns expressed and questions raised by the requesting court or tribunal as regards the application of Convention law to the domestic proceedings.

Further, the Guidelines approved by the Plenary Court in September 2017 reiterate that in order for the Court to be in a position to provide clear interpretative guidance to the requesting court or tribunal, a request should be set out as prescribed in the Protocol and Rules of Court and should be complete and precise.

The Explanatory Report to the Protocol does not address the extent, if any, to which the parties to the procedure can or should be involved in the initiative to request an advisory opinion or in the formulation of any request. The Guidelines note that the requesting court or tribunal has a degree of discretion to determine whether it is "relevant" to include a summary of the arguments of the parties on the subject-matter of the request. To some extent this absence of detail mirrors the position in EU law but, as we know, the CJEU has developed case-law on the subject, emphasising that the right to request a preliminary ruling is not an individual right of the parties but rather is a right (and sometimes a duty) of the national court.³⁵ The extent to which parties are involved in the formulation of any request for an art.267 TFEU ruling varies greatly between Member States. The Guidelines, however, do note that depending on the position in domestic law, it may well be the case that one or both parties can take the initiative to ask the domestic court to make a request for an advisory opinion in their grounds of appeal against the decision of an inferior court. Nonetheless, it is emphasised that in any event the final decision on whether or not to request an advisory opinion rests with the appellate court or tribunal insofar as it has been designated as a court which may make such a request for the purposes of the Protocol.

A further point of note is the recommendation that the requesting court include "where possible and appropriate" its views on the Convention question raised and any analysis it may have made in this regard. The NGOs consulted in 2015 expressed concern that this might lead to the outcome of the domestic proceedings being prejudged.³⁶ Questions of national procedural law aside, we do not, personally, see where the problem lies. The views expressed are clearly not binding but they may be of tremendous assistance to the Court. It will be under pressure to provide an answer in an expedited procedure in order not to delay domestic proceedings.³⁷ The Guidelines point out that what is important is that the requesting court or tribunal, in the exercise of its judgment, places the Court in the most informed position possible in order to enable it to provide the interpretative guidance sought.

Finally, while there was no indication in the Protocol or the Explanatory Report of any limit to the written comments or documents submitted, the Guidelines provide detailed practical instructions for the presentation of a request. According to these Guidelines, the page limit, in principle, for a complete request should not exceed 20 pages. The economy and relevance of documents submitted in connection with a request for an advisory opinion is plainly an important consideration given both linguistic and time constraints.

³⁵ See, e.g. judgment in *T-Mobile Czech Republic v Vodafone Czech Republic* (C-508/14), 6 October 2015 at [28]-[29]: "Under Article 267 TFEU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor".

³⁶ See the legal briefing of the Open Society, March 2016, reference provided below.

³⁷ See, similarly, para.24 of the CJEU's non-binding Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C 338/01, remembering that a preliminary ruling is, moreover, binding.

2. Procedure for deciding on the acceptance or rejection of a request

This procedure is set out in art.2(1) of Protocol No.16 which makes clear that the Court has discretion regarding whether to accept or refuse a request but that the latter must be reasoned.³⁸ This contrasts with the referral procedure where the five-judge referral panel, as indicated previously, does not reason the refusal of a referral request. Once again, this difference could be regarded as entirely in accordance with the nature of the judicial dialogue which the advisory opinion procedure seeks to enhance. Nevertheless, it is worth emphasising that both the original Group of Wise Persons Report 2006 and the Court in its own 2012 Reflection Paper proposed no obligation to reason in order to preserve the Court's flexibility and limit the additional workload which processing requests for advisory opinions might entail.

It should not be presumed that the referral and the advisory opinion panels would be the same or identical in their composition. After all, art.2(3) of the Protocol requires that the panel "shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains"; a requirement that does not apply to the referral panel, the composition of which is governed by Rule 24(5) of the Rules of Court. In fact, Rule 24(5)(c) expressly provides that "No judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request may be a member of the panel when it examines that request". The composition of the five-judge advisory opinion panel is governed by Rule C of the new Chapter X to the Rules of Court. It will consist of the President of the Court, two Section Presidents, the judge elected in respect of the Contracting Party to which the requesting court or tribunal pertains and a judge designated by rotation from among the other Section judges serving on the panel for a six-month period.

The amended Rules of Court provide in Rule 3(2) that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court. However, there is no formal time-limit expressed, either in the Guidelines or in binding form, within which the Court should adopt a decision to refuse a request for an advisory opinion.

As indicated previously, it can be expected that the advisory opinion panel will, over time, clarify what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto".

We express a note of caution, again a personal one, in relation to the need for the panel to clearly reason in terms of jurisdiction or admissibility.³⁹ A close reading of the case-law of the CJEU under art.267 TFEU reveals that these issues are sometimes treated as synonymous and sometimes not.⁴⁰ In general, the CJEU has refused to provide preliminary rulings where the domestic case is hypothetical, where the question referred bears no relation to the facts and subject-matter of the case before the national court, where the facts or legal framework are insufficiently clear (even though the Court can also make further inquiries of the national referring court in both regards) or where the questions do not involve an interpretation of EU law.⁴¹

The terms of decisions to refuse a request will and should provide guidance to domestic courts and tribunals when considering whether to make a request and will and should thereby help to deter inappropriate requests which will consume precious Court resources.

In this context, it is necessary to insert a further note of caution (a personal obiter no doubt) in relation to the statement in the Explanatory Report to the effect that:

³⁸ See also Rule C(4).

³⁹ Already one can see some potential "false friends" in the Protocol and the Explanatory Report, where the former refers in the preamble to an extension of the Court's "competence", while the latter talks about an extension of its "jurisdiction".

⁴⁰ See, e.g. the treatment of jurisdiction and admissibility questions in *Pohotovost* (C-470/12), 27 February 2014 at [58]-[61]; *Szabó* (C-204/14), 4 September 2014 at [18]-[25]; *Crono Service* (C-419/12 and C-420/12), 13 February 2014 at [43]-[44] or *Vinkov* (C-27/11), 7 June 2012 at [44]-[45].

⁴¹ This case-law is accessible via the CJEU digest of case-law at https://curia.europa.eu/common/reecdoc/reperoire_jurisp/bull_3/tab_index_3_04.htm [Accessed 25 May 2018].

“It is to be expected that *the Court would hesitate* to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1.”⁴²

After all, this statement describes an untested procedure which will require the Court to extend its jurisdiction to a perhaps very different judicial exercise than those which it currently performs under art.34 and without any prior knowledge of how many states will consent to the Protocol or the frequency, complexity and clarity of their requests if and when they do.⁴³ The Court’s initial Reflection Paper on advisory opinions spoke of cases which might not require further clarification or where Strasbourg case-law is sufficiently clear, implicitly referring to something along the line of the CJEU’s *acte clair* doctrine. The Court will of course have to be deft when explaining to a national court which thinks the case-law is unclear why, in contrast, the Court considers it is. Another scenario envisaged by the Group of Wise Persons Report 2006 was the rejection of a request where its subject-matter overlaps with that of a pending case. It will surely be possible for the Court to refuse a request even if the subject-matter falls within the scope of Protocol No.16 and basic procedural requirements are complied with. Certainly, the Group of Wise Persons Report 2006 referred to previously stated that the new advisory jurisdiction should be subject to strict conditions and the provision of such opinions would not constitute the Court’s principal judicial function. By implicating the Grand Chamber in all requests deemed admissible, Protocol No.16 could otherwise have not insignificant consequences for the workload of that judicial formation. It may require, in the short or medium term, adaptation of that formation’s working methods.

3. The nature and form of an advisory opinion

It is the Grand Chamber of the Court that shall deliver advisory opinions following acceptance of a request by the five-judge panel and reasons shall be given (art.2(2) and 4(1)).⁴⁴

This was considered appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under art.43 of the Convention. Time alone will tell whether this choice was wise. A specialised advisory opinion Chamber might, alternatively, have allowed any subsequent individual application (alleging non- or incorrect application of any opinion) to be relinquished rapidly and where necessary to the Grand Chamber.

While the draft Explanatory Report referred explicitly to the possibility of the Grand Chamber reformulating the questions in the request, the text as adopted does not expressly tackle this issue. If reformulation or reclassification of the advice sought were an option, which the Court’s case-law on the reclassification of complaints suggests it might be,⁴⁵ then the Court’s advisory opinion might address articles of the Convention not the subject of the request in addition or even instead of those which are. Reformulation of questions is a well-established technique in Luxembourg preliminary references albeit, it should be added, not one always or universally welcomed by the national courts.⁴⁶

⁴² See para.14 of the Explanatory Report.

⁴³ Since the questions which can be the subject of an advisory opinion have some parallel with those which can be the subject of a referral request, it is worth reproducing the number of such requests accepted in recent years: 7 (2012), 10 (2013), 18 (2014), 15 (2015), 14 (2016) and 10 (2017).

⁴⁴ There is no similar provision under the TFEU or the Rules of Procedure of the CJEU requiring references from superior courts or courts of last resort to be dealt with by the Grand Chamber of that court. Member States or EU institutions can request, however, that a case be dealt with by the Grand Chamber (see art.60(1) of the ECJ’s Rules of Procedure).

⁴⁵ See, by analogy, the Court’s approach in contentious proceedings, where it has repeatedly indicated that “being master of the characterisation to be given in law to the facts of the case (see *Castravet v Moldova* (App. No.23393/05), judgment of 13 March 2007 at [23]; *Marchenko v Ukraine* (App. No.4063/04), judgment of 19 February 2009 at [34]; and *Berhani v Albania* (App. No.847/05), judgment of 27 May 2010 at [46]) [it] is not bound by the characterisation given by the parties”: *Gatt v Malta* (App. No.28221/08), judgment of 27 July 2010 at [19].

⁴⁶ See, e.g. the CJEU judgments in *Campina* (C-45/06) [2007] E.C.R. I-02089 at [30] and [31], and *Fuß* (C-243/09) [2010] E.C.R. I-09849 at [39]: “[I]n the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to

It remains to be seen to what extent the new procedure will entail significant additional work for the Grand Chamber and how easy it will be for that composition to reconcile its workload under arts 33 and 34 of the Convention with this new advisory workload. It cannot be excluded that the new procedure will warrant some changes to the Court's internal working methods in Grand Chamber cases.

As indicated previously, if a request is accepted, the composition of the Grand Chamber will be determined by Rule 24(2)(a), (b) and (e) of the Rules of Court. It shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains or, failing that, an ad hoc national judge.⁴⁷

Not only will advisory opinions be reasoned; they may be accompanied by separate concurring and dissenting opinions or a bare statement of dissent (art.4(1) and (2) and Rule D(8)). In its Opinion on the draft Protocol the Court noted that:

“This is in keeping with the Rules of Court on advisory opinions under the current system (Rule 88 § 2) although it has been the practice of the Court when issuing advisory opinions to endeavour to speak with one voice.”⁴⁸

This leads to the inevitable question, raised we understand in the context of the Dutch Senate consideration of draft ratifying legislation, whether and how an opinion of the Grand Chamber in such proceedings can be seen as a correct/authoritative ruling on the “question of principle” raised by the requesting court where, in the context of contentious proceedings, judgments of the Court regularly contain dissenting opinions both in Chamber judgments as well as in Grand Chamber judgments.⁴⁹ Personally speaking, we consider that if the advisory opinion is to fulfil the function for which it was intended—enhancing judicial dialogue with national judges with a view to reinforcing implementation of the Convention—the Grand Chamber will be put to the collegiate test in future and must seek to minimise the occasions on which, on questions of legal principle, it is highly divided.⁵⁰

4. Priority treatment

The Explanatory Report referred to the need to avoid “undue delay” without specifying what is meant by undue delay?

Rule 3(2) of the Rules of Court sets out that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 thereof. Section XI of the Guidelines provides further detail on the priority to be accorded to requests, and makes provision for ‘urgent’ examination over and above the priority status normally to be accorded to all such requests.

In such urgent cases, the Guidelines provide that the requesting court or tribunal should indicate, giving reasons, whether there are any special circumstances which would require an urgent examination of the request and a speedy ruling by the Court. It will be for the Court to determine whether the reasons put forward by the requesting court or tribunal are such as to justify an expedited treatment of the request. The Court can also decide of its own motion to treat a request according to an expedited procedure.

The Explanatory Report had made clear that priority status for requests for advisory opinions should apply at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in hearings,⁵¹ as well as the Court itself.

reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts”.

⁴⁷ Article 2(3) of the Protocol and Rule 24(2)(b).

⁴⁸ Paragraph 11 of the Opinion, cited above (emphasis added).

⁴⁹ See the deliberations of the Eerste Kamer on 5 September 2017.

⁵⁰ A good case in point may be the *Béláné Nagy v Hungary* (App. No.53080/13), judgment of 13 December 2016.

⁵¹ See also art.3, discussed below.

For cases terminated in 2015, the average time for a decision before the Grand Chamber following referral was 15.6 months and, following relinquishment, 17.5 months. For cases terminated in 2016, the average time was 17.1 following referral and 17.4 months following relinquishment. The speed of put through is clearly affected by the number of cases pending before that formation and entry into force of the Protocol may, as stated previously, increase the pressure.

Looking to the Luxembourg court for some additional statistical guidance, the 2016 annual report of that Court reveals the following:

- on average, it took 15 months to dispose of a preliminary reference;
- as regards a subset of the art.267 TFEU procedure, the urgent preliminary ruling procedure, 12 urgent preliminary rulings were requested in 2016 but the Court chose to apply the procedure in eight cases. It took, on average, 2.7 months to dispose of these cases, up from 2.1 in 2015.

Although referring to a quite distinct court and judicial procedure, these statistics reveal that the Strasbourg Court is highly likely to be faced with decisions and challenges regarding what is meant by “no undue delay” and what, in practice, priority means. As the CJEU knows only too well, the time taken to dispose of a preliminary reference—which at its peak in 2003 reached 25.5 months—at times influenced the decision by certain national courts on whether to refer.

If “undue delay” is interpreted to mean less than the present Grand Chamber average, this can be expected to have a knock-on effect on the work of the Court generally and on the work of the Grand Chamber in particular.

5. Hearings and interventions

Hearings are clearly not excluded but neither are they obligatory.⁵² According to Rule D(6) of the amended Rules of Court, the President will decide on whether or not to hold a hearing at the close of the written procedure.

Most Grand Chamber cases (referrals and relinquishments) are organised with an oral procedure.⁵³ If the procedure is both written and oral the time taken for the advisory opinion to be communicated to the requesting court will of course be longer.

The Member State from which the request originates may submit written comments or appear at any hearing but is not obliged to do so. The President of the Court may also, pursuant to art.3 and in the interest of the proper administration of justice, invite any other Member State or person to submit written comments or take part in any hearing.

As regards who can intervene and how they do so, a number of issues were initially relatively vague and, even after the amendment of the Rules of Court and the development of Guidelines, some remain so.

It was not initially clear whether the parties to the proceedings at the domestic level would be notified of a request and/or invited to intervene if that request is accepted or, in certain cases, in the initial processing of the request. The Explanatory Report indicates that this is expected but the text of the Protocol left the question open. Rule D(3) provides that the President of the Grand Chamber may invite these parties to submit written observations and, if appropriate, to take part in an oral hearing. It has been observed that were parties allowed to submit their memoranda automatically, the borderline between adversarial procedure and the advisory opinion procedure would become blurred.⁵⁴ The Guidelines provide that with regard to

⁵² See the terms of art.3 of Protocol No.16. See also para.21 of the Explanatory Report which provides that it will be for the Court to decide whether to hold a hearing on an accepted request.

⁵³ See Rules 63 and 71. Most Chamber cases are processed without a hearing.

⁵⁴ See K. Dzehtsiarou and N. O’Meara, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?” (2014) *Legal Studies* 18.

notification about progress in the proceedings, it is for the requesting court or tribunal to keep the parties to the domestic proceedings informed, except in the event that one or both parties have been invited to intervene in the proceedings, in which case the Court shall assume this function.

Will the Court and its President be as inclusive as they are now, in some Grand Chamber cases, regarding requests for third party interventions under art.36(2) and Rule 44?⁵⁵ The new Rule 44(7) will apply the provisions on third-party intervention mutatis mutandis to the advisory opinion procedure.⁵⁶ The same criterion—acceptance in the interests of the proper administration of justice—applies. Careful consideration of this issue is required given the different nature of the advisory procedure, the fact that it is occurring in the context of a pending case between identified parties, the fact that it is not intended as a vehicle for abstract review of Member State legislation or policy and the time component highlighted above. It is useful to refer again to the art.267 TFEU procedure, where intervention extends only to the parties to the domestic proceedings, EU institutions (where appropriate), Member States and the European Commission as a sort of *amicus curiae*.⁵⁷ In Luxembourg, in cases before the Grand Chamber and even at chamber level, extensive use of this intervention is made by Member States depending on the legal and political importance, and to some extent novelty, of the questions raised in the pending preliminary reference.⁵⁸ In contrast, to date, Member States have availed themselves sparingly of their opportunity to intervene in Strasbourg Grand Chamber cases.⁵⁹ Given the proposed jurisprudential effects of future advisory opinions handed down by the Grand Chamber, it is worth considering whether Contracting Parties, even if they have not ratified Protocol No.16, should not pay greater attention to the question of third party interventions in future. In the run up to the 2018 Copenhagen conference on the future of the Court and the Convention system, there was much discussion of the different form—judicial and political—which dialogue with the Court should take. The Court, in its Opinion on the draft Copenhagen Declaration, stressed that in relation to the development of its case-law, the appropriate mechanisms for dialogue take the form of domestic court decisions and third-party interventions before the Court. It noted that the latter mechanism can be relevant to different stages in the examination of a case by the Court, including the admissibility stage, the stage of seeking referral of a case under art.43 of the Convention, and ultimately that of the Grand Chamber’s consideration of the case. The Court stressed that, used well, interventions by third parties in proceedings are helpful for the Court, giving it the benefit of additional perspectives on the issues to be decided in the case. It noted that this mechanism of engagement by states with the Court’s judicial function does not appear to be used to its fullest potential and that, once Protocol No.16 has entered into force, this mechanism may become even more significant. We would underline the Court’s position in this regard.⁶⁰

While para.13 of the Explanatory Report expressly envisaged that the Court “would be able to receive requests in languages other than English or French, as it does at present for individual applications”, no mention is made in either the Protocol itself or the Explanatory Report of the language of written

⁵⁵ See, variously, P. Harvey, “Third party interventions before the ECtHR: A rough guide” (24 February 2015) *Strasbourg Observers*, <https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-echr-a-rough-guide/> [Accessed 25 May 2018]; W.A. Schabas, *The European Convention on Human Rights* (OUP, 2015), pp.788–795 and L. van der Eynder, “An Empirical Look at the Amicus Curaie Practice of Human Rights NGOs Before the ECtHR” (2013) 31 *Netherlands Quarterly of Human Rights* 271.

⁵⁶ Note that, pursuant to Rule D(5), copies of third-party interventions shall be transmitted to the requesting court or tribunal and the latter shall have the opportunity to comment on them.

⁵⁷ See art.23 of the Statute of the Court of Justice of the European Union.

⁵⁸ In the seminal CJEU case on the scope of application of the Charter of Fundamental Rights of the EU (e.g. *Åkerberg Fransson* (C-617/10), 26 February 2013) nine Member States and the European Commission intervened. In recent ground-breaking data protection cases, the number of Member State interventions was also very high—see, e.g. *Digital Rights* (C-293/12 and C-594/12), 8 April 2014 (eight Member States, European Parliament and the European Commission) or *Tele 2 Sverige* (C-203/15 and C-698/15) judgment of 21 December 2016 (15 Member States, European Parliament, Council and Commission).

⁵⁹ Out of a grand total of 19 judgments and one decision delivered by the Grand Chamber during the course of 2017, Member States intervened in five cases.

⁶⁰ Opinion of the European Court of Human Rights on the draft Copenhagen Declaration, adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018, https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhagen%20ENG.pdf [Accessed 25 May 2018], para.16; see now also paras 33–41 (“Interaction between the national and European level—the need for dialogue”) of the Copenhagen Declaration as adopted on 13 April 2018.

submissions and interventions. Rule 44(6), which applies mutatis mutandis to third-party interventions in an advisory opinion procedure, requires them to be in an official language. Rule D(3) is silent on the language of the submissions of any parties to the domestic proceedings.

Finally, judicial dialogue, in order to be enhanced, also has to be nurtured—particularly when what is at issue is a new, untried procedure. Even when dealing with accepted requests, it cannot be excluded that the Court would wish to engage its judicial interlocutor further. The new Rule D(2) provides that after a request is accepted, the President of the Grand Chamber may invite the requesting court or tribunal to submit any further information which is considered necessary for clarifying the scope of the request or its own views on the questions raised by the request. Similarly, the Guidelines will envisage the possibility to seek supplementation of the request where it is considered to be “deficient”. The terms of Rule D(2) could be read as presupposing that the conditions for the admissibility of a request provided for in Rule B(2.1) are to be strictly applied and have been met. Guidelines aside, the strictness or flexibility in the application of the B(2.1) procedure will be closely watched by national courts one would imagine. Depending on the number of requests received, it may also determine the extent of the Court’s additional advisory workload.

6. Language of requests and of advisory opinions

While the Court has only two official languages,⁶¹ requests for advisory opinions may be addressed to the Court in the national official language used in the domestic proceedings in accordance with Rule 34(7). If the language used is not an official language of the Court, the Rules provide that an English or French translation must be submitted within the time-limit fixed by the President of the Court.

As regards the request itself, this means that the immediate access of most judges to the request, except where the language is a well-known one, may only be through the national judge and the registry lawyers until or unless a translation is available. On the one hand, one could argue that this is entirely in keeping with the Court’s existing working methods—or rather the existing constraints under which it works—when dealing with individual applications. On the other, it could be argued that this method is ill-suited to a procedure which has, as its purpose, the enhancement of *judicial* dialogue and where any delay will have a knock-on effect on the still pending domestic proceedings.

The Explanatory Report emphasised the sensitivity of the language issue but only as regards the resulting advisory opinions; not as regards the initial processing and subsequent treatment of requests by and within the Court. It provides that:

“It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court’s official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations.”⁶²

⁶¹ Rule 34.

⁶² See para.23 of the Explanatory Report.

In the absence of increased budgetary resources, it is difficult to foresee how the issue of translation can be tackled. The Court, in its Opinion on the draft Protocol, expressed grave concern on this issue both in terms of workload and cost.⁶³

VI. Where do we go from here?

As indicated previously, the Court has been working for some considerable time to prepare itself for the entry into force of Protocol No.16, now known to be on 1 August 2018. As part of this process, amendments to the Rules were adopted by the Plenary on 19 September 2016 and non-binding Guidelines were approved by the Plenary on 18 September 2017. The operation of the latter will be kept under periodic review.

The new procedure has been the subject of various but not extensive academic and judicial comment.⁶⁴ Legal academia is, understandably, more reactive than predictive when it comes to a new, untested judicial procedure. The paucity of commentaries will no doubt change in due course.

Particular concern relating to the Protocol has been expressed in some EU circles. In *Opinion 2/13* on the accession of the EU to the ECHR, the Court of Justice referred to Protocol No.16, noting that:

“.... since [after accession] the ECHR would form an integral part of EU law, the mechanism established by that protocol could—notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR—affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, ... is the keystone of the judicial system established by the Treaties.”⁶⁵

Many commentators have criticised the CJEU’s own criticism of the failure in the draft accession agreement to make any provision in respect of the relationship between the mechanism established by Protocol No.16 and the preliminary ruling procedure provided for in Article 267 TFEU. On the one hand, when the CJEU was deliberating, the Protocol was not yet in force, nor was it foreseeable when it would be. On the other hand, commentators point out that misuse by national courts of Protocol No.16 in order to circumvent the preliminary reference procedure and refer questions on substantive EU fundamental rights law to the Strasbourg Court could be sanctioned in different ways, not least by the introduction of infringement proceedings. Furthermore, it should be recognised that in some cases the problem may not necessarily be the decision to request a non-binding opinion from Strasbourg but the decision to refrain from seeking a binding one from Luxembourg. In *Melki and Abdeli*, the CJEU examined the priority nature of an interlocutory procedure for the review of the constitutionality of a national law (known as the *question prioritaire de constitutionnalité* or QPC in French law). The CJEU held in that case that:

“.... Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure

⁶³ See para.14 of the Opinion, cited above.

⁶⁴ See variously L.-A. Siciliano, “L’élargissement de la compétence consultative de la Cour européenne des droits de l’homme—A propos du Protocole no.16 à la Convention européenne des droits de l’homme”, 2014/97 *Revue trimestrielle des droits de l’homme* 9-29; D. Riteng, “Le renvoi préjudiciel communautaire, modèle pour une réforme du système de protection de la CEDH?” (2002) 3ème année, no.7 *L’Europe des libertés: revue d’actualité juridique* 3-7; P. Gragl, “(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol No.16” (2013) 38 E.L.Rev. 229; J. Gerards, “Advisory Opinions, Preliminary Rulings and the New Protocol No.16 to the ECHR” (2014) 21 *Maastricht Journal of European and Comparative Law* 633; J. Callewaert, “Protocol No.16 and EU law” in *Mélanges en l’honneur de Dean Spielmann* (WLP, 2015), pp.57–63; Open Society Justice Initiative, *Implementing ECHR Protocol No.16 on Advisory Opinions*, March 2016; and Dzehtisarou and O’Meara, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?” (2014) *Legal Studies* 18.

⁶⁵ *Opinion 2/13*, 18 December 2014 at [196]-[199].

prevents—both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question—all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.”⁶⁶

In contrast, art.267 of the TFEU was judged not to preclude such national legislation, in so far as the other national courts or tribunals remain free, *inter alia*, to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary. As the advisory opinion procedure is both facultative in terms of its use and non-binding in terms of the resulting opinion, it is questionable to what extent a *Melki and Abdeli* type instruction would be required to deter or prevent national courts of EU Member States from having recourse to the advisory opinion procedure under Protocol No.16. Given the terms of art.52, para.3 of the Charter and indeed the very reason for its existence, it is clear that some questions referred under the advisory opinion procedure may, indeed will, have indirect consequences for the interpretation for the corresponding provisions of the Charter. As the President of the CJEU emphasised in his speech at the opening of the 2018 Strasbourg judicial year: “the CJEU takes account of the Convention as the minimum threshold for protection”, even if, of course, the EU system of fundamental rights protection may go above and beyond that threshold. That does not mean, however, that the advisory opinion procedure, as such, should pose a problem for the autonomy and effectiveness of the EU judicial order or for the latter’s exclusive competence when it comes to the interpretation of EU law, including the Charter. Indeed, in *Opinion 2/13*, the CJEU stressed the mutually interdependent legal relations linking the EU and its Member States and the fact that the EU’s legal structure:

“is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.”⁶⁷

Given these essential characteristics of the EU legal order it is difficult therefore, from a Strasbourg perspective, to see why EU Member State courts would systematically or regularly have recourse to the ECHR seeking answers to questions which, in reality, concern EU law. That being said, the advisory opinion panel and the Grand Chamber when seised of a request, will have to adhere faithfully to the Court’s well-established case-law according to which, under the terms of art.19 and art.32(1) of the Convention, the Court is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.⁶⁸

Suffice it, for our present purposes, to say that the CJEU’s foray into an examination of Protocol No.16 in *Opinion 2/13* underlines the interest and sensitivity which the Protocol, rightly or wrongly, may excite in some quarters, the need for the new procedure to be well explained and, when it comes into force, the need for the Strasbourg Court to carefully delimit its jurisdiction when accepting/refusing requests and handing down advisory opinions. Protocol No.16 was not intended as an invitation to forum shop but rather as a means to enhance judicial dialogue regarding the interpretation and application of the Convention.

⁶⁶ *Melki and Abdeli* (C-188/10 and C-189/10) [2010] E.C.R. I-05667. On the QPC in Strasbourg case-law, see *Renard e.a. v France* (App. Nos 3569/12, 9145/12), decision of 25 August 2015.

⁶⁷ See *Opinion 2/13* at [167]-[168].

⁶⁸ See, e.g. *Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17 at [110].

Falls the Shadow—Defending Democracy in South Africa and Across the World

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Constitutional rights; Courts' powers and duties; Democracy; Human rights; South Africa

Abstract

This article considers the challenges to democracy and the world order it underpins from a South African perspective. It examines the success of the political transition from the inhumane system of apartheid to democracy and the hope that the period from 1994 brought with it for the country, and focusses in particular on the Constitution forged at the dawn of South Africa's democracy, and its principal features. It discusses the signs of democratic regression that have punctuated the last 10 years and draw from the South African experience, particularly under the regime of President Zuma, to highlight the pressures that were brought to bear on South Africa as a young democracy. It argues, with reference to certain representative cases, that it is because of constitutionally entrenched democratic principles and institutions and an active citizenry that South Africa has withstood the challenges faced by its democracy over the last decade. Finally, it emphasises that it is precisely at moments of threat to democratic ideals, that it has proved (and remains) essential for South Africa to live up to the aspirational demands of its own Constitution, and to seek, together with other states, to meet challenges with a principled and courageous foreign policy, guided by human rights and the rule of law.

Between the idea
And the reality,
Between the motion
And the act
Falls the Shadow¹

“Is Democracy Dying?” This is the title of the May/June 2018 issue of *Foreign Affairs Magazine*² in which its editor, Gideon Rose, poses the question whether democracy is dying in the US. In one of the featured articles, Walter Russell Mead observes that: “it is, in many ways, a stressful and anxious time to be alive. And that anxiety has prompted a pervasive sense of despair about American democracy—a fear that it has reached a point of dysfunction and decay from which it will never recover”.³

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¹ T.S. Eliot, “The Hollow Men”.

² Published by the Council on Foreign Relations, an independent, non-partisan member organisation, think tank, and publisher.

³ Mead, Walter Russell, “The Big Shift”, *Foreign Affairs*, 22 April 2018, <https://www.foreignaffairs.com/articles/united-states/2018-04-16/big-shift> [Accessed 25 May 2018].

In the context of increasing numbers of international migrants (reported to be 258 million in 2017),⁴ a world where a few are extremely wealthy while billions live in extreme poverty,⁵ the rise of authoritarian, nativist and even fascist regimes and movements,⁶ and the scourge of corporate and government corruption, there is an anxious sense that democracy and a world order founded on the rule of law and respect for human rights are under threat.⁷ This anxiety is felt worldwide, including on the African continent in general and in South Africa in particular.

In this article, we consider the challenges to democracy and the world order it underpins from a South African perspective. We do so by briefly calling to mind the success of the political transition from the inhumane system of apartheid to democracy and the hope that the period from 1994 brought with it for the country. We focus in particular on the Constitution forged at the dawn of South Africa's democracy, and its principal features. We discuss the signs of democratic regression that have punctuated the last 10 years and draw from the South African experience, particularly under the regime of President Zuma, to highlight the pressures that were brought to bear on South Africa as a young democracy. We argue, with reference to certain representative cases, that it is because of constitutionally entrenched democratic principles and institutions and an active citizenry that South Africa has withstood the challenges faced by its democracy over the last decade. Finally, we emphasise that it is precisely at moments of threat to democratic ideals, that it has proved (and remains) essential for South Africa to live up to the aspirational demands of its own Constitution, and to seek, together with other states, to meet challenges with a principled and courageous foreign policy, guided by human rights and the rule of law. At a time when the world is in need of leadership that is inclusive, mature and which confirms—rather than rejects—the values of multilateralism, accountability and strength by unity, South Africa stands poised to make a significant contribution to international affairs. With the Zuma years behind us, there remains much to be redone and rebuilt with the benefit of lessons learnt. Eyes will be on our leadership for positive pointers about South Africa's future role on the global stage, not just being open to business and trade, but as a trusted partner to other countries which want to build a more sustainable, fair and tolerant future—to tackle together issues like climate change, migration, trade, terrorism and international accountability, as obvious examples of global issues that impact locally.

Writing in 1993, Nelson Mandela emphasised that South Africa's foreign relations would henceforth be based on the belief that "human rights should be the core concern of international relations".⁸ He made clear that South Africa was "ready to play a role in fostering peace and prosperity in the world we share with the community of nations". He committed South Africa to being at the "forefront of global efforts to promote and foster democratic systems of government" and emphasised that "accountable government is good government".

After the elections of 1994 that signalled a peaceful transition from oppression to democracy, the country and indeed the world was thrown into a sense of euphoria over the potential South Africa had and the lessons to be extracted from her experience. "Rainbow nation" and "miracle nation" are phrases that were frequently used to encapsulate the hope that South Africa brought to the world.

⁴ United Nations, International Migration Report, 2017, UN Doc ST/ESA/SER.A/404. Refugees and asylum seekers make up approximately 10 per cent of this number.

⁵ Oxfam, *Reward Work Not Wealth*, January 2018.

⁶ See former US Secretary of State Madelaine Albright's recent article in the *New York Times*, where she notes that "fascism—and the tendencies that lead toward fascism—pose a more serious threat now than at any time since the end of World War II". "Will We Stop Trump Before It's Too Late?", *New York Times*, 6 April 2018, <https://www.nytimes.com/2018/04/06/opinion/sunday/trump-fascism-madelaine-albright.html> [Accessed 25 May 2018].

⁷ See, e.g. Richard N. Haass, "Liberal World Order, R.I.P.", Council on Foreign Relations, 21 March 2018, <https://www.cfr.org/article/liberal-world-order-rip> [Accessed 21 April 2018]; *The Economist*, "Blessed are the peacemongers: The liberal order of the past 70 years is under threat", 21 September 2017 print edition, <https://www.economist.com/news/books-and-arts/21729415-it-was-underpinned-movement-make-waging-aggressive-war-illegal-and> [Accessed 25 May 2018].

⁸ Nelson Mandela, "South Africa's Future Foreign Policy" (1993) 72(5) *Foreign Affairs*.

Front and centre to that hope was the Constitution of the Republic of South Africa.⁹ The Constitution recognised that the advent of democracy in 1994 was not the endpoint in the long struggle for social justice, equality and democratic freedom. It was simply the beginning. Thus, the Constitution was intended to be a transformative instrument, no mere entrencher of a status quo already achieved.¹⁰ As the interim Constitution noted in its epilogue, the Constitution was:

“a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”

The Constitution set as its core values, and the leitmotif of its transformative agenda, human dignity, equality, freedom, constitutional supremacy, the rule of law and accountable democratic government.¹¹

Beyond extending the franchise and associated political and civil rights to all citizens, replacing the doctrine of parliamentary sovereignty with the doctrine of constitutional supremacy and according all South Africans human rights, including socio-economic rights, enshrined in a justiciable Bill of Rights, the Constitution was intended to serve as the yardstick against which government could be held accountable by citizens.

Thus, the Constitution was the fledgling democracy’s bulwark to ensure that, as Mandela passionately proclaimed at his inauguration, “never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world”.¹²

Despite all the euphoria of the transition to democracy, and in some respects because of it, the constitutional project has been put to the test, and not only because the new ANC government that came to power in 1994 under President Mandela had to deal with the legacy of centuries of racial discrimination and socio-economic exclusion under apartheid and colonialism before that. Particularly over the past 10 years (under the administration of former President Zuma) South Africa has witnessed numerous concerning affronts to its constitutional and democratic ideals, leading to anxiety, frustration and increased tensions amongst South Africans. Under former President Zuma’s administration corruption, the poor management of state resources and the systematic attempt to disable and dismantle independent state institutions (particularly in an attempt to ensure that Zuma and his cronies did not face accountability for corruption) had left many South Africans, and indeed international observers, feeling that the dream of the rainbow nation was no longer achievable.¹³

⁹ The interim Constitution came into force on 27 April 1994, and laid the foundation for the final Constitution which came into force in 1997. Uniquely, it was the newly established Constitutional Court that was required, before the final Constitution could be adopted, to certify that it complied with the principles set out in the interim Constitution. The first draft of the final Constitution did not pass muster. It was only the second draft which received the Constitutional Court imprimatur, after amendments had been made in accordance with the Court’s First Certification Judgment. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (First Certification Judgment) and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (Second Certification Judgment).

¹⁰ The new Constitutional Court in one of its first judgments, delivered in 1995, noted that “[i]n some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic”, *S v Makwanyane* 1995 (3) SA 391 (CC) at [262] (per Mahomed J).

¹¹ See s.1 of the Constitution. Professor Etienne Mureinik famously opined: “If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion” (“A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S.A.J.H.R. 31 at 32). Quoted by the Constitutional Court, inter alia, in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at [25]-[26].

¹² From Nelson Mandela’s inauguration speech, 10 May 1994.

¹³ See, e.g. *The Economist*, 9 December 2017, where the lead article and cover was “The Corruption of South Africa”, which suggested a country broken by corruption and “state capture”, <https://www.economist.com/news/leaders/21732114-avoid-dire-two-decade-dynasty-dysfunction-south-africas>

But constitutions, conceived in hope, show their mettle in times when democracy and the rule of law are under threat. And, indeed, a constitution that enshrines democracy, human rights and the rule of law, demonstrates its true value and necessity, like all pre-commitment devices, precisely when the siren calls of political expediency and avarice are at their loudest.

South Africa's Constitution has three key features that were to prove decisive when the rapacious shadow of the Zuma-administration fell on Mandela's "beautiful land". First, it creates and entrenches independent institutions, including the judiciary, to, in various ways, act as guardians of the newly formed constitutional democracy.¹⁴ Second, it enshrines the principle of constitutional sovereignty, which means that all exercises of public power are subject to constitutional control.¹⁵ Third, it provides for generous standing grounds that ensure that violations of the Constitution and the Bill of Rights can be challenged by anyone acting in the public interest.¹⁶

At a time characterised by Justice Cameron of the Constitutional Court as one "of structural disintegration, social fraying and predatory looting",¹⁷ the underlying democratic principles encapsulated in the Constitution were tested in the crucible of numerous cases that were brought against President Zuma and his government, often by public interest litigants. Much litigation focused on rampant corruption, perhaps the most significant cause of declining optimism in the country's potential and the greatest attempt at eroding South Africa's democratic gains. These cases included a challenge to the legislation that sought to replace South Africa's independent and highly regarded corruption fighting unit with an institution which lacked independence from the government which it was tasked with investigating.¹⁸ The Constitutional Court upheld the challenge and found that the failure to provide an adequately independent corruption fighting unit violated both the Constitution and South Africa's international obligations. In compelling and emotive language the Court noted that "corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project". The Court ordered Parliament to amend the legislation to remedy the deficiencies so as to ensure that the independence of the corruption fighting unit was properly secured, so that it could fulfil its mandate to investigate corruption, including in government, without fear or favour. When Parliament, despite being ordered by the Constitutional Court to amend the unconstitutional legislation, still failed to make sufficient amendments to ensure the independence of the new institution, in a subsequent case, brought by a public interest NGO, the Court itself ultimately amended the legislation to ensure that independence was guaranteed.¹⁹

The government then, in what could only be seen as a brazen and deeply cynical move, proceeded to appoint a new head of the independent corruption unit, who was clearly unfit for office. This attempt by the government to stifle the institution and its primary mandate (the investigation and uprooting of the cancerous corruption at the heart of government and public institutions), was again challenged by public interest NGOs. Ultimately, the Court set aside the appointment.²⁰

¹⁴-ruling-anc-should-ditch and <https://www.economist.com/news/briefing/21732086-ruling-african-national-congress-ponders-choice-between-dynasty-and-reform-how-jacob-zuma> [both Accessed 25 May 2018].

¹⁵In addition to establishing an independent judiciary, subject only to the Constitution and the rule of law, and tasked as the guardians of the Constitution, the Constitution created a variety of constitutional institutions to ensure accountability and independent monitoring of government. These include an independent National Prosecuting Authority, the Public Protector (who has broad powers to investigate any conduct in state affairs or in public administration in any sphere of government that is alleged or suspected to be improper), the Auditor General (tasked with independently auditing and reporting on the financial management of national, provincial and local government departments) and the Electoral Commission (tasked with independently ensuring free and fair elections).

¹⁶*Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at [48]; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at [78]-[80].

¹⁷Constitution s.38. See also *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) at [21]-[23].

¹⁸Edwin Cameron, "The Constitution is still our best practical hope", Keynote, Sunday Times Literary Awards, 1 July 2013, <http://www.politicsweb.co.za/news-and-analysis/the-constitution-is-still-our-best-practical-hope->. [Accessed 25 May 2018]

¹⁹*Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

²⁰*Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (2) SA 1 (CC).

²¹*Helen Suzman Foundation v Minister of Police* [2017] ZAGPPHC 68; 2017 (1) SACR 683 (GP) (17 March 2017).

Another successful court challenge resulted, by way of example, in former President Zuma being ordered to repay public funds that were used to effect upgrades to his private Nkandla homestead.²¹ The case was effectively based on the Court confirming a finding by the Public Protector (whose role we discuss further below) that former President Zuma was liable for publicly funded upgrades to his private residence. The Constitutional Court's judgment in graphic and powerful terms began by sounding a clarion call for accountability and the rule of law, while issuing a stinging rebuke to the avarice of the Zuma-administration (especially as, in a break with tradition, the Chief Justice read out the judgment, which was carried live on TV and online):

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.”

During the Zuma-era, the courts were also confronted with cases arising from the government's attempts to bypass Parliament (and simultaneously avoiding the public consultation that Parliament is constitutionally mandated to ensure when it acts). One case stands out for particular discussion, at a time when the world faces repeated news of evidence that the Russian government of President Putin is engaged in efforts to undermine and interfere in the democratic processes of other nations.²² The Western Cape High Court was faced with a challenge to the conclusion of an intergovernmental agreement in relation to nuclear cooperation and procurement between the Russian and South African Governments.²³ The agreement formed part of the Zuma government's reckless pursuit of the trillion-rand procurement of new nuclear power plants that was neither necessary nor affordable, and where concerns had been raised that the agreement was the result of corrupt practices. The South Africa-Russia agreement made a number of substantive commitments in relation to nuclear procurement (including granting the Russian government full indemnity from any liability and the right to veto the involvement of any other country in the construction of the plants). The Zuma-government sought to bypass the constitutional requirement that parliamentary approval must be sought and obtained to make international agreements binding on the Republic. The government had sought to achieve this by improperly tabling the agreement before Parliament under a section which did not require parliamentary approval but merely notificatory tabling (which section was only applicable to run-of-the-mill agreements of no substantive moment, which did not warrant parliamentary and public scrutiny). The Court, in an application brought by two environmental NGOs, set aside the unconstitutional actions of government, and required that if the government wished to bind South Africa to the agreement it would have to obtain parliamentary approval (which would involve a public consultation process). The case (which also set aside certain domestic actions necessary for new nuclear procurement) was widely viewed as the effective death knell of the Zuma government's pernicious nuclear build programme (broadly criticised as allegedly aimed at the corrupt enrichment of Zuma and his associates).

The victory is not to be underestimated. The two activists behind the case were recently awarded the Goldman Environmental Prize, the world's largest award honouring grassroots environmental activists,

²¹ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC).

²² See, e.g. *The Economist*, 24 February 2018, with the cover and lead story being “The Meddler: How Putin meddles in Western democracies”, <https://www.economist.com/news/leaders/21737276-and-why-wests-response-inadequate-how-putin-meddles-western-democracies> [Accessed 25 May 2018].

²³ *Earthlife Africa v Minister of Energy* 2017 (5) SA 227 (WCC).

for “stopping their government’s massive secret nuclear deal with Russia—a deal that would have threatened the country’s health, environment and finances”²⁴. As *The Guardian* reported, the court victory was a major setback for Putin’s plans to increase Russia’s income and influence, and may have contributed to the fall of Zuma after nine years in power.²⁵ The South African nuclear case is thus a small but important example of a country—through its courts, and civil society—standing up to insidious attempts to undermine democracy.

In another attempt to bypass constitutional and democratic safeguards in relation to the conducting of foreign affairs, the Zuma-government sought to withdraw from the International Criminal Court (ICC). This followed criticism levelled against South Africa for failing to arrest Sudanese President Omar al-Bashir pursuant to two arrest warrants issued by the ICC. This occurred notwithstanding an interim Court order requiring the government to prevent President al-Bashir’s departure from the country (where he had been attending an African Union summit) pending the determination of urgent litigation to compel the government to arrest him.²⁶ Ultimately, the Supreme Court of Appeal held that the government had violated its domestic legislation which implemented South Africa’s obligations under the Rome Statute by failing to arrest President al-Bashir.²⁷ In October 2016, the government without any public notice or consultation, and, importantly, absent parliamentary approval, summarily deposited a notice of withdrawal from the Rome Statute with the UN Secretary General. This decision was urgently and successfully challenged in the courts by the official opposition party and numerous public interest NGOs.²⁸ The Pretoria High Court found that government had violated the Constitution by bypassing Parliament and simply depositing a notice of withdrawal absent parliamentary approval (and, thus, short-circuiting the concomitant public consultation process that a proper parliamentary approval process would have involved). The government was ordered to rescind its notice of withdrawal, which it duly did (depositing the embarrassingly titled “Withdrawal of Notice of Withdrawal” with the UN Secretary General).²⁹

More recently, litigation has resulted from the Zuma government’s decision in August 2017 to grant Grace Mugabe, the wife of the then Zimbabwean President, Robert Mugabe, immunity from prosecution following her, alleged assault of a young woman in South Africa. The decision to grant immunity was taken after a criminal case had been opened against Ms Mugabe for assault with the intent to do grievous bodily harm, and notwithstanding that (and perhaps, precisely because) the prosecuting authorities had formerly advised the government that there was a *prima facie* case against Ms Mugabe. This decision was challenged in the Pretoria High Court on the basis that it was unconstitutional, unlawful, and violated rights in the Bill of Rights and, as at the time of writing, judgment is awaited following argument before the Court. The challenge was brought by an opposition political party, a public interest NGO, and the young woman who was allegedly assaulted, and was supported by a number of public interest NGOs (acting as friends of the court).

But Courts, and public interest litigants, do not operate in a vacuum. Nor were they alone in holding the Zuma government to account.

South Africa has a free and vigorous press, staffed by courageous journalists. Throughout the Zuma-era the press, through conscientious investigative journalism, laid bare the extent of the rot at the heart of the

²⁴ “The Women Who Stopped the Nuclear Deal” *New Internationalist*, 23 April 2018, <https://newint.org/features/web-exclusive/2018/04/23/women-stopped-nuclear-deal> [Accessed 25 May 2018].

²⁵ J. Watts, “Goldman prize awarded to South African women who stopped an international nuclear deal”, *The Guardian*, 23 April 2018, <https://www.theguardian.com/world/2018/apr/23/goldman-prize-awarded-to-south-african-women-who-stopped-an-international-nuclear-deal> [Accessed 25 May 2018].

²⁶ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* [2015] ZAGPPHC 402; 2015 (5) SA 1 (GP).

²⁷ *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA).

²⁸ *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP). For fuller discussion see Max du Plessis Guénal Mettraux, “South Africa’s Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability” (2017) 15(2) *Journal of International Criminal Justice* 361.

²⁹ Currently the government is still reconsidering its position in respect of the ICC, and has not yet sought to approach parliament for approval to once again seek to withdraw.

South African state. Indeed, as *The Economist* noted, “[w]hat is unusual about South Africa is not that corruption thrives, but that it does so in plain sight. Thanks to a history of civic activism, a free press and a robust judiciary, South Africans are aware of the wholesale theft. Investigative journalists have catalogued corruption at all levels of government”.³⁰ For instance, investigative journalists at different media houses collaborated to analyse and break stories, over many months, arising from hundreds of thousands of leaked emails (provided by whistle-blowers) that related to the Guptas, a family of businessmen at the centre of the state capture allegations, who stand accused of extensive corruption and the manipulation of state institutions and departments for their own enrichment.³¹

Beyond merely engaging in public interest litigation, civil society has actively sought to hold the Zuma-administration to account and bring to an end a culture of impunity and the looting of state resources. Various civil society organisations made sure that they could not be ignored. They demanded that their concerns be addressed, through rallies, protests and numerous engagements with government.³²

It is precisely because courts do not operate in a vacuum, and are, and must be, responsive to the political and societal moment in which they find themselves, that South Africa’s irrepressible civil society and press also played another important role. In holding the Zuma-administration to account and ensuring transparency in the public square, the press and civil society effectively created the necessary space and context for the courts to make many of their brave decisions in defence of democracy and constitutional rights and principles: setting aside government decisions at the highest level (including in relation to the staffing of constitutional institutions and the conducting of foreign affairs), rewriting legislation, and stalling a nuclear procurement programme with the Russian government. In other times, and in different contexts, many of these decisions may have been criticised as unacceptable encroachments upon executive power. Despite predictable efforts by Zuma-acolytes and others within government to cast certain of the Court’s decisions as unacceptable judicial intrusion into the executive realm,³³ and with certain courts cautioning that not every political dispute could be resolved by the judges,³⁴ on the whole the judgments were rightly lauded by a society that had lost trust in the Zuma-administration.

This, of course, raises interesting and important jurisprudential questions about the role of courts in times of social and constitutional turmoil; and how the South African courts were able to continue to make bold decisions, not only openly critical of government but even prescriptive of how it should act, while managing to retain their institutional authority and credibility, and with government still implementing³⁵ and publicly acknowledging that it will respect those decisions.³⁶ We cannot hope to do those issues justice in this article. However, part of the answer may lie in three interwoven points. First, the South African Constitution is autochthonous. It was not imposed from afar. It is the manifestation and cornerstone of South Africa’s peaceful and negotiated transition to democracy after long years of struggle against apartheid and colonialism. It represents the hopes and aspirations, as well as the fears, of the disparate but united

³⁰ “The choice that could save South Africa, or wreck it”, *The Economist*, 9 December 2017.

³¹ See generally, <http://www.gupta-leaks.com/> [Accessed 25 May 2018], where much of this journalism has conveniently been collected.

³² By way of example, see <https://www.savesouthafrica.org/> [Accessed 25 May 2018].

³³ For example, in 2015, after the High Court judgment in the President al-Bashir case discussed above, the Minister of Higher Education complained that the “judiciary tend to somehow overreach” into areas that were for the executive and that there was a danger of Parliament and the executive being run by the courts (see <https://www.iol.co.za/news/politics/sacp-calls-for-summit-on-judiciary-1882432> [Accessed 25 May 2018]).

³⁴ See the judgment by Davis J in *Mazibuko v Sisulu* 2013 (4) SA 243 (WCC) at 256E-H, warning that “Courts do not run the country, nor were they intended to govern the country. Courts exist to police the constitutional boundaries, as I have sketched them. ... There is a danger in South Africa however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy, or disputes which clearly carry polycentric consequences beyond the scope of adjudication”.

³⁵ By and large, that is. There were instances where orders were not implemented. See “A Review of Concourt and SCA Decisions: Undermining or Empowering the Rule of Law?”, available at <https://hsf.org.za/publications/hsf-briefs/a-review-of-concourt-decisions-undermining-or-empowering-the-rule-of-law> [Accessed 25 May 2018]. Oftentimes the failure to comply may have been attributed to lack of resources or skills. But there have been occasions of wanton non-compliance. Perhaps most infamously was the government’s failure to comply with the court order requiring it to ensure that President al-Bashir of Sudan was arrested pursuant to an international arrest warrant issued by the ICC in relation to charges of crimes against humanity, war crimes and genocide. See *Minister of Justice v South African Litigation Centre* 2016 (3) SA 317 (SCA) at [5]-[7].

³⁶ For an insightful article that considers how the Constitutional Court built and maintained its institutional security from 1995 to 2006 see Theunis Roux, “Principle and pragmatism on the Constitutional Court of South Africa” (2009) 7(1) *International Journal of Constitutional Law* 106.

people of the new South Africa. It is owned by them and claimed by them. Second, the Constitution itself recognises the role of the courts as the guardians of the Constitution, and empowers them with the broad remedial powers they have used. The courts did not aggregate this role to themselves, rather the Constitution itself demanded it of them. It emphatically states that the courts “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”,³⁷ and it then requires the courts to exercise the broad discretion to devise “just and equitable” remedies to deal with the resulting invalidity.³⁸ Third, because of the guardian role that South Africa’s autochthonous Constitution envisages for the courts, at times of crisis and when constitutional principles and rights, including socio-economic rights, are under threat, it is to the courts that citizens have turned for assistance—and people defend institutions which defend them. A dramatic example of this is that in the midst of a social grants crisis in 2017, where it appeared that the provision of social grants to some 17 million recipients³⁹ was threatened with collapse due to admitted maladministration by the government, civil society organisations turned to the Constitutional Court. An urgent hearing was convened and a full judgment delivered a mere two days later.⁴⁰ As the Court pointed out in its opening paragraph of its judgment:

“[o]ne of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity, equality and freedom. This judgment is, however, not an occasion to celebrate this achievement. To the contrary, it is necessitated by the extraordinary conduct of the Minister of Social Development (Minister) and of the South African Social Security Agency (SASSA) that have placed that achievement in jeopardy.”

In the judgment the Court crafted an order to ensure that social grants (the right to social assistance being a constitutionally protected right) would continue to be paid,⁴¹ under a special regime which included not only regular reporting by government to the Court but also the creation of an expert panel to oversee the process and report to the Court. Yet, the Court was mindful that the urgent national crisis confronting it and the country, while requiring it to step into the breach created by government neglect, was testing the limits of its legitimate remedial power. In defending its order it pointed out that, “[i]t is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances”.⁴² Also, of note, in a first for the Court, and as a mark of the Court’s displeasure at the apparent inaction by the Minister of Social Development, it sought to ensure that the Minister, who was ultimately responsible for the payment of

³⁷ Constitution s.172(1)(a).

³⁸ Constitution s.172(1)(b).

³⁹ Of a population of 52 million, there are officially over 10 million social grants beneficiaries, the number climbs to approximately 17 million, when one includes the children in respect of whom the beneficiaries receive child care grants.

⁴⁰ *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC).

⁴¹ The Court ordered that the private company that had been making the payments of all social grants on the government’s behalf would have to continue to do so, given that no-one else was in a position to provide the service. The private company’s ongoing duty to continue to ensure that social grants were paid was sourced not in contract but in the company’s constitutional obligations. The private company had previously been paying social grants pursuant to a contract that the Constitutional Court had declared invalid (due to unlawfulness in the tender pursuant to which the contract was awarded), but which invalidity had been suspended by the Court to ensure that grants were still paid while government either successfully appointed a new private company by way of lawful tender or took over the service itself. Government’s failure to do either, and to timeously advise the Court of its failure, prior to the term of the social grants contract (kept in place by the suspension of invalidity) coming to its end, precipitated the social grants crisis. See *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC) at [40]-[52], and the previous judgment, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No.2)* [2014] ZACC 12; 2014 (4) SA 179 (CC). For a full discussion of AllPay see Max du Plessis and Andreas Coutsoudis, “Considering corruption through the AllPay lens: on the limits of judicial review, strengthening accountability, and the long arm of the law” (2016) 4 S.A.L.J. 755.

⁴² *Black Sash* [2017] ZACC 8; 2017 (3) SA 335 (CC) at [51]. The Court went on to point out that: “Everyone stressed that what has happened has precipitated a national crisis. The order we make imposes constitutional obligations on the parties that they did not in advance agree to. But we are not ordering something that they could not themselves have agreed to under our supervision had an application been brought earlier, either by seeking an extension to the contract that would have expired on 31 March 2017 or by entering into a new one.”

social grants, was, to the extent necessary, held personally accountable: in its judgment it ordered the Minister to file an affidavit to show cause why she should not be joined in her personal capacity to the litigation and ordered to pay the costs of the litigation personally.⁴³

The above discussion of key cases and their implications is necessarily selective and brief. But it leaves us here: in the last 10 years South Africa has seen the importance of constitutionally entrenched independent institutions and mechanisms for accountability and transparency, and, perhaps most important, the need for an active and engaged citizenry and civil society, who are given proper constitutional agency. As Justice Cameron recently remarked, “Courts can give a constitution air and breath. The legislature and the executive can give it muscle. But its lifeblood depends on an active citizenry”⁴⁴.

Constitutionally created and empowered institutions, such as the Public Protector, also played their part. Thuli Madonsela, the public protector for much of the Zuma-era, was active and effective in investigating abuses of power. In addition to the investigation and report which ultimately forced Zuma to repay the public money improperly spent on his private residence, the Public Protector’s other reports range from a minister’s splurge on trips to Switzerland to visit his girlfriend using state resources,⁴⁵ to the report on “state capture” which implicated former President Zuma and other public officials in apparently illicit relationships with certain business associates aimed at the looting of public funds on a grand scale. This report required former President Zuma to exercise his power to establish a commission of inquiry to investigate the state capture. The former President was required to appoint a judge chosen by the Chief Justice (this particular innovation by the Public Protector was included to protect against any attempt by President Zuma to compromise the independence of any inquiry into corrupt activities in which he was implicated). After more litigation (including a failed attempt by former President Zuma to review and set aside the Public Protector’s report),⁴⁶ the Commission on State Capture, headed by the Deputy Chief Justice (as selected by the Chief Justice) has been established and has begun its investigations.

During the Zuma-era, it was not only the courts, and other constitutional institutions such as the Public Protector, that played their part in protecting our constitutional democracy, human rights and the rule of law. Parliament (including government-party MPs) has, albeit belatedly, in the face of numerous admonitions by the courts and the groundswell of negative public opinion in relation to corruption, stopped rubber-stamping decisions of state-owned enterprises and government departments and has taken on a more robust role in scrutinising such decisions. And, in the 2016 local government elections, given the widespread corruption and maladministration that had been allowed to flourish under the Zuma administration, voters began to turn away from the ANC. It lost control of the major metros, thus confronting, for the first time, the risk of being relegated to a rural political party, and facing the real possibility of a humiliating performance in the upcoming 2019 national elections. The 2016 election results and what they betoken for the ANC played no small part in seeing the ANC, at its internal conference at the end of December 2017, electing the pragmatic and principled Cyril Ramaphosa as its new President, defeating President Zuma’s favoured successor (his former wife). Within three months, President Zuma was forced to resign by the ANC, and Ramaphosa was sworn in as the new President of South Africa. A few weeks thereafter, Jacob Zuma sat humbled in a courtroom in Durban, facing criminal charges in relation to racketeering, corruption, money laundering and fraud. These charges had been reinstated by the prosecuting authority due mostly to the persistent litigation of the official opposition party. In October

⁴³ Given the conflicting versions in the Minister’s personal costs affidavit and those of the CEO of the social grants agency and the former Director General of the Minister’s department (who had, unexpectedly, both filed affidavits questioning aspects of the Minister’s affidavit), the Court, in a separate judgment, ordered a judicial enquiry to resolve the disputes of fact so that the Court could determine whether the Minister had acted in good faith. See *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 20; 2017 (9) BCLR 1089 (CC).

⁴⁴ Edwin Cameron, *Safeguarding the Constitution and the Rule of Law*, 4th Congress of the Conference of Constitutional Jurisdictions of Africa, April 2017, http://www.judiciary.org.za/images/phocadownload/ccja/CCJA-24-April-2017_Justice-Edwin-Cameron.pdf [Accessed 25 May 2018].

⁴⁵ The late Mr Sicelo Shicaka.

⁴⁶ *President of the Republic of South Africa v Office of the Public Protector* [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) (13 December 2017).

2017, it eventually prevailed and the decision by the Acting National Director of Public Prosecution in April 2009 to discontinue the prosecution of Zuma on over 700 corruption charges was set aside by the Supreme Court of Appeal on the basis that the decision to stop the prosecution was irrational and unconstitutional.⁴⁷

It is too early to predict whether President Ramaphosa will restore and rebuild all that was physically and metaphorically broken in what may come to be thought of as South Africa's lost-decade. But there are already many reasons for optimism (including the appointment of two widely respected former Ministers of Finance, both of whom had been summarily fired by President Zuma from the position,⁴⁸ allegedly to further the aims of state capture, to head the National Treasury and the Department of Public Enterprises respectively), and hopes run high for the man that famously Nelson Mandela wanted to succeed him as President.

One of the areas that is in need of urgent restoration is South Africa's international relations. Under the Zuma administration, South Africa lost its way, and its voice, in foreign affairs. Vision and principle were replaced by the haphazard, expedient and short-sighted—perhaps best exemplified by the ill-fated attempt to withdraw from the ICC.⁴⁹

As South Africa enters a new era its international relations aims and engagements must once again be guided by the core values of its Constitution (human dignity, equality, freedom and the rule of law) and the Constitution's transformative commitment and character—actively seeking to ensure a better future while fully cognisant of the injustice-riven realities of the present. As a matter of domestic commitment and focus, the Constitution demands nothing less of the Ramaphosa administration when it acts globally.⁵⁰

More importantly, in an era of authoritarians and demagogues, when there is a sense that a shadow has fallen over democracy, and the once self-evident commitments to human rights, social justice, and the rule of law seem under threat, South Africa has a role to regain. It has an opportunity to heed the words of Mandela, and the demands of its own Constitution, and “take up its rightful and responsible place in the community of nations”⁵¹

Through its own weathering of the democratic storm over the last decade, and its once-thought-impossible peaceful transition to democracy in the decade-and-a-half before that, South Africa has both practical insights and a moral resilience gained the hard way.

There is a present and urgent yearning in South Africa and, we suggest elsewhere, for leadership that is principled and inclusive, that builds bridges rather than destroys them, and which is rooted in a respect for everyone's rights rather than a derisive dismissal of others that are different. South Africa's democratic lessons were forged in the crucible of a bruising past and its transition from apartheid to constitutional democracy, and—we believe—these have been tested and strengthened in the last 10 years under a venal and avaricious President. But its democratic future, as with all other nations, is not to be taken for granted, particularly at this time in world history. A stronger and inclusive democracy remains vital for South

⁴⁷ *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* [2017] ZASCA 146, 2018 (1) SA 200 (SCA).

⁴⁸ In December 2015, President Zuma fired Nhlanhla Nene as Minister of Finance. President Zuma appointed as Nene's successor an unheard-of parliamentarian with no relevant experience, which created such political and societal outrage, and economic turmoil, that was he forced a few days later to appoint the highly regarded Pravin Gordhan, who had been Minister of Finance before Nene, to the position again. Then in March 2017, President Zuma fired Pravin Gordhan. Since taking over the Presidency, President Ramaphosa has restored sanity by appointing Nene as the Minister of Finance and Gordhan as the Minister of Public Enterprises.

⁴⁹ On this, see further Max du Plessis, “South Africa's latest threat to withdraw from the ICC, or, How to Squander Leadership”, *Daily Maverick*, 11 December 2017, <https://www.dailymaverick.co.za/article/2017-12-11-south-africas-latest-threat-to-withdraw-from-the-icc-or-how-to-squander-leadership/#.WuPzsy-B2gw> [Accessed 25 May 2018].

⁵⁰ As the Constitutional Court recently emphasised, Mandela's outline of South Africa's future foreign policy in 1993 (that human rights should be the core concern of international relations, and that South Africa should be ready to play a role in fostering peace and prosperity in the world we share with the community of nations, and that the time had come for South Africa to take up its rightful and responsible place in the community of nations) “is echoed in the preamble to the Constitution where it is stated: ‘We, the people of South Africa, … adopt this Constitution as the supreme law of the Republic so as to … Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations’”, *National Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC).

⁵¹ Nelson Mandela, South Africa's Future Foreign Policy (1993) 72(5) *Foreign Affairs*.

Africa to achieve its Constitution's transformative commitments domestically. And as a member of the community of nations, a stronger and safer world for South Africa lies in seeking joint solutions for the problems of a connected world, be it on security, terrorism, the environment, nuclear threats, corruption or the global economy.

Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition

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Autonomy; European Court of Human Rights; Gender reassignment; Self-determination; Transgender identity

Abstract

Western societies have traditionally acknowledged only two genders, male and female. Yet as a recent judgment by the German Federal Constitutional Court shows, this is beginning to change, and claims for legal gender recognition of non-binary persons are increasingly being made. Drawing on insights from comparative law, this article argues that whether legal moves beyond the binary are desirable or not depends in large part on the rationale that undergirds them, and examines several potential rationales. At its best, legal gender recognition for non-binary persons should aim to foster self-determination within a larger social fabric of existence, both by supporting non-binary persons in day-to-day interactions and by challenging the self-evidence of the gender binary. By reference to the case-law of the European Court of Human Rights on transgender rights, the article examines whether such a rationale could already be said to lie latent in European jurisprudence.

Introduction

On 10 October 2017, the German Constitutional Court ruled that it is unconstitutional to retain legal gender markers so long as they are restricted to only male and female, with no affirmative designation possible beyond these two options.¹ This judgment constitutes a particularly emphatic intervention within a broader development, in legal systems across the globe, to acknowledge the limits of the gender binary. Explicit recognition of non-binary or otherwise gender-variant persons² had previously found its way, for example, into the legal systems of Australia, Bangladesh, India, Nepal, New Zealand, Pakistan and parts of the US, with contestation or reform of the binary system also reported to be ongoing in many other states. Such developments are usually quite limited in scope (restricted, for example, to certain issues such as passports, census categories or birth certificates) or plagued by a lack of proper implementation beyond initial, often judicial, pronouncements—but they nonetheless serve to showcase that non-binary persons are slowly being written into legal existence.³

With the judgment of the German Constitutional Court as well as recent policy changes in Malta, the move beyond the gender binary has now arrived in Europe. Further challenges by way of judicial

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¹ German Federal Constitutional Court, App. No.1 BvR 2019/16 decision of 10 October 2017; for more context, see fn.28 below.

² In what follows, I will use only the term “non-binary”. Not all persons outside of the gender binary identify with this term (or even accept the dichotomy between binary and non-binary); its use here is not intended to be prescriptive.

³ To borrow a phrase from A. Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (London and New York: Cavendish, 2002), p.80.

proceedings are ongoing, for example, in Austria, Belgium and the UK⁴; and there is hope that the German judgment will push the courts seized of these cases to rethink the binary assumptions which, until now, have so often been taken for granted within Europe. Against the backdrop of these ongoing challenges and the questions they open up for courts across Europe, this article will reflect on the rationale of legal gender recognition for non-binary persons in relation to previous European jurisprudence on transgender rights. Building on the judgment of the German Constitutional Court and other judicial pronouncements in favour of non-binary recognition from outside Europe and using the case-law of the European Court of Human Rights as a foil,⁵ I will discuss whether moving beyond the gender binary constitutes a simple extension of previous rationales for legal gender recognition or whether it necessitates a more radical shift in thinking about how and why we retain legal gender markers.

Legal sex or legal gender: confronting (bio)logic

Within Europe, the landmark case for transgender rights is commonly considered to be the judgment by the European Court of Human Rights in *Goodwin*, which established a right to legal gender recognition as part of the right to private life (art.8 of the ECHR) as well as the relevance of the gender thus recognised for the purposes of marriage (art.12 of the ECHR).⁶ Yet while this ruling obliged the State Parties to provide for *some* kind of legal gender recognition, it took the view that the “appropriate means” for doing so fall within their margin of appreciation,⁷ and subsequent judgments have mostly rubber-stamped various barriers to recognition.

For present purposes, it is particularly relevant to note that, in *Goodwin*, the Court itself restricted its ruling to “post-operative transsexuals”.⁸ In other words, while acknowledging a person’s gender identity may be the driving factor behind legal gender recognition, a right to such recognition remains dependent on bodily modification by way of hormone therapy and surgery. On this approach, legal gender recognition remains grounded in a concern with anatomy which Alex Sharpe has dubbed (bio)logic.⁹ As Damian Gonzalez-Salzberg summarised it with regard to the Court’s position at the time, legally relevant gender is “no longer determined by an immutable ‘biological’ truth of the body, but it is found in the surgically modified anatomy of the transsexual genitalia”.¹⁰

A similar concern with (bio)logic may be found in various cases ostensibly establishing legal gender recognition for non-binary persons—although, given the continued focus on anatomy, it may be more accurate to speak of “legal sex” than “legal gender”.¹¹ This is perhaps most clearly in evidence in the case of *Norrie*, in which the High Court of Australia ruled that it was permissible to change the applicant’s

⁴ For updates on the latter, see <https://elancane.livejournal.com> [Accessed 25 May 2018].

⁵ For a very cautious move beyond the binary within the broader Council of Europe system, see Parliamentary Assembly, Resolution 2048 (2015) at 6.2.4. Another possible point of reference is the legal order of the EU, which—similarly to the case-law of the European Court of Human Rights—is currently phrased or interpreted predominantly within the gender binary but also carries the potential for its subversion. On both aspects (in the context of intersexuality), see e.g. M. Travis, “Accommodating Intersexuality in European Union Anti-Discrimination Law” (2015) 21 *European Law Journal* 180. I will, however, mostly leave EU law aside here—it is difficult to discern clear rationales for legal gender recognition in the case-law of the European Court of Justice since it deals with civil status law only obliquely, through the lens of other areas of law (e.g. in cases relating to equality in pensions). See very clearly in that regard the recent opinion of Advocate-General Bobek in *MB v Secretary of State for Work and Pensions* (C-451/16), 5 December 2017, particularly at [22]-[29], [76], [79] and [98].

⁶ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 447.

⁷ *Goodwin* (2002) 35 E.H.R.R. 447 at [93]; see J.T. Theilen, “The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe”, in G. Schreiber (ed.), *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven* (Berlin, Boston: de Gruyter, 2016), p.378; P. Dunne, “‘Recognizing Identities, Denying Families’: Conditions for the Legal Recognition of Gender Identity in Europe”, in C. Casonato and A. Schuster (eds), *Rights On The Move—Rainbow Families in Europe* (Trento: University of Trento, 2014), p.296.

⁸ *Goodwin* (2002) 35 E.H.R.R. 447, e.g. at [90], [100], and [108]; confirmed in *Stella Nunez v France* (App. No.18367/06), decision of 27 May 2008; contrast Inter-American Court of Human Rights, advisory opinion OC-24/17 of 24 November 2017, e.g. at [127] and [146].

⁹ Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (2002), particularly chs 3 and 4.

¹⁰ D.A. Gonzalez-Salzberg, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights” (2014) 29 *American University International Law Review* 797, 817; see also R. Sandland, “Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights” (2003) 11 *Feminist Legal Studies* 191, 200.

¹¹ While I take sex to be socially constructed (see e.g. S.J. Kessler, *Lessons from the Intersexed* (New Brunswick, N.J.: Rutgers University Press, 1998)), I use it here as a reference to biology (and anatomy in particular) in the way legal discourse commonly does.

legal sex from “male” to “non-specific”.¹² It did so on the basis of the applicant’s submission that “the purpose of the Register is to state the truth about matters recorded in the Register to the greatest possible extent” and that, in light of the applicant’s “ambiguous” sex, “it would be to record misinformation in the Register to classify her as male or female”.¹³ As Neuman Wipfler has argued, the High Court thus sees legal gender as a form of truth-acknowledgment, while “locating the truth of gender in a person’s genitals”.¹⁴

There are many drawbacks to such an approach. Let me highlight just one: the connection to the terminology applied to the non-binary option. Before appeal to the High Court, the New South Wales Court of Appeal had ruled that besides “non-specific”, other “appropriate identifications such as ‘intersex’, ‘androgenous’, [sic] or ‘transgender’, being words that appear to be recognised designations of sexual identity, may be registered”.¹⁵ While this is a relatively vague proclamation, the reference to “identifications” and “designations of sexual identity” as well as the mention of the term “transgender”, which is commonly connected more to gender identity and expression than to biology and anatomy,¹⁶ inject an element of identity-based self-declaration into the Court of Appeal’s approach. The High Court’s ruling, by contrast, remains firmly grounded in (bio)logic throughout. Accordingly, it rejected the multiplicity of possible terms proposed by the Court of Appeal and instead allowed *only* the term “non-specific” to cover all those persons whose sex is considered to be “ambiguous”.¹⁷ Some non-binary persons may well accept or even prefer such a designation, but as the developments in the German legal system mentioned below will demonstrate, many will not find it sufficient—as Wallbank has noted, its vagueness makes it appear not so much as “a ‘third’ Legal Sex, but a catch-all Legal Sex indicating no Legal Sex classification or a Non-Sex Legal Sex”.¹⁸

In light of its recent case-law, it seems unlikely that the European Court of Human Rights could rely on such “sex classification” rather than truly establish legal gender recognition for non-binary persons. While it has never formally abandoned its reliance on (bio)logic, its judgment in *AP, Garçon and Nicot* found a violation of art.8 of the ECHR because legal gender recognition was made conditional on “sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility”.¹⁹ Surgical intervention in general is not explicitly discussed, nor is the judgment’s relation to the notion of “post-operative transsexuals” as encountered in *Goodwin*—but the importance of physical integrity is stressed throughout the judgment,²⁰ and it is difficult to imagine how the previous approach could be upheld without risking inconsistency. Unless the Court adopts a highly regressive stance, then, it cannot mirror *Norrie* in perpetuating (bio)logic and treating the recording of anatomical “truth” as the rationale of legal gender recognition for non-binary persons.

¹² High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

¹³ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at [30].

¹⁴ A.J.A. Neuman Wipfler, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents” (2016) 39 *Harvard Journal of Law and Gender* 491, 514; see also R. Wallbank, “Australia”, in J.M. Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.518.

¹⁵ NSW Court of Appeal, *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 at [205] (per Beazley ACJ, emphasis in original).

¹⁶ See, e.g. the description of the term given by S. Stryker, “My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage”, in S. Stryker and S. Whittle (eds), *The Transgender Studies Reader* (New York: Routledge, 2006), pp.254–255; and, on its tension in relation to “intersex”, P. Currah, R.M. Juang and S. Price Minter, “Introduction”, in P. Currah, R.M. Juang and S. Price Minter (eds), *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), p.xv.

¹⁷ High Court of Australia, *Norrie* [2014] HCA 11 at [31] and [35].

¹⁸ Wallbank, “Australia”, in Scherpe (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.520.

¹⁹ *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [120].

²⁰ *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13) at [123], [127] and [131]–[133]; see also at [130] which speaks of “medical treatment” in general, and considers it to not be “the subject of genuine consent” when enforced as a precondition to legal gender recognition; still, the clear and presumably deliberate restriction of the judgment to the issue of sterilisation, e.g. at [120] and [135], leaves room for doubt as to the Court’s future approach.

From an “anomalous position” to an “affirmative designation”

Yet while the landmark judgment in *Goodwin* remained mired in (bio)logic, it also made indication of other rationales for legal gender recognition besides recording anatomical “truth”. One of the most often and enthusiastically quoted passages from that judgment states that lack of legal gender recognition leads to a “conflict between social reality and law” which “places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety”.²¹ Besides noting the use of the pronouns “he or she”, which confirm the binary outlook of the European Court of Human Rights, we may also ponder the reference to “social reality”. For many trans men and women, this is an intelligible concept—they will, at some point during or after their transition, pass as male or female, respectively, and by obtaining legal recognition of their gender, the chance that they will be unwillingly outed as trans is greatly reduced. They can thus, as Paul Kavanagh put it, achieve “the freedom, like everyone else, to slip quietly into the crowd”.²²

This is an important rationale, and slipping quietly into the crowd should certainly be an option for those who wish it. Yet even within the gender binary, this rationale by no means covers all trans men and women, particularly those whose “social reality” is less clear-cut because they do not conform to gender stereotypes regarding their conduct and appearance.²³ Most legal regimes, including courts that have traditionally been quite active in combatting restrictive regimes of legal gender recognition, continue to accept preconditions relating to the visual appearance of trans persons as legitimate,²⁴ thus forcing them to create an ostensibly coherent “social reality” which contrasts with their legal classification before they are allowed to change the latter.

Focusing specifically on recognition of non-binary persons brings the problems involved in this approach into stark relief. Given the binary outlook which continues to be deeply inscribed into the fabric of most (Western) societies, can we even imagine what a culturally legible “social reality” for non-binary persons would look like? On the rare occasions on which a person’s gender presentation differs so drastically from the common norms that they cannot be easily identified as either male or female, they will nonetheless be measured against that binary, leading to confusion at best—“you should be women, and yet your beards forbid me to interpret that you are so”²⁵—or violence at worst.²⁶ It seems unlikely, therefore, that non-binary persons would be able to “slip quietly into the crowd”.

To be sure, by adapting their gender presentation in a certain way, some non-binary persons can pass as male or female. Yet the crucial point is that a non-binary legal gender will make this *more difficult* since it will show them to be at variation from the gender binary in those situations in which legal gender becomes relevant, and thus make them stand out.²⁷ In other words, contrary to the argument of the European Court of Human Rights that legal gender recognition (within the binary) allows trans persons to pass as cisgender and avoid an “anomalous position”, legal gender recognition for non-binary persons showcases and confirms their *difference* from dominant gender norms. Far from allowing them to “slip quietly into the crowd”, it becomes, in a sense, the confirmation of a position of involuntary defiance in the face of the gender binary.

The judgment of the German Constitutional Court is particularly helpful to illustrate this shift in perspective. The crux of that case was whether a blank space, as already provided for under German law

²¹ *Goodwin* (2002) 35 E.H.R.R. 447 at [77].

²² P. Kavanagh, “Slipping Quietly into the Crowd—UK Transsexuals Finally out of Exile” (2005) 9 *Mountbatten Journal of Legal Studies* 21, 42.

²³ See critically Sharpe, *Transgender Jurisprudence. Dysphoric Bodies of Law* (2002), p.78.

²⁴ German Federal Constitutional Court, decision of 11 January 2011, BVerfGE vol.128, 109, 130.

²⁵ William Shakespeare, *Macbeth*, 1.3.

²⁶ See generally, V. Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000), ch.6, particularly p.144 on the gender binary.

²⁷ Hence the importance of avoiding it for those who do not wish it; see fn.57 below.

for intersex persons,²⁸ provided sufficient legal gender recognition. The Constitutional Court held that it does not:

“The blank space retains the exclusively binary model of gender and creates the impression that the legal recognition of an additional gender identity is not an option, with the entry of a legal gender instead being merely unsettled, unresolved or forgotten about. This does not constitute recognition of the applicant’s own experience of gender.”²⁹

The legislator was instructed to adapt the regime of legal gender accordingly. Renouncing the notion of legal gender altogether would be one permissible option³⁰; so long as it is retained, all current options (male, female, blank space) must likewise be retained,³¹ as well as being supplemented by an additional “uniform affirmative designation” (*einheitliche positive Bezeichnung*).³²

This notion of an *affirmative* designation (or “empowering terminology”, as an Australian report put it³³) rather than a blank space makes the point of legal gender recognition for non-binary persons particularly clear. The Constitutional Court further argued that the lack of such a designation “makes it more difficult for those concerned to move in public and be perceived by others as a person of the gender which they are” and that it contributes, in day-to-day interactions influenced by legal gender, to a lack of recognition with the same “self-evidence” (*Selbstverständlichkeit*) as male or female persons.³⁴ An affirmative designation, it may be concluded by way of contrast, would be a step towards empowering non-binary persons by disrupting the self-evidence of the gender binary—proactive recognition by the law “could have a powerful personally validating and socially authorising effect”.³⁵ As with those trans men and women who do not get read as unambiguously male or female, respectively, legal gender recognition for non-binary persons thus “places the weight of the state behind the trans person” in everyday interactions,³⁶ and provides “an authoritative resource in situations of perceived gender misrecognition”.³⁷

Self-determination and social transformation

Let me further develop the matter through a different prism. Another rationale that has often been said to underlie legal gender recognition is that of personal autonomy or *self-determination*. For example, the European Court of Human Rights has cited these notions both in *Goodwin* and in a number of subsequent

²⁸ Paragraph 22(3) of Personenstandsgesetz (PStG), inserted by amendment of 7 May 2013, Bundesgesetzblatt 2013 I, p.1122: “If the child can be assigned to neither the female nor the male sex, then entry into the birth register is to be made without any such specification”. I should note that while my focus here is on non-binary recognition, whether for those intersex persons who identify as such or for trans persons, this issue cannot resolve the most pressing concern of many intersex activists: preventing non-consensual surgeries on intersex infants; see R. Hupf, “Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital ‘Normalizing’ Surgery” (2015) 22 *William & Mary Journal of Women and the Law* 73.

²⁹ German Federal Constitutional Court, App. No.1 BvR 2019/16 at [43]. (Author’s translation).

³⁰ German Federal Constitutional Court, App. No.1 BvR 2019/16 at [50], [52] and [65]; on the merits of this option, see Grietje Baars, “The Politics of Recognition and the Limits of Emancipation through Law” (29 November 2017), <http://verfassungsblog.de/the-politics-of-recognition-and-the-limits-of-emancipation-through-law/> [Accessed 25 May 2018].

³¹ German Federal Constitutional Court, App. No.1 BvR 2019/16 at [51] and [65].

³² German Federal Constitutional Court, App. No.1 BvR 2019/16 at [65].

³³ Australian Human Rights Commission, “Sex Files: The Legal Recognition of Sex in Documents and Government Records” (The Sex and Gender Diversity Project, Concluding Paper, 2009), pp.3 and 33–34.

³⁴ German Federal Constitutional Court, App. No.1 BvR 2019/16 at [48]; see also, on such everyday interactions, J.T. Theilen, “Intersexualität bleibt unsichtbar: Kritische Anmerkungen zum Beschluss des Bundesgerichtshofs zu nicht-binären Eintragungen im Personenstandsrecht” (2016) 69 *Das Standesamt* 295, 299–300, citing from the legislative debates concerning para.22(3) PStG.

³⁵ T. Bennett, “‘No Man’s Land’: Non-Binary Sex Identification in Australian Law and Policy” (2014) 37 *UNSW Law Journal* 847, 866–867; see also Theilen, “Intersexualität bleibt unsichtbar: Kritische Anmerkungen zum Beschluss des Bundesgerichtshofs zu nicht-binären Eintragungen im Personenstandsrecht” (2016) 69 *Das Standesamt* 295, 299–300; G. Schreiber, “Geschlecht als Leerstelle? Zur Verfassungsbeschwerde 1 BvR 2019/16 gegen die Versagung eines dritten Geschlechtseintrags” (2017) *Ethik und Gesellschaft* 1, 22.

³⁶ See Neuman Wipfler, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents” (2016) 39 *Harvard Journal of Law and Gender* 491, 541.

³⁷ D. Cooper and F. Renz, “If the State Decertified Gender, What Might Happen to its Meaning and Value?” (2016) 43 *Journal of Law and Society* 483, 496.

judgments.³⁸ It has likewise been taken up by other courts as the common principle underlying legal gender recognition of any kind, including recognition of non-binary persons. The German Constitutional Court based its argument on the general right to self-determination of one's personality, to which it held the legal recognition of one's gender identity to be inextricably connected,³⁹ while the Supreme Court of India, in its *NALSA* judgment on recognition of a "third gender", referred repeatedly to principles like personal autonomy and self-determination throughout its reasoning.⁴⁰

If there seems to be general agreement on the importance of self-determination as a rationale for legal gender recognition, then much turns on how that concept is understood. Judith Butler has distinguished between two different conceptions: one that is "individualist, if not libertarian",⁴¹ and one which is more sensitive to societal context. She favours the latter, arguing that "we must be part of a larger social fabric of existence in order to create who we are",⁴² and that "self-determination becomes a plausible concept only in the context of a social world that supports and enables [an] exercise of agency".⁴³ Indeed, both the approaches discussed in the preceding section—enabling trans men and women to "slip quietly into the crowd" as well as providing legal affirmation to non-binary persons—in some way take into account the everyday context within which trans persons are situated, i.e. their interactions with other people who have a particular understanding of gender. In that sense, the two approaches are structurally similar, although they then go on to twist these interactions between an individual and society at large in very different directions (the possibility of passing and the affirmation of difference, respectively).

These differences become more prevalent when we further broaden our perspective to include the implications of a contextualised understanding of self-determination. Assuming that self-determination is only possible within "a larger social fabric of existence", Judith Butler argues that "changing the institutions by which humanly viable choice is established and maintained is a prerequisite for the exercise of self-determination", and thus that "individual agency is bound up with social critique and social transformation".⁴⁴ In other words: If self-determination is dependent on societal context, then it becomes crucial to change said context in such a way as to increasingly make self-determination possible.

This aspect is entirely lacking within the case-law of the European Court of Human Rights, which accepts a right to legal gender recognition in some contexts, but only in such a way that it *does not challenge broader societal gender norms such as the gender binary*.⁴⁵ By way of contrast, consider the *NALSA* judgment: Justice Sikri, in particular, argued that legal recognition of the "third gender" can only constitute the "beginning" of a broader movement to "a dignified life of transgender people".⁴⁶ Sometimes, he notes, "a change in the law precedes societal change and is even intended to stimulate it"; in order to bring about a "complete paradigm shift"—i.e. to move beyond the gender binary in the broader societal context—law

³⁸ *Goodwin* (2002) 35 E.H.R.R. 447 at [90]; *van Kick v Germany* (2003) 37 E.H.R.R. 51 at [73]; *YY v Turkey* (App. No.14793/08), judgment of 10 March 2015 at [102]; *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [93]; see also Inter-American Court of Human Rights, advisory opinion OC-24/17, esp. at [88] and [127].

³⁹ German Federal Constitutional Court, App. No.1 BvR 2019/16 at [45].

⁴⁰ Supreme Court of India, *National Legal Services Authority (NALSA) v Union of India*, Writ Petition (Civil) No.400 of 2012, esp. at [74]; see also e.g. at [20], [61], [67]–[68] and [70] (per K.S. Radhakrishnan, J) and at [114], [121] and [123] (per A.K. Sikri, J).

⁴¹ J. Butler, "Undiagnosing Gender", in *Undoing Gender* (New York and London: Routledge, 2004), p.85.

⁴² Butler, "Undiagnosing Gender", in *Undoing Gender* (2004), pp.100–101.

⁴³ J. Butler, "Introduction: Acting in Concert", in *Undoing Gender* (New York and London: Routledge, 2004), p.7.

⁴⁴ Butler, "Introduction: Acting in Concert", in *Undoing Gender* (2004), p.7.

⁴⁵ See Gonzalez-Salzberg, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights" (2014) 29 *American University International Law Review* 797, 826; Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights" (2003) 11 *Feminist Legal Studies* 191 and 201; E. Bjorge, "Sexuality Rights under the European Convention on Human Rights" (2011) 29 *Nordic Journal of Human Rights* 158, 183; see also, more generally, S. Cowan, "Looking Back (To)wards the Body: Medicalization and the GRA" (2009) 18 *Social and Legal Studies* 247, 248; L. Westbrook and K. Schilt, "Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System" (2014) 28 *Gender and Society* 32, 52; Travis, "Accommodating Intersexuality in European Union Anti-Discrimination Law" (2015) 21 *European Law Journal* 180, 191.

⁴⁶ Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [114] (per A.K. Sikri, J); the applicant in the judicial proceedings before the German courts has similarly confirmed that legal gender recognition "is, of course, only a first step": "Ich bin weder Mann noch Frau". Vanja über die Kampagne für eine dritte Option" (5 January 2015), <http://www.taz.de/!5024783/> [Accessed 25 May 2018].

must play a “more pre-dominant role”.⁴⁷ Justice Radhakrishnan similarly argued in the very first paragraph of the judgment that the “moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, *a mindset which we have to change*”.⁴⁸

Tying these various strands of argument together, I would argue that one important rationale of legal gender recognition for non-binary persons which can be excavated from various judgments at the national level is the idea of fostering self-determination within what Butler calls “a larger social fabric of existence”.⁴⁹ On that approach, legal gender recognition constitutes legal affirmation of non-binary identities even as it recognises that their struggle does not end with law,⁵⁰ but that self-determination can only take place within a broader societal context and the gender norms which it imposes. An “affirmative designation” for those non-binary persons who wish it, as proposed by the German Constitutional Court, would ideally both support them in day-to-day interactions in which legal gender becomes relevant and, in doing so, serve to challenge the gender binary and bring about societal change more generally.

The implications of different rationales

I have treated different rationales for legal gender recognition of non-binary persons separately for the sake of analytical clarity, but it is important to note that, in practice, they do not usually appear in such a clear-cut manner. For example, while *Norrie* most strongly emphasises the rationale of recording anatomical “truth”, elements of (bio)logic also shine through in the judgments of the Supreme Court of India and the German Constitutional Court. The prior classifies hijras as “third gender” in part because they “do not have reproduction capacities as either men or women”⁵¹ which, as Aniruddha Dutta has noted, “homogenizes the hijra community in reductive biological terms” and poses issues of both over- and under-inclusiveness⁵²—even though other passages in the same judgment contain a strong rhetoric in favour of self-declaration regardless of biological status.⁵³ The reasoning of the German Constitutional Court similarly refers to general notions of self-determination which build on its previous case-law concerning trans persons and can thus be read in a broad manner—yet, in light of the facts of the case, the ruling is formally restricted to intersex persons or, as the Court puts it, “persons whose sex development exhibits variations compared to male or female sex development”.⁵⁴ It thus remains to be seen how inclusive the legislator’s response will be.⁵⁵

Despite these amalgamations, I would argue that legal gender recognition for non-binary persons will take a different form depending on which rationale(s) mainly underpin(s) it. Of the possible rationales canvassed above, for example, a focus on recording anatomical “truth” will lead to a relatively static

⁴⁷ Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [119] (per A.K. Sikri, J).

⁴⁸ *NALSA* Writ Petition (Civil) No.400 of 2012 at [1] (per K.S. Radhakrishnan, J; emphasis added); these statements are in line with (and no doubt the product of) the Court’s activist self-perception (see e.g. M. Guruswamy and B. Aspatwar, “Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court”, in D. Bonilla Maldonado (ed.), *Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013)), but their gist could just as well be applied to legal reforms without judicial input.

⁴⁹ See fn.42 above.

⁵⁰ See also Currah, Juang and Price Minter, “Introduction”, in Currah, Juang and Price Minter (eds), *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), p.xxiii; L.M. Giosa, M.V. Schiro and P. Dunne, “Argentina”, in J.M. Scherer (ed.), *The Legal Status of Transsexual and Transgender Persons* (Cambridge et al.: Intersentia, 2015), p.584; ACT Law Reform Advisory Council, “Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT” (2012), pp.48–49.

⁵¹ Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [11] (per K.S. Radhakrishnan, J).

⁵² A. Dutta, “Contradictory Tendencies: The Supreme Court’s NALSA Judgment on Transgender Recognition and Rights” (2014) 5 *Journal of Indian Law and Society* 225, 230; for this reason and others, the judgment has been received very critically by local activists: see, e.g. Gee Imaan Semmalar, “Gender Outlawed: The Supreme Court Judgment on Third Gender and Its Implications” (19 April 2014), https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120&Itemid=133 [Accessed 25 May 2018]. See also, more generally, E.B. Towle and L.M. Morgan, “Romancing the Transgender Native: Rethinking the Use of the ‘Third Gender’ Concept”, in S. Stryker and S. Whittle (eds), *The Transgender Studies Reader* (New York: Routledge, 2006).

⁵³ Particularly Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012, fifth directive.

⁵⁴ German Federal Constitutional Court, App. No.1 BvR 2019/16, first operative paragraph.

⁵⁵ See also Chris Ambrosi, “Die Dritte Option: Für wen?” (29 November 2017), <http://verfassungsblog.de/die-dritte-option-fuer-wen/> [Accessed 25 May 2018].

system exclusive of those non-binary persons with genitalia that do not get read as “ambiguous”—and, in the worst-case scenario, a non-binary or “non-specific” category that is *over-inclusive* of some intersex or trans persons on the basis of their anatomy even though they identify as male or female.⁵⁶ A focus on “slipping quietly into the crowd”, as found in *Goodwin*, is important to retain for those who wish it,⁵⁷ but is unlikely to lead to moves beyond the gender binary at all given the disruption this would cause. Finally, a form of recognition that seeks to foster self-determination within a larger social fabric of existence should be more fluid and lay a stronger focus on empowering forms of “affirmative designation”, as well as aiming to reach beyond civil status law to also reform other areas of law and further disrupt the self-evidence of the gender binary.⁵⁸

The different rationales are perhaps most radically in evidence if we consider *when* legal gender recognition should take place. So long as recording anatomical “truth” remains an aim of the state, the currently widespread system of registration soon after birth—usually on the basis of phenomenological sex—can be said to contribute to that aim. Yet if the rationale of legal gender recognition is to foster self-determination within a larger social fabric of existence, then classification by others, before one’s legal gender can be self-designated, simply makes no sense⁵⁹—rather, such externally imposed classifications then constitute an unnecessary “legal branding of a child”, as Darren Rosenblum memorably put it.⁶⁰ Thus, if we were to take the rationale of fostering self-determination seriously, then there should arguably be no entry of a legal gender at birth, but rather at a later point when it can be based on gender identity rather than sex.

Outlook

It remains to be seen, of course, how various courts across Europe will fare when confronted with non-binary applicants—or whether legislative reform proves to be the more fertile ground. With regard to regional human rights protection, art.8 of the ECHR is certainly broad enough to accommodate claims by non-binary applicants.⁶¹ I have argued that the recent case-law of the European Court of Human Rights has laid the foundations for it to move beyond (bio)logic and that, even in *Goodwin*, it made reference to a notion of self-determination which showed an awareness of societal context. These elements could be built upon, although the latter would need to be rethought in such a way as to go beyond an emphasis only on allowing trans persons to “slip quietly into the crowd” and instead also encompass a form of “affirmative designation” that actively challenges the gender binary.

In light of the Strasbourg Court’s generally cautious approach to delicate subjects involving structural change in recent years, it may seem unlikely that it would take such a progressive stance: As Merris Amos has recently put it in a different context, the Court “is not willing to be the catalyst for change”.⁶² Its use of European consensus as an interpretive method makes things more complicated still. In *AP, Garçon and*

⁵⁶ Neuman Wipfler, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents” (2016) 39 *Harvard Journal of Law and Gender* 491, 514; Bennett, “No Man’s Land”: Non-Binary Sex Identification in Australian Law and Policy” (2014) 37 *UNSW Law Journal* 847, 859.

⁵⁷ See generally S. Ahmed, *Queer Phenomenology* (Durham, NC: Duke University Press, 2007), p.177.

⁵⁸ See, e.g. Supreme Court of India, *NALSA* Writ Petition (Civil) No.400 of 2012 at [75] (per K.S. Radhakrishnan, J) in contrast to s.32J(1) of the New South Wales Births, Deaths and Marriages Registration Act 1995; on the difficult question of what legal gender “actually makes possible”, see Cooper and Renz, “If the State Decertified Gender, What Might Happen to its Meaning and Value?” (2016) 43 *Journal of Law and Society* 483, 500 (emphasis in original).

⁵⁹ Neuman Wipfler, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents” (2016) 39 *Harvard Journal of Law and Gender* 491, 529.

⁶⁰ Darren Rosenblum, “For Starters, ‘Unsex’ the Birth Certificate” (3 November 2015), *New York Times*, <https://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/for-starters-unsex-the-birth-certificate> [Accessed 25 May 2018].

⁶¹ As evidenced by its preliminary interpretation in the ongoing Austrian proceedings: see Austrian Constitutional Court, decision of 14 March 2018, E 2918/2016-29.

⁶² M. Amos, “Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?”, in P. Kapotias and V. Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, forthcoming 2018), ms p.30.

Nicot, for example, it acknowledged the severe problems involved in treating transgender identities as a psychological disorder,⁶³ but nonetheless observed that “a psychiatric diagnosis features among the prerequisites for legal recognition of transgender persons’ gender identity in the vast majority of the forty Contracting Parties which allow such recognition” and found no violation.⁶⁴ Given the relative paucity of legal gender recognition for non-binary persons in Europe so far, there is a chance that the European Court of Human Rights would make use of a similar form of argument to deny such recognition, or to restrict itself to a minimalist rationale by retreating to (bio)logic.

I hope to have made clear that such an approach would not be satisfactory. At its best, legal gender recognition for non-binary persons can foster self-determination within a larger social fabric of existence. At its worst, however, it can be used as “a way of purifying” the pre-existing categories rather than challenging them,⁶⁵ and further contribute to the stigmatisation of trans, intersex and non-binary persons. Not every legal move beyond the gender binary is progressive: Some may be harmful.

⁶³ See J.T. Theilen, “Depathologisation of Transgenderism and International Human Rights Law” (2014) 14 *Human Rights Law Review* 327.

⁶⁴ *AP, Garçon and Nicot v France* (App. Nos 79885/12, 52471/13 and 52596/13), judgment of 6 April 2017 at [139].

⁶⁵ Gina Wilson, “On Norrie v NSW Registrar of Births, Deaths and Marriages” (22 June 2013), *Intersex Human Rights Australia*, <http://oiii.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/> [Accessed 25 May 2018].

From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights

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✉ Inhuman or degrading treatment or punishment; Mandatory life imprisonment; Prisoners' rights; Whole life orders

Abstract

The imposition of life sentences upon prisoners, and their compatibility with the European Convention on Human Rights, is a contentious legal and political issue, especially in the United Kingdom. Applications to the Strasbourg Court against the UK have resulted in a number of legally significant and sometimes seemingly contradictory outcomes. The Grand Chamber's controversial 2017 Hutchinson judgment seems to come to the opposite conclusion to the landmark Vinter judgment four years earlier, which may at first seem to demonstrate a watering-down of Convention standards. However, by looking at Hutchinson in its wider context, including its interpretation in the subsequent case of Matiosaitis v Lithuania, it seems to be the case that, at least in the eyes of the Second Chamber, the significance of Hutchinson is largely limited to the factual situation in the United Kingdom, and does not seem to signal a wider change of direction for the general Strasbourg jurisprudence.

Over the last 10 years, in what has been described by one judge as a “breathtakingly fast process”,¹ the European Court of Human Rights has handed down a series of rulings on whether so-called “life sentences”—imprisonment for an indefinite term without any formal opportunity for parole, release or reduction—are compatible with the European Convention on Human Rights (the Convention). The relevant right engaged in such cases is art.3, which prohibits the infliction of torture, inhuman or degrading treatment in absolute terms.² The Court has suggested that the imposition of a truly irreducible life sentence would constitute such treatment because:

“Even those who commit the most abhorrent and egregious acts nevertheless retain their essential humanity and carry within themselves the capacity to change … to deny them the experience of hope [of release] would be to deny a fundamental aspect of their humanity, and to do that would be degrading.”³

Until recently, the jurisprudence in this area has been relatively clear, with the Court handing down a set of cases which were, albeit sometimes imperfectly, generally consistent with each other. Change, if it

* I would like to thank Elise Maes for comments and assistance with an earlier draft of this article.

¹ *Matiosaitis v Lithuania* (App Nos 22662/13, 51059/13, 58823/13, 59692/13, 57900/13, 60115/13, 69425/13 and 72824/13), judgment of 23 May 2017, concurring opinion of Judge Küris at [3].

² Article 3 of the European Convention of Human Rights. See, e.g. *Gäfgen v Germany* (2011) 52 E.H.R.R. 1 at [87].

³ *Matiosaitis* (App No.22662/13) at [180]. For further views on the link between life sentences and the dehumanisation of the person, see N. Mavronicola, “Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution” (2014) 77(2) M.L.R. 292; A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: OUP, 2005), p.86; *Wellington v Secretary of State for the Home Department* [2007] EWHC 1109 (Admin); [2008] 3 All E.R. 248 at [39 (vi)] (Laws LJ).

did come, tended to be incremental, and in one direction: towards greater protection for life prisoners, by imposing tighter conditions upon states subjecting prisoners to whole-life tariffs.

In January 2017, however, the Grand Chamber handed down its decision in *Hutchinson v United Kingdom*,⁴ holding that the whole-life sentence regime in the United Kingdom was at that point Convention-compliant, departing from its contrary pronouncement four years earlier.⁵ The decision seems to take a comparatively less stringent position with regards to art.3 than it did in the preceding case-law,⁶ reducing rather than strengthening prisoner protections, and, on its face, advocating a lower-intensity standard of review. This article seeks to go beyond this preliminary evaluation by assessing the *Hutchinson* case in its proper context; looking at the preceding case-law, the judgment itself, and, crucially, the way in which the case was considered in the Court's more recent judgment of *Matiōsaitis v Lithuania*.⁷ In doing so, it will be questioned whether *Hutchinson* really does signify a wider change of direction in the Court's jurisprudence, or whether, construed retrospectively, it should be treated as an exceptional case if applicable only to its own facts.

The emergence of the jurisprudence: The *Kafkaris* era

In 2008, the Grand Chamber handed down its judgment in *Kafkaris v Cyprus*,⁸ finding, for the first time, that the imposition of a whole-life sentence could violate art.3 of the Convention. The Court established that where a prisoner was held without "any prospect of release"⁹ whatsoever, this would constitute degrading treatment and fall foul of art.3. To remedy this possibility, the Court held that some "possibility of review"¹⁰ allowing for the consideration of release must be in place.

Whilst undoubtedly a landmark case, establishing important principles and setting the path for further development, *Kafkaris* and the cases that immediately followed it now seem relatively conservative in their scope. For example, in subsequent cases, when invoking *Kafkaris*, the Court tended to synthesise its principles into a singular requirement—that the sentence is "de facto and de jure reducible".¹¹ Generally, this did not mandate a particularly high level of scrutiny; the Court said that if a prisoner was "not deprived of all hope" of release or reduction of their sentence, they could not rely on art.3.¹² Thus prisoners were held not to be deprived of all such hope where their sentence was subject to a discretionary Presidential (or Vice-Presidential) power of clemency,¹³ nor when the possibility of parole fell on a date outside their expected lifespan.¹⁴ On one occasion the Court found that the mere existence of "mechanisms ... available" was enough to satisfy the requirements art.3, without further scrutiny.¹⁵ It would seem that the Court was reluctant to find a breach of art.3 so long as it could identify *any* potential avenue for release, however remote or unrealistic. Perhaps because of this, the early case-law indicates no real trouble in applying *Kafkaris*; its application in each case was presented as relatively straightforward in practice, without the need for any major elaboration.¹⁶

⁴ *Hutchinson v United Kingdom* (App No.57592/08), judgment of 17 January 2017 (Grand Chamber).

⁵ *Vinter v United Kingdom* (2016) 63 E.H.R.R. 1. The Grand Chamber judgment was handed down on 9 July 2013.

⁶ M. Pettigrew, "A Vinter Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg" (2017) 8(2) *New Journal of European Criminal Law* 128.

⁷ *Matiōsaitis* (App No.22662/13).

⁸ *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35.

⁹ *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹⁰ *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹¹ See, e.g. *Ahmad v United Kingdom* (2013) 56 E.H.R.R. 1 at [242]; *Törköly v Hungary* (App No.4413/06), decision of 5 April 2011; *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹² *Streicher v Germany* (App No.40384/04), decision of 10 February 2009. See also *Iorgov v Bulgaria* (No.2) (App No.36295/02), judgment of 2 September 2010 at [52]: a state cannot "deprive the applicant of all hope of release or reduction of sentence".

¹³ *Kafkaris* (2009) 49 E.H.R.R. 35; *Iorgov* (No.2) (App No.36295/02).

¹⁴ *Törköly* (App No.4413/06).

¹⁵ *Ahmad* (2013) 56 E.H.R.R. 1 at [244].

¹⁶ *Garagin v Italy* (App No.33290/07), decision of 29 April 2008; *Streicher* (App No.40384/04); *Iorgov* (No.2) (App No.36295/02); *Lynch and Whelan v Ireland* (App Nos 70495/10 and 74565/10), decision of 18 June 2013. A possible exception might be the partly dissenting opinions in *Kafkaris* (2009) 49 E.H.R.R. 35 itself.

The advent of *Vinter*

In 2013, the Grand Chamber handed down its judgment in *Vinter v United Kingdom*.¹⁷ It became—and probably remains—the leading Strasbourg authority on life sentences; it is generally promulgated as the definitive statement of the law in this area (which is sometimes now even referred to by shorthand as “*Vinter standards*”).¹⁸ This is partially because it is a more recent Grand Chamber decision, but also because, vitally, it is taken to have expanded and elaborated on the requirements of art.3 beyond the embryonic statements in *Kafkaris*. Indeed, commentators have drawn a distinction between the early case-law on the one hand and the “post-*Vinter* case-law”¹⁹ on the other.

Vinter upheld much of the essence of the previous law; the Court repeated that in order to comply with art.3, any sentence must be “de facto and de jure reducible”,²⁰ requiring a “possibility of review” (executive or judicial)²¹ regarding a “prospect of release”.²² Article 3, therefore, was read as “requiring the reducibility of the sentence”²³ and later cases explicitly confirmed that the absence of any review mechanism would therefore breach art.3.²⁴ All of this sits easily with *Kafkaris*.

However, the Court went further. In the case itself, and through its progeny,²⁵ it established that in order for a sentence to be reducible in practice, in addition to the mere existence of a review mechanism, four additional criteria must be met: first, the review must meet a certain standard; secondly, the conditions of that review must be clear and knowable to the prisoner; thirdly, the review mechanism must be in place from the imposition of the sentence; and fourthly, the conditions must be clear and knowable from the imposition of the sentence.

In elucidating the first requirement, a sufficient standard of review, the Court set out what a review mechanism must do to ensure a sentence is really “de facto and de jure reducible”. Thus, the conditions of review must relate to the appropriateness of the sentence under relevant penological grounds.²⁶ As the Court put it in *Öcalan* (No.2), any review must assess:

“whether the applicant’s continued incarceration is still justified … either because the requirements of punishment and deterrence have not yet been entirely fulfilled or because the applicant’s continued detention is justified by reason of his dangerousness.”²⁷

As such, post-*Vinter*, a review based on unrelated considerations such as ill-health or the whim of a president will not meet such criteria.²⁸ In addition, these conditions have to be *possible* to attain; prisoners must be given “a chance, however remote, to someday regain their freedom”²⁹ and impossible conditions or insurmountable barriers, such as the inclusion of psychiatric requirements in a facility without relevant facilities to identify these³⁰ will not grant the prisoner the necessary hope of release. In relation to this, the

¹⁷ *Vinter* (2016) 63 E.H.R.R. 1.

¹⁸ See, e.g. *Matiošaitis* (App No.22662/13), concurring opinion of Judges Lemmens and Spano.

¹⁹ *TP and AT v Hungary* (App Nos 37871/14 and 73986/14), judgment of 4 October 2016, dissenting opinion of Judge Kūris at [16]; *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris at [2], [3], [19].

²⁰ *Vinter* (2016) 63 E.H.R.R. 1 at [107].

²¹ *Vinter* (2016) 63 E.H.R.R. 1 at [119]-[121].

²² *Vinter* (2016) 63 E.H.R.R. 1 at [108].

²³ *Vinter* (2016) 63 E.H.R.R. 1 at [119].

²⁴ *Öcalan v Turkey* (No.2) (App Nos 24069/03, 197/04, 6201/06 and 10464/07), judgment of 19 March 2014 at [204]; *László Magyar v Hungary* (App No.73593/10), judgment of 20 May 2014 at [52].

²⁵ *Vinter* (2016) 63 E.H.R.R. 1 and the subsequent case-law will be referenced interchangeably; whilst some later cases have been viewed as developing the law beyond *Vinter* (e.g. the Court in *TP and AT* (App Nos 37871/14 and 73986/14) suggested one later case “further developed” the law, at [38]), the subsequent case-law tends to treat this group of cases synonymously—see *Hutchinson* (App No.57592/08) at [42].

²⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [119]; *László Magyar* (App No.73593/10) at [50]; *Čačko v Slovakia* (App No.49905/08), judgment of 22 July 2014 at [73].

²⁷ *Öcalan* (App Nos 24069/03, 197/04, 6201/06 and 10464/07) at [207].

²⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [127], [129]; *Öcalan* (App Nos 24069/03, 197/04, 6201/06 and 10464/07) at [203]; *Bodein v France* (App No.40014/10), judgment of 13 November 2014 at [56]; *Kaytan v Turkey* (App No.27422/05), judgment of 15 September 2015 at [65]; *Murray v Netherlands* (2017) 64 E.H.R.R. 3 at [100].

²⁹ *Harakchiev and Toloumov v Bulgaria* (App Nos 15018/11 and 61199/12), judgment of 8 July 2014 at [264].

³⁰ *Murray* (2017) 64 E.H.R.R. 3 at [125].

Court has set out a broad timeframe in which the review must take place; it has established a 25-year consensus,³¹ with 30 potentially permitted,³² but not 40.³³ A disproportionately long waiting time before review becomes available to a prisoner risks creating a situation where a prisoner is unable to challenge the legitimacy of their continued incarceration at a time when penological justifications may have legitimately altered.³⁴ Article 3, therefore, requires a proper review, whether executive or judicial in nature,³⁵ of the necessity of continued incarceration within a reasonable time as to ensure the utility of such a review.

The second requirement relates to the clarity of the requirements of release. The conditions themselves must be sufficiently clear and understandable. It must be clear “what [a prisoner] must do to be considered for release and under what conditions”³⁶ and these conditions must be made known to the prisoner, to the extent that they can gain a “precise cognisance” of such requirements.³⁷

The third requirement is that the review mechanism must be in place from the imposition of the sentence. In other words, if no review mechanism is in place, the breach of art.3 will be found from the very imposition of the sentence.³⁸ The corollary of this position is that the review mechanism must exist through all stages of the incarceration. If at any point the prisoner does not have at their disposal a possibility of review, art.3, it would seem, will be breached for the duration of that period, even if remedied at a later stage.³⁹

The fourth requirement is that like the existence and effectiveness of a review mechanism, the necessary clarity of the conditions of that mechanism must also be in place from the start of the sentence.⁴⁰ In *Trabelsi*, the Court used the language of “objective, pre-established criteria” allowing the prisoner to know the conditions of release “at the time of imposition of the sentence”.⁴¹ Like with the third requirement, a level of clarity is continuously required. If conditions are not sufficiently clear and cognisable, art.3 will be breached for the duration of their absence, even if clear rules are introduced later.⁴²

The Court applied these requirements stringently to the cases which came before it, including in *Vinter* itself. The case concerned the UK’s life sentencing practice, in which a life sentence, once imposed, was only able to be mitigated through the statutory power of compassionate release exercised by the Home Secretary.⁴³ Such a release required, as a prerequisite, something akin to terminal illness or serious incapacitation.⁴⁴ To bolster its argument, the UK government suggested that since the Home Secretary had a duty to act compatibly with art.3, she would not (and legally *could* not) interpret the compassionate release guidelines restrictively, and would instead adopt a broad position with regards to its use, compatible with the Court’s case law.⁴⁵

Ultimately, the Court found against the government. It stated that the strict compassionate release grounds, taken literally, did not meet the substantive criteria required by art.3⁴⁶ and the Court was

³¹ *Vinter* (2016) 63 E.H.R.R. 1 at [120].

³² *Bodein* (App No.40014/10) at [61]-[62].

³³ *TP and AT* (App Nos 37871/14 and 73986/14) at [45].

³⁴ *TP and AT* (App Nos 37871/14 and 73986/14) at [48].

³⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [119]-[121]. Some judges have questioned whether the later case-law mandates a judicial, rather than executive review—see *Matiošaitis* (App No.22662/13), concurrence of Judge Kūris; *Murray* (2017) 64 E.H.R.R. 3, partly concurring opinion of Judge Pinto de Albuquerque at [13]; cf. *Hutchinson* (App No.57592/08) at [47]-[50] and *Lendore v Attorney General of Trinidad and Tobago* [2017] 1 W.L.R. 3369 at [67]: art.3 does not “mandate any particular form of review”.

³⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [122].

³⁷ *Trabelsi v Belgium* (2015) 60 E.H.R.R. 21 at [137].

³⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [122]; *Kaytan v Turkey* (App No.27422/05) at [66]; *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris at [6].

³⁹ *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque.

⁴⁰ A. Ashworth, “R. v Newell (Lee William): sentencing—life imprisonment—whole life orders” (2014) 6 Crim. L.R. 471, 472.

⁴¹ *Trabelsi* (2015) 60 E.H.R.R. 21 at [137].

⁴² *László Magyar* (App No.73593/10) at [153]; *Čačko* (App No.49905/08) at [75].

⁴³ Crime (Sentences) Act 1997 s.30.

⁴⁴ *Vinter* (2016) 63 E.H.R.R. 1 at [12], [43].

⁴⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [94]; see *R. v Bieber* [2009] 1 W.L.R. 223; *R. v Oakes* [2012] EWCA Crim 2435.

⁴⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [127].

unconvinced with the government's claim that the power operated more widely in practice.⁴⁷ Moreover, it found that the guidelines for the power were deemed too unclear⁴⁸ and were not in any case made known to prisoners.⁴⁹ A violation of art.3 resulted.⁵⁰

It is clear, then, that although both Grand Chamber judgments are often cited together as authoritative propositions of law,⁵¹ that *Vinter* extended the “de facto and de jure reducible” requirement far beyond the initial framework introduced in *Kafkaris*. The requirements for satisfying art.3 as laid down in *Vinter* are different—or at least more developed—than those in *Kafkaris*; Judge Kūris goes so far as to suggest *Vinter* effectively overrules the previous case-law.⁵² In addition, it is doubtful that certain early cases which passed the *Kafkaris* threshold would survive post-*Vinter*. In *Harakchiev*, for example, the Court, in finding a violation of art.3, compared its conclusion with its previous finding to the contrary some years earlier in an almost identical factual situation. In justifying the difference, the Court pointed out that it was “decided after *Kafkaris* … but before *Vinter*” and that it “cannot adopt the same approach … in light of the Grand Chamber’s later ruling, in … *Vinter*”.⁵³

In sum, through *Vinter*, the Court ushered in a new understanding of what the Convention required in terms of life sentences. The case was followed faithfully in a number of decisions,⁵⁴ resulting in a relatively consistent and authoritative line of case-law.⁵⁵

A change in approach? *Hutchinson v United Kingdom*

After the Grand Chamber’s ruling in *Vinter*, the English Court of Appeal handed down its ruling in *McLoughlin*.⁵⁶ It “clarified” the operation of the Home Secretary’s statutory power of compassionate release, describing it as having a “wide meaning”⁵⁷ beyond its literal (and non-binding) wording, allowing (and requiring) the evaluation of penological grounds for incarceration. As a result, and disagreeing with the European Court’s conclusion in *Vinter*, the Court of Appeal concluded that the UK system met the art.3 criteria.⁵⁸

Following this, in January 2017, the Grand Chamber availed itself of a new opportunity to examine the situation in the UK. In that case, *Hutchinson v United Kingdom*,⁵⁹ the Court essentially accepted the Court of Appeal’s argument, and found that the UK’s life sentences framework did *not* breach art.3. This, of course, is the opposite conclusion to the one it reached in *Vinter*. But in *Hutchinson*, the Grand Chamber cited both *Vinter* and *Murray* in its judgment⁶⁰; nowhere in the judgment does it overrule or overtly disregard any previous authority. In setting out the relevant law, the Court reiterated the post-*Vinter* principles: there must be review on legitimate penological grounds,⁶¹ these grounds of review must be clear, and crucially, must be in force and knowable “from the outset”.⁶² This clearly matches up with the

⁴⁷ *Vinter* (2016) 63 E.H.R.R. 1 at [126].

⁴⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [125], [129].

⁴⁹ *Vinter* (2016) 63 E.H.R.R. 1 at [128].

⁵⁰ *Vinter* (2016) 63 E.H.R.R. 1 at [130].

⁵¹ *TP and AT* (App Nos 37871/14 and 73986/14), dissenting judgment of Judge Kūris at [27].

⁵² *Matišaitis* (App No.22662/13), concurring opinion of Judge Kūris at [2], [5].

⁵³ *Harakchiev and Tolumov* (App Nos 15018/11 and 61199/12) at [252]-[253]; compare *Jorgov (No.2)* (App No.36295/02). See also similar assessment of Judge Kūris in *TP and AT* (App Nos 37871/14 and 73986/14) (dissenting opinion of Judge Kūris at [6]-[8]) regarding that case and *Törköly* (App No.4413/06).

⁵⁴ However, there have been some accusations that later case-law subsequently developed the jurisprudence beyond that which was set out in *Vinter*, notably, from the Privy Council in *Lendore*, who regarded the subsequent expansion of the law as a “misunderstanding” of *Vinter*—see *Lendore* [2017] 1 W.L.R. 3369 at [29].

⁵⁵ “Relatively” perhaps rather than absolutely, as the requirement of imposition from the start of the sentence had been applied somewhat flexibly in some of the cases—see, e.g. *Čačko* (App No.49905/08) at [79]-[81]; *Koky v Slovakia* (App No.13624/03), judgment of 12 June 2012 at [31]-[33].

⁵⁶ *R. v McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964.

⁵⁷ *McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964 at [33].

⁵⁸ *McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964 at [35], [37].

⁵⁹ *Hutchinson* (App No.57592/08).

⁶⁰ *Hutchinson* (App No.57592/08) at [42].

⁶¹ *Hutchinson* (App No.57592/08) at [43].

⁶² *Hutchinson* (App No.57592/08) at [44].

requirements of *Vinter* as outlined above. Why, then, did the majority of judges in the Grand Chamber come to the opposite conclusion to those in *Vinter* when the principles it espoused were identical?

The answer falls to the very dubious application of the law to the facts. As regards the first criterion, the standard of review, the Court accepted and upheld the Court of Appeal's statement of the law, accepting that it had "clarified"⁶³ the UK position and, by implication, admitted it had previously misunderstood it in *Vinter*. Thus, the Court agreed that the Home Secretary's power of compassionate release, properly understood, actually required her to review the penological justifications of an individual sentence. This is, of course, a contestable claim,⁶⁴ especially as the same argument was emphatically rejected in *Vinter*.⁶⁵ Nothing had changed in practice between *Vinter* and *Hutchinson*, after all.

Even more troublesome is the application of the "clarity" criterion. Thus, even if the Home Secretary's power is construed widely enough to include a proper review of the sentence, this does not in itself satisfy art.3 unless the conditions in which this will take place are clear and knowable to the prisoner(s) serving a life sentence. The Home Secretary's powers stem not from a clear code or legislation, but the abstract legal requirement to act in a way that is compliant with art.3. It is not obvious how this can be sufficiently clear and knowable to prisoners, especially given that this had been unclear to the Grand Chamber four years prior.⁶⁶ Indeed, the only document prisoners had at their disposal indicating the possible conditions of release—the "Lifer Manual" detailing the operation of the "compassionate grounds" for release—was problematic for two reasons: it was both non-binding in nature and actually set out incorrect information,⁶⁷ pointing exclusively to ill-health or similar circumstances as conditions of release and not anything like the post-*Vinter* penological grounds which the Court accepted were nonetheless operational and crucial to satisfy art.3. This clearly seems to be out of step with the previous post-*Vinter* application of the principle.

If the first and second *Vinter* requirements, that the conditions of release meet a certain substance and clarity, were dealt with poorly in *Hutchinson*, more worrisome still is that the third and fourth requirements—that conditions for release should be in force and knowable from the imposition of the sentence—were barely acknowledged at all. It is unclear whether the Court deemed the "clarification" of the law to apply from the point of its enunciation (either when given by the Court of Appeal in 2014 or accepted by the Grand Chamber in 2017) or whether it applied *ex tunc*.⁶⁸ Naomi Hart notes that the prisoner in question in *Hutchinson* was sentenced prior to the Human Rights Act 1998 becoming coming into force in the UK, and thus the Home Secretary would have been under no direct art.3 obligations from that source at the time of the imposition of the prison sentence.⁶⁹ Thus even if accepted that the Home Secretary had a sufficiently substantive power to review sentences at the time of the prisoner's imposition, it seems impossible to suggest that this was sufficiently clear and knowable to the prisoner from the start of their sentence. Frustratingly, the Court glossed over this aspect of the case-law altogether. The Court explicitly stated that it would evaluate only on the position of the law as in force at the time,⁷⁰ specifically going against both the earlier case-law and the Court's own statement of the law earlier in the case.⁷¹ Dissenting

⁶³ *Hutchinson* (App No.57592/08) at [38]-[41].

⁶⁴ See, e.g. M. Pettigrew, "A Vinter Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg" (2017) 8(2) *New Journal of European Criminal Law* 128, 136. Alternatively, it might be said that the Court of Appeal's so-called "clarification" itself had the effect of widening the UK position so that it is (from that point) compliant with Strasbourg standards. But this does not solve other related problems, such as the fact that this policy was not in force from the beginning of the sentence, violating *Vinter*'s third and fourth requirements—see below.

⁶⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [126].

⁶⁶ This point has been made forcefully by a number of commentators in the area: A. Beetham, "Whole life orders and article 3" (2017) 81(3) *Journal of Criminal Law* 236, 237; J. Bild, "The whole life sentence in England and Wales" (2015) 74(1) C.L.J. 1, 2; N. Hart, "Whole Life Sentences in the UK: Voite-Face at the European Court of Human Rights?" (2015) 74(2) C.L.J. 205, 207. A. Ashworth, "R. v Newell (Lee William): sentencing—life imprisonment—whole life orders" (2014) 6 Crim. L.R. 471, 473. See also *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque at [31]-[34].

⁶⁷ *Hutchinson* (App No.57592/08) at [65]: The Grand Chamber recommended revising the Manual because it did not reflect the law at the time.

⁶⁸ A point that was previously made by Judge Kalaydjeva: see *Hutchinson v United Kingdom* (2015) 61 E.H.R.R. 13, dissenting opinion of Judge Kalaydjeva.

⁶⁹ N. Hart, "Whole Life Sentences in the UK: Voite-Face at the European Court of Human Rights?" (2015) 74(2) C.L.J. 205, 207.

⁷⁰ *Hutchinson* (App No.57592/08) at [73].

⁷¹ *Hutchinson* (App No.57592/08) at [44].

Judge Lopez Guerra suggested, not without merit, that this could have been fatal to the government's case.⁷²

What is to be made of *Hutchinson*? On its face, the case seems to show a “backtracking”⁷³ or “retreat”⁷⁴ from *Vinter*, either by applying an unusually lenient standard of assessment or declining to assess some parts of the post-*Vinter* framework altogether. But the wider significance of this is obfuscated by the fact that the Court places this new approach *alongside* a promulgation of the otherwise orthodox principles of the case-law. This disingenuous tactic—saying one thing and doing another—leaves the law in a state of confusion.⁷⁵ It is unclear from the judgment alone whether *Hutchinson* should be seen as the Court pulling back from *Vinter* and adopting a new, weaker standard of review,⁷⁶ or whether the Court is continuing to adhere to the *Vinter* standard, but just applying it sloppily to the facts of this case, perhaps mindful of the particular political implications behind its judgment.⁷⁷ Given that “the Convention is what the Strasbourg Court says it is”,⁷⁸ the Court in *Hutchinson*—the Grand Chamber, no less—succeeded only in making the Convention requirements inherently more uncertain.

Testing the waters: *Matiošaitis*

So what is the status of the *Vinter* case-law post-*Hutchinson*? A first indication was given by the UK Privy Council in July 2017. In *Lendore*,⁷⁹ perhaps unsurprisingly, that court treated *Hutchinson* as confirming a narrower art.3 standard and bolstering the UK's own preferred position,⁸⁰ consistently with *McLoughlin*. In fact, it deemed cases like *Trabelsi*—with its emphasis on “objective, pre-established criteria”—as representative of an overzealous misapplication of the art.3 requirement, later corrected by *Hutchinson*.⁸¹

However, more illustrative is the May 2017 Second Chamber judgment of *Matiošaitis v Lithuania*.⁸² In that case, life prisoners complained that their sentences, indefinite but for the possibility of presidential pardon, breached art.3. The Court took its usual route of setting out the case-law before applying it to the facts. In doing so, it re-emphasised that there must exist a review mechanism allowing for the prospect of release, that review being on proper grounds; an “actual assessment of the relevant information [of] whether his or her continued imprisonment is justified on legitimate penological grounds”⁸³ rather than of capricious things like age and illness.⁸⁴ It also emphasised that the conditions must be attainable in practice⁸⁵ and reiterated the principle that any grounds for review need to be sufficiently clear and knowable.⁸⁶ *Murray*⁸⁷ was cited and paraphrased as authority for this, part of the case-law canon seemingly discarded in the earlier Privy Council judgment.⁸⁸

⁷² *Hutchinson* (App No.57592/08), dissenting opinion of Judge Lopez Guerra.

⁷³ A. Beetham, “Whole life orders and article 3” (2017) 81(3) *Journal of Criminal Law* 236, 237.

⁷⁴ M. Pettigrew, “A Vinter Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg” (2017) 8(2) *New Journal of European Criminal Law* 128, 135.

⁷⁵ The Privy Council in *Lendore* remarked that the case-law authorities “are by no means consistent among themselves” (*Lendore* [2017] 1 W.L.R. 3369 at [63]).

⁷⁶ Case Comment, “Life Imprisonment without prospects of release” (2017) 3 E.H.R.L.R. 329, 331.

⁷⁷ *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque. Whilst this article can make only a fleeting reference to the UK's political circumstances, it is worth mentioning that UK politicians have in recent times made a number of threats to withdraw from the European Convention; the Conservative party took a position in their 2015 manifesto which was explicitly hostile to the ECHR. See S. Greer and R. Slowe, “The Conservatives' Proposals for a British Bill of Rights: Mired in Muddle Misconception and Misrepresentation?” (2015) 4 E.H.R.L.R. 370, especially 379–381.

⁷⁸ *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris at [4].

⁷⁹ *Lendore* [2017] 1 W.L.R. 3369.

⁸⁰ *Lendore* [2017] 1 W.L.R. 3369 at [70].

⁸¹ *Lendore* [2017] 1 W.L.R. 3369 at [70]-[71].

⁸² *Matiošaitis* (App No.22662/13).

⁸³ *Matiošaitis* (App No.22662/13) at [174].

⁸⁴ *Matiošaitis* (App No.22662/13) at [162]-[163].

⁸⁵ *Matiošaitis* (App No.22662/13) at [177].

⁸⁶ *Matiošaitis* (App No.22662/13) at [168].

⁸⁷ *Murray* (2017) 64 E.H.R.R. 3.

⁸⁸ *Matiošaitis* (App No.22662/13) at [174].

Crucially, when applying these principles to the facts, unlike in *Hutchinson*, the Court in *Matiošaitis* applied a fairly rigorous test to Lithuania's prison regime. Whilst in the applicants' cases their possibility of release came in the form of a presidential pardon, the Lithuanian review system was much more formalised than the one in, say, *Kafkaris*. Unlike in *Hutchinson*, there existed a published list of qualifying considerations, all of which related to the ongoing justification of the sentence, which the authorities would take into account when reviewing the sentence. Whilst this list was non-exhaustive, this was not in itself fatal.⁸⁹ The Court accepted that the review criteria went unchanged during the tenure of the applicants' incarceration,⁹⁰ that it was available to them and any other prisoner at any point⁹¹ and that that the prison authorities had also put in place certain programmes aimed at social rehabilitation of prisoners, thus enabling them to take steps towards attaining the conditions required for their release.⁹²

Despite this, the Court found that the system did *not* meet Convention standards. The review mechanism, despite the merit of the pre-established criteria, was nonetheless found to be insufficient for prisoners "to know what [they] must do to be considered for release and under what conditions"⁹³ especially due to the lack of specific reasons given alongside rejections of review applications.⁹⁴ The absence of such specific reasons meant that prisoners, according to the Court, would be left in "a conundrum as to what he or she must do" to gain a pardon.⁹⁵ This, coupled with the fact that applications for release were very rarely successful in practice,⁹⁶ caused the Court to deign the pardon system a royal prerogative of mercy rather than the type of sophisticated review mechanism necessary for art.3.⁹⁷

In addition, whilst accepting that a social rehabilitation programme was a positive initiative, the Court still found that the poor living conditions within the prison, particularly the number of hours life prisoners spend in total isolation, mitigated the effectiveness of any reform programme: the "deleterious effects of such life prisoners' regime must have seriously weakened the possibility of the applicants reforming"⁹⁸ and therefore the ability to meet the conditions for release. Taking these issues together, the Court found that the Lithuanian system ultimately fell beneath the high standard required to satisfy the requirements of art.3.⁹⁹

The decision is striking when compared directly with *Hutchinson* for several reasons. First, in *Hutchinson*, the Court easily accepted the claim that the Home Secretary's discretion would be carried out in a way which allowed the assessment of penological grounds without any real evidence to support this; in *Matiošaitis*, on the other hand, the Court very carefully considered whether the required assessment of the required penological grounds would be carried out *de facto*. To this effect the frequency and operation of the pardoning mechanism in practice was not an issue in *Hutchinson*¹⁰⁰ but was deemed very important in *Matiošaitis*.

Secondly, the mere existence of an abstract legal obligation stemming from the operation of art.3 (clarified only through case-law, no less) upon the Home Secretary was enough to satisfy art.3's clarity requirements in *Hutchinson*; from this, prisoners were apparently able to know what they must do to be eligible for release.¹⁰¹ On the other hand, the detailed published list of considerations available to prisoners was not enough in *Matiošaitis*, partially because of a lack of reasons given by the president in practice.

⁸⁹ *Matiošaitis* (App No.22662/13) at [168].

⁹⁰ *Matiošaitis* (App No.22662/13) at [166].

⁹¹ *Matiošaitis* (App No.22662/13) at [167].

⁹² *Matiošaitis* (App No.22662/13) at [178].

⁹³ *Matiošaitis* (App No.22662/13) at [175], [181].

⁹⁴ *Matiošaitis* (App No.22662/13) at [170], [181].

⁹⁵ *Matiošaitis* (App No.22662/13) at [176].

⁹⁶ *Matiošaitis* (App No.22662/13) at [172].

⁹⁷ *Matiošaitis* (App No.22662/13) at [173].

⁹⁸ *Matiošaitis* (App No.22662/13) at [179].

⁹⁹ *Matiošaitis* (App No.22662/13) at [181]-[182].

¹⁰⁰ *Hutchinson* (App No.57592/08) at [53].

¹⁰¹ *Hutchinson* (App No.57592/08) at [63]-[64].

On this point, *Hutchinson* simply said that to act compatibly with art.3 and the Human Rights Act, the Home Secretary would be required to “give reasons”—without analysing whether this had ever occurred.¹⁰²

Thirdly, the adequacy of reform programmes or the de facto possibility of achieving the conditions for release, so fatal a problem in the *Matiošaitis* judgment, were not even mentioned in *Hutchinson*.

Fourthly, as regards to *Hutchinson*’s most glaring omission, namely the lack of examination into whether the incarceration breached art.3 from the start of the sentence, *Matiošaitis* is less directly helpful. The particular case facts established that the review mechanism here had been in force, relatively unchanged, since the imposition of the sentence.¹⁰³ *Matiošaitis* does reiterate that an absence of review mechanisms from the beginning of a sentence would mean that a breach of art.3 “arises at the moment of the imposition of the life sentence”,¹⁰⁴ although *Hutchinson* also relied on authority suggesting the same.¹⁰⁵ Nonetheless, the more oblique nature of that statement, alongside an emphasis on the fact that art.3 was breached in one applicant’s case despite the fact that he had not yet reached the time period to make him eligible for review,¹⁰⁶ as well as the apparent examination of how long the review mechanism has been in force,¹⁰⁷ emphasised the temporal aspect of art.3 and strongly suggests that the requirement of a framework from the imposition of the sentence has not been jettisoned from the jurisprudence.

To summarise, it is clear that the Court in *Matiošaitis* employed a more penetrating assessment of Lithuania’s prison system than the *Hutchinson* Court did with regards to the UK. It emphasised to a much greater extent the reducibility of the sentence de facto and the clarity of associated criteria for this; asserted a higher standard of proof; applied greater scrutiny to the state’s claims, and, crucially, seemed to reassess the strand of jurisprudence that art.3 requirements must be present from the start of the sentence, a facet so gravely overlooked in *Hutchinson*.

Conclusions: the current law and the status of *Vinter* in a post-*Hutchinson* landscape

Matiošaitis, then, helps shed light on how best to construe *Hutchinson*, at least according to the European judges. It seems like the Court takes an approach that is more consistent with the rest of the post-*Vinter* case-law than the Court in *Hutchinson* did. How is that possible, given *Hutchinson* was decided by the Grand Chamber just six months prior?

One possible explanation is that the Court in *Matiošaitis* cleverly engineered its way around the *Hutchinson* precedent. Elements of this could be gleamed from the language of the *Matiošaitis* judgment; in the sections dealing with the Court’s findings, *Hutchinson* is mentioned just six times, compared to nine times for *Vinter* and fourteen times for *Murray*. Where *Hutchinson* is cited, it is used as authority for setting out a useful overview of the case-law¹⁰⁸ or as a citation for the use of the margin of appreciation.¹⁰⁹ It could be, then, that the Court in *Matiošaitis* was doing exactly what the Court in *Hutchinson* did—saying one thing and doing another—by saying a case (here, *Hutchinson*) applies without actually applying it in practice.

But the Court need not be framed in such a duplicitous way. Rather than viewing *Hutchinson* as establishing a new approach which must be artificially worked around, we can—as it seems the Court in *Matiošaitis* did—instead take *Hutchinson* as authority only as regards to its own factual situation, rather than for a general change in the case-law. *Hutchinson* can be retrospectively classified as a case of bad application of the existing law, rather than the good application of some modification of it.

¹⁰² *Hutchinson* (App No.57592/08) at [51].

¹⁰³ *Matiošaitis* (App No.22662/13) at [167].

¹⁰⁴ *Matiošaitis* (App No.22662/13) at [182].

¹⁰⁵ *Hutchinson* (App No.57592/08) at [44].

¹⁰⁶ *Matiošaitis* (App No.22662/13) at [182].

¹⁰⁷ *Matiošaitis* (App No.22662/13) at [167].

¹⁰⁸ *Matiošaitis* (App No.22662/13) at [156], [160].

¹⁰⁹ *Matiošaitis* (App No.22662/13) at [181].

This sits more easily with the Court's approval of *Hutchinson* in *Matiošaitis*; it is cited alongside authorities like *Vinter* and *Harakchiev* without distinction,¹¹⁰ and nowhere in the judgment does the Court suggest that *Hutchinson* represents any sort of departure from the previous case-law; on the contrary, from the outset, it is presented as an equally authoritative statement of the law, standing for exactly the same principles, as the post-*Vinter* case of *Murray*.¹¹¹ In confirming *Hutchinson* in this way, the Court, seemingly paradoxically, also confirms *Vinter*.

In conclusion, the Court in *Matiošaitis* has shown that *Hutchinson* need not necessitate the discarding of the stringent post-*Vinter* requirements. On the contrary, *Hutchinson* can be treated as an orthodox statement of law, with the specific application of its facts an isolated example, rather than indicating a general trend in the case-law. However seemingly fictitious this may seem, this seems to be the way the Court is squaring that circle. With at least two forthcoming cases in the near future,¹¹² time will tell whether this narrative will prevail in the long term.

¹¹⁰ *Matiošaitis* (App No.22662/13) at [160], [171], [181].

¹¹¹ *Matiošaitis* (App No.22662/13) at [156].

¹¹² *Tekin and Baysal v Turkey* (App Nos 40192/10 and 8051/12), communicated to the Turkish government on 20 July 2015 and *Viola v Italy* (App No.77633/16), communicated to the Italian government on 30 May 2017.

Case Analysis

The Right to be Forgotten in Cases Involving Criminal Convictions

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>Data subjects' rights; EU law; Human rights; Internet service providers; Personal data; Public interest; Right to erasure; Spent convictions

Abstract

In NT1 and NT2 v Google and The Information Commissioner *the High Court of England and Wales considered the applicability of the right to be forgotten to cases involving “spent” criminal convictions under the Data Protection Directive and in light of the decision of the Court of Justice of the European Union (CJEU) in Google Spain v AEPD. The decision represents an important development in the evolving body precedent concerning the right to be forgotten in European law while also offering an insight into a potential shift in attitude among common law courts towards the applicability of art.8 rights in the context of criminal convictions.*

Introduction

NT1/NT2¹ is perhaps the most high-profile consideration of the right to be forgotten in a common law jurisdiction following the decision in *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)*² in 2014. The case, more accurately two joined cases, concerns NT1 and NT2, two businessmen previously convicted of criminal offences. The claimants sought the removal by the defendant, Google, of search results concerning their previous convictions on the basis that the results conveyed inaccurate, out-of-date and irrelevant information, failed to attach sufficient public interest and/or otherwise constituted an illegitimate interference with their right to be forgotten as established in *Google Spain*.

1. The right to be forgotten in *Google Spain*

In *Google Spain* the CJEU interpreted art.14 of the Data Protection Directive 1995³ and the Charter of Fundamental Rights of the European Union, in particular arts 7 and 8, as including a “right to be forgotten”. In that case a Spanish national, Mr Gonzalez, complained to the AEPD that a Google search of his name revealed an article from Spanish newspaper *La Vanguardia* containing information related to the 1998 sale of his property in satisfaction of social security debts.

The AEPD upheld Costeja’s complaint and ordered Google to delist the results. On appeal before the Spanish High Court a preliminary referral was made to the CJEU. The referral sought clarification in relation to three questions. First, the High Court queried the application of the Directive to Google as a US-based company. Secondly, the Court sought clarification on the “controller” status of a search engine

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¹ NT1 and NT2 v Google and The Information Commissioner [2018] EWHC 799 (QB).

² Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) (C-131/12). Henceforth *Google Spain*.

³ Directive 95/46/EC.

under the Directive and finally whether individuals had a “right to be forgotten” by a search engine and, if so, what the scope of such a right might be.

The CJEU found the Directive did apply to Google, and that in making the information containing personal data available an internet service provider processed personal data and was therefore a data controller for the purposes of art.2 the Directive.⁴

The Court also held a “right to be forgotten” exists under arts 7 and 8 of the Charter of Fundamental Rights, which entitles individuals to request that information no longer be made available to the general public by means of search engine results.⁵ In acknowledging the right, the Court held privacy would “as a rule” outweigh the interests of internet users in finding information, and Google’s economic interests, but noted the right was not absolute.

As a result of *Google Spain*, data subjects may apply to the relevant national authority or court under art.12(b) and/or art.14(1)(a) of the Directive to remove links to third party publications from the results of internet search engines.⁶ Subsequent to the decision the art.29 Working Party issued Guidelines on the implementation of the judgment. Part II of the Guidelines outline common criteria for handling complaints pursuant to *Google Spain*, on which Warby J drew in assessing the claims of NT1 and NT2.⁷

2. Claims in the case

In accordance with *Google Spain* the claimants each sought delisting orders under s.14, and compensation under s.13 of the Data Protection Act 1998 (DPA), which gives effect to the Directive.⁸ Additionally, the claimants sought compensation for the tort of misuse of private information as a result of Google’s conduct in continuing to return search results in the period following their complaints.⁹

Drawing on the ruling in *Google Spain* as well as the art.29 guidelines, Warby J identified the main issues in NT1/NT2 as:

1. Whether the claimants were entitled to have the links complained of excluded from Google’s Search results:
 - a. due to contents which constituted inaccurate personal data; or
 - b. because the continued listing constituted an unjustified interference with the data protection or privacy rights of the complainant.
2. If the claimants were entitled to have the links excluded, whether the claimants were entitled to compensation for the persistence of the listing pending the judgment.¹⁰

3. NT1’s case

In the late 1980s and early 1990s NT1 was involved in a property business in connection with which he was later convicted of a criminal conspiracy to defraud consumers and was sentenced to a term of imprisonment. NT1 was also accused, but not convicted of, a separate conspiracy connected with the same undertaking. There was contemporaneous media coverage of these and related matters, links to which were made available by Google Search. NT1 was released on licence having served half his custodial sentence in the early 2000s.

⁴ *Google Spain* at [28], [33]-[34], [38].

⁵ *Google Spain* at [94], [96].

⁶ *Google Spain* at [81], [85], [94], [99].

⁷ *Google Spain* at [135], [141], [159]. Article 29 Data Protection Working Party, “Guidelines on the Implementation of the Court of Justice of the European Union Judgment on Case C-131/12 Google Spain and Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez”, 26 November 2014, at http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [Accessed 25 May 2018].

⁸ NT1 and NT2 [2018] EWHC 799 (QB) at [26].

⁹ NT1 and NT2 [2018] EWHC 799 (QB) at [42]; *Campbel, McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73.

¹⁰ NT1 and NT2 [2018] EWHC 799 (QB) at [9].

After his conviction became spent NT1 requested that Google remove links to reports of his convictions.¹¹ The first request to delist was submitted in June 2014 following the ruling in *Google Spain* and sought the removal of six links. Google replied in October 2014 agreeing to delist one link but declining in respect of the remaining five. NT1 requested that Google reconsider the decision, which Google declined to do. Subsequently, NT1's solicitors repeated the request for removal, which was again refused. Consequently, NT1 brought suit leading to *NT1/NT2*.¹²

3.1 Abuse of process?

Warby J first considered Google's contention that NT1's claims were an abuse of the Court's process as they amounted to an illegitimate attempt to circumvent the procedural and substantive law applicable to claims in defamation.¹³ Warby J dismissed this argument noting that a claimant may choose to "... rely on any cause of action that arises or may arise from a given set of facts" without such choice being considered an abuse.¹⁴

3.2 Google's claim of journalistic exemption

Warby J also rejected Google's contention that it should be permitted to avail of the journalism exemption contained in s.32 of the DPA which provided that processing for special purposes, included journalism, enjoyed exemptions from the provisions of the Act including s.14.¹⁵ Google contended that the processing was undertaken with a view to publication for journalistic purposes and should therefore be exempted.

Warby J found that although he could accept that the concept of journalism was broad, the concept was not so elastic as to embrace every activity connected to conveying information or opinions.¹⁶ Nor did he find that he could agree with the narrower version of Google's argument that the concept of journalism covered services the purpose of which was to enable users to access third-party publisher content which disclosed information, opinions and ideas. The judge noted that Google's service was a commercial one and that Google's own purposes were therefore separate and distinct in nature.¹⁷

The judge noted, obiter, that Google's argument, if accepted, would fail to meet the elements required by s.32(1)(b) and (c) as there was no evidence that Google had given consideration to the public interest in its continued publication of the URLs complained of at any time before NT1's delisting request.¹⁸ Warby J thus found that the claim failed at the threshold stage and proceeded to consider the grounds on which the claimant might assert a successful claim for delisting pursuant to *Google Spain*.

3.3 Could a delisting order be made?

3.3.1 Were the data accurate?

NT1 made six complaints of inaccuracy in relation to the use of particular words or phrases though no particulars of the alleged inaccuracies were provided. This required the judge to carry out his own analysis from which he concluded that there were three complaints about the first article complained of, five about the second article complained of and two about a book extract.¹⁹ In assessing whether inaccuracy was

¹¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [5].

¹² *NT1 and NT2* [2018] EWHC 799 (QB) at [6].

¹³ *NT1 and NT2* [2018] EWHC 799 (QB) at [57], [58].

¹⁴ *NT1 and NT2* [2018] EWHC 799 (QB) at [61].

¹⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [95].

¹⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [98].

¹⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [98]-[101].

¹⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [102].

¹⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [79].

indeed present, Warby J endorsed the understanding of the court in *Charleston v New Group Newspapers Ltd*²⁰ that words must be read and interpreted in context. NT1 resisted this view as imposing “artificial restrictions” on the meaning of words or phrases used — an assertion not accepted by the Court.²¹

Noting the inherent difficulty in assessing the truth of statements published two decades previously, particularly in light of the testimony of NT1 who under cross-examination tended to “evoke, to exaggerate, [and] to obfuscate” Warby J found himself unable to accept much of the claimant’s testimony and rejected all six complaints of inaccuracy.²²

3.3.2 Was there an interference with NT1’s privacy or data protection rights?

The CJEU in *Google Spain* made clear that where evidence exists that the availability of a search result is causing prejudice to the claimant’s rights this would be a strong factor in favour of delisting. The Working Party in its discussion cited an example of undue prejudice in which a foolish misdemeanor, no longer the subject of public debate and with no wider public interest, would lead to a situation in which the disproportionately negative impact on the privacy of the data subject would merit delisting.²³

In analysing the remaining information, Warby J noted the claimant’s allegation that the continued availability of the information had infringed his right to privacy and caused substantial damage and distress to him as a result of his subsequent treatment as a “pariah” in his business and social life, as well as making him the subject of threats in public places. NT1 also alleged that there had been disruption to his family life.²⁴

Warby J noted that while there was some information in the articles which related to the complainant’s health, information which was *prima facie* private, the information was trivial, historic and made in public in the course of proceedings such that it was not intrinsically private.²⁵

In assessing the remainder of the claims, Warby J noted NT1’s case suffered from a lack of causation in establishing whether the harm would have resulted irrespective of Google’s actions.²⁶ In particular, the judge noted that the only evidence of threats dated from incidents during NT1’s term in prison and shortly after his release and could not be attributed to any illegitimate processing by Google.²⁷ Equally, the judge found he could not attribute the only specific incident recounted by NT1 in which a business deal was hindered by the counterparty’s knowledge of his conviction to the behavior of Google as it occurred before NT1’s conviction became spent.²⁸

In relation to the impacts on the claimant’s family and private life, the judge noted that the claims were little more than a reiteration of the pleaded case with no specific incidents or detail as to the nature of the impact with the result that the evidence of harm or prejudice to NT1’s rights to privacy and data protection was insufficient to add any great weight in favour of delisting.²⁹

3.3.3 Balancing individual rights and the public interest

In seeking to balance NT1’s rights as against the public interest, Warby J noted that the Working Party Guidelines identified the overall purpose of its criteria as assessing whether the information is relevant according to the interest of the general public. The Guidelines noted that whether the claimant was still

²⁰ *Charleston v New Group Newspapers Ltd* [1995] 2 A.C. 65.

²¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [83], [142].

²² *NT1 and NT2* [2018] EWHC 799 (QB) at [92]-[94].

²³ *NT1 and NT2* [2018] EWHC 799 (QB) at [147].

²⁴ *NT1 and NT2* [2018] EWHC 799 (QB) at [149].

²⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [140], [145], [146].

²⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [151].

²⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [152].

²⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [153].

²⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [154], [155].

engaged in the same professional activity and was a public individual would be particularly relevant in such an assessment.

Google contended that NT1's business career since his release from prison, combined with misleading claims made online,³⁰ supported their contention that the information should remain available to act as correction to the narrative promoted by the claimant.³¹ In response, NT1 contended that the right to receive information is inherently less weighty than the right to impart it.³²

Warby J found no support for NT1's contention at law or in the argument presented³³ and went on to note that NT1's post-prison career included lending money to businesses and individuals—a pursuit which the judge found it reasonable to assume was funded by the proceeds of the fraud perpetrated on consumers who had moved abroad prior to the claimant's arrest and imprisonment.³⁴ Warby J further noted that the scale of NT1's fraud was far from negligible and that the claimant's portrayal of himself online and on social media were aimed at the public and were known to be false and misleading.³⁵

The judge then turned to examine whether, as a result of NT1's role in public life, the information complained of constituted genuinely private information. The Working Party Guidelines provide that there will be a stronger argument against delisting where the information concerns a public figure, or an individual playing a role in public life.³⁶ The judge noted the Working Party's definitions of "public figures", which includes individuals who have a degree of media exposure and "playing a role in public life" which the Working Party suggests should be guided by whether the public have an interest in information which may protect them against improper public or professional conduct.³⁷

The judge noted that though NT1's role in public life was no longer prominent it subsisted, in light of which, and combined with the claimant's misrepresentation of his reputation online, Warby J found that NT1 was a public figure and that the Working Party Guidelines favoured the continued availability of the information.³⁸

3.3.4 Criminal nature of the offence

Finally, Warby J considered the criminal nature of the offence involved. The judge noted that the context in which the information was published was that of substantially fair and accurate reporting in national media of public legal proceedings and that such reporting was both a natural and foreseeable result of the dishonest criminal conduct of the claimant.³⁹

Warby J dismissed NT1's claim that he had a legitimate expectation of rehabilitation after leaving prison noting that, had the law remained as it stood when NT1 was released, his sentence would never have become spent, only becoming entitled to such an expectation in 2014 following the revision of the law.⁴⁰ The issue to be addressed was therefore whether the fact that the conviction was spent was sufficiently weighty to mandate an order for delisting.⁴¹

This section of Warby J's consideration is perhaps where the impact of *Google Spain* at a national level becomes most obvious—requiring the Court to reconcile, in light of legislation passed 25 years before the advent of the internet, the right to rehabilitation as an aspect of the law of personal privacy with

³⁰ Subsequent to his release and resuming his business NT1 also caused online postings to be made about his business experience and reputation which promoted the idea of NT1 as a man of "unblemished integrity". *NT1 and NT2* [2018] EWHC 799 (QB) at [123], [124].

³¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [117].

³² *NT1 and NT2* [2018] EWHC 799 (QB) at [134].

³³ *NT1 and NT2* [2018] EWHC 799 (QB) at [132]-[134].

³⁴ *NT1 and NT2* [2018] EWHC 799 (QB) at [121].

³⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [130].

³⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [139]; *Von Hannover v Germany (No. I)* (2005) 40 E.H.R.R. 1 at [63].

³⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [137].

³⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [138].

³⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [157].

⁴⁰ *NT1 and NT2* [2018] EWHC 799 (QB) at [158].

⁴¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [163].

the competing right of the public to information.⁴² At the beginning of his analysis the judge returned to first principles, noting that the starting point in the common law is that criminal proceedings are held in public and that a person will not enjoy a reasonable expectation of privacy in relation to their content. The judge went on to note that despite this there may come a time, determined by Parliament, when a conviction becomes spent and an individual's art.8 rights are engaged.

However, Warby J found that it did not follow from this that the individual's art.8 rights are of preponderant weight and observed that there is no bright line in art.8 jurisprudence on when the article will outweigh other rights.⁴³ The judge found that NT1's case lay at the very outer limit of those sentences which could become spent under the statutory scheme, and indeed would never have become spent under the law as it stood from 1974 to 2014 in accordance with the Rehabilitation of Offenders Act 1974.⁴⁴ Moreover, Warby J remarked that the comments of the sentencing judge clearly indicated the claimant's sentence would have been longer but for his ill-health.

Warby J concluded that NT1's art.8 rights were not engaged due to his conduct subsequent to his release, the nature of his offence, including the length of his sentence, and his failure to proffer detailed evidence of the impact on his rights which was attributable to the continued availability of the search results.⁴⁵

The judge also emphasised that while it was of limited relevance to those with whom NT1 had business dealings to learn of his conviction, there were people who had a legitimate interest in such knowledge, still more so in circumstances where the claimant's own postings online had misrepresented his business record and reputation.⁴⁶ Warby J thus found that retention would serve the legitimate purpose of correcting the record in circumstances where it was not clear the relevance of the information had been exhausted.⁴⁷

3.4 Decision and remedies

Warby J thus dismissed NT1's claims of inaccuracy and also dismissed the remainder of the delisting claim on the basis that the claimant had failed to satisfy the criteria established in *Google Spain*. Warby J further found that the claim for misuse of private information failed, having found Google's processing to be justified, and that there was thus no basis for the award of compensation.⁴⁸

4. NT2's case

In the early 2000s NT2 was involved in a firm which was subject to public campaign of opposition due to its environmental practices. Criminal and nuisance acts were committed against the firm and NT2 received death threats. In response, the firm hired private investigators to seek to identify those responsible. In his role within the firm NT2 authorised these investigators to use surveillance methods which he knew to be illegal.⁴⁹

NT2 pleaded guilty at an early stage and was sentenced to sixth months' imprisonment of a potential maximum sentence of 12 months, which was reduced in light of his guilty plea and the presence of personal mitigating factors.⁵⁰ Both the conviction and sentence were reported in national and local media. NT2 served six weeks in custody and was released in 2008. As with NT1 the conviction became "spent" but

⁴² *NT1 and NT2* [2018] EWHC 799 (QB) at [165]-[166].

⁴³ *NT1 and NT2* [2018] EWHC 799 (QB) at [166].

⁴⁴ Subsequently the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) the rehabilitation period after which sentences became spent was reduced.

⁴⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [167].

⁴⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [168].

⁴⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [168], [169].

⁴⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [56].

⁴⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [179]-[181].

⁵⁰ *NT1 and NT2* [2018] EWHC 799 (QB) at [182].

the original news reports remained available. Unlike NT1, however, NT2's conviction and sentence were also mentioned in more recent publications, two of which were reports of interviews given by NT2.

NT2 requested the removal of eight links by Google in April 2015.⁵¹ Google declined on the grounds that the reports related "to matters of substantial public interest regarding [NT2's] professional life".⁵² NT2 subsequently issued proceedings seeking relief in respect of the eight links as well as three further links two of which were subsequently removed voluntarily.⁵³

At the outset Warby J noted that Google's claims of abuse of process and journalistic exemption also failed in respect of NT2.⁵⁴

4.1 Could a delisting order be made?

4.1.1 Were the data accurate?

The claimant alleged inaccuracy in respect of one of the articles only. NT2 alleged the piece was inaccurate as it suggested, incorrectly, that he had gained financially from his crime.⁵⁵ Google accepted that the item conveyed serious imputations against suspected criminals but argued that those portions of the piece could not have been understood as referring to NT2.⁵⁶ Warby J, however, found that the article was inaccurate as it gave the misleading impression that the claimant's criminality did result in financial gain, by describing and comparing the claimant's case to those involving instances in which individuals had received financial gain as a result of criminal activity.⁵⁷ The judge thus made the appropriate delisting order.⁵⁸

4.1.2 Was there an interference with NT2's privacy or data protection rights?

As with NT1, NT2 claimed the availability of the links complained of had resulted in a profound impact on his business and personal life. Warby J noted that, as with NT1, much of the emphasis was on the impact of the listings on the claimants' business. In NT2's case the impacts were a subsequent disadvantage or difficulty in securing banking facilities and business opportunities. The judge noted that though the information given exceeded that provided by NT1, the claims remained vague and lacked detail.⁵⁹

4.1.3 Balancing individual rights and the public interest

In considering whether NT2 constituted a public figure, the judge found that while the complainant did not enjoy the status as a public figure which he previously had, he remained a public figure in a reduced but not wholly eliminated capacity.⁶⁰

Warby J continued, noting that the claimant was no longer involved with the industry of which he had been a part at the time of the crime nor had he misrepresented his reputation or history as NT1 had. Google maintained that despite this the information in NT2's case remained relevant and that the self-promotion engaged in by NT2 supported the claim that the articles complained of should remain available to correct the record.

Google drew, specifically, on two press interviews given by NT2 subsequent to his conviction becoming spent, as well as a personal website and online news reports which promoted NT2 as a successful

⁵¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [7].

⁵² *NT1 and NT2* [2018] EWHC 799 (QB) at [8].

⁵³ *NT1 and NT2* [2018] EWHC 799 (QB) at [8], [174].

⁵⁴ *NT1 and NT2* [2018] EWHC 799 (QB) at [177].

⁵⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [212], [187].

⁵⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [188].

⁵⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [190].

⁵⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [191].

⁵⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [216]-[218].

⁶⁰ *NT1 and NT2* [2018] EWHC 799 (QB) at [210].

businessman with experience in finance and environmental matters. Warby J found that the interviews indicated NT2 was not seeking to hide his crime from the public and that neither the publications nor the interviews made claims which were inconsistent with the evidence against him or “extravagantly beyond what might have been justified by reference to the principle of rehabilitation”.⁶¹

4.1.4 The criminal nature of the offence

The most significant point on which the cases of NT1 and NT2 differed, in the opinion of the judge, was the nature of the criminal offences involved. As with NT1 the judge noted that the reporting at issue was a natural, probable and foreseeable consequence of the complainant’s conviction and that, with the exception of the article delisted for inaccuracy, the reporting was fair and accurate in the context of the remaining publications.⁶²

Warby J noted that while a criminal offence was at issue in both cases, distinctions were apparent between the claimants’ cases. The first was that NT2’s conviction was always due to become spent—both under the 1974 Act as well as following its 2014 revision with the result that NT2 had a legitimate expectation of rehabilitation from the time of his release.⁶³ The judge also noted that, unlike NT1, NT2 provided credible evidence in support of his case that the availability of the search results had caused damage to his business. In a private context the judge noted that the presence of a young family in NT2’s case strengthened his case for the existence of an interference with his art.8 rights.⁶⁴

The judge also emphasised the nature of NT2’s conviction as a significant factor in deciding whether the information had prejudiced his rights under arts 7 and 8. Warby J noted that the crime of invasion of privacy was not a crime of dishonesty, as had been the case with NT1 and that NT2 had acted in good faith believing his actions were necessary in light of his targeting by malign actors. The judge placed particular emphasis on the fact that NT2 did not contest the charges, had pleaded guilty at an early stage and showed an awareness and remorse for his crime which Warby J deemed to be genuine.⁶⁵ Finally, the judge repeatedly noted that the relevance of the crime to potential customers was “slender to non-existent” and that there was no suggestion the wrongdoing would be repeated.⁶⁶

4.2 Decision and remedies

Based on these factors Warby J noted that the information complained of had become irrelevant and of insufficient, legitimate interest to users to justify its continued availability.⁶⁷ The judge found the information had been public at the time of publication but that that position had changed over time and that art.8 was engaged, in particular by the presence of a young family in NT2’s life.⁶⁸

While the judge noted the interference with the claimant’s art.8 rights was not grave he found the impact on NT2’s rights was nevertheless sufficient to require justification based on relevance which Google had been unable to provide.⁶⁹

Therefore, Warby J, in addition to upholding the complaint of inaccuracy, found there had been a misuse of private information in as much as the claimant had established a reasonable expectation of privacy as a result of: the fact that his sentence would always have become spent; the change in the character of the information over time; and the engagement of his art.8 rights. As a result the judge issued

⁶¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [205], [206].

⁶² *NT1 and NT2* [2018] EWHC 799 (QB) at [219]-[220].

⁶³ *NT1 and NT2* [2018] EWHC 799 (QB) at [222].

⁶⁴ *NT1 and NT2* [2018] EWHC 799 (QB) at [221]-[222].

⁶⁵ *NT1 and NT2* [2018] EWHC 799 (QB) at [222].

⁶⁶ *NT1 and NT2* [2018] EWHC 799 (QB) at [203], [204], [222].

⁶⁷ *NT1 and NT2* [2018] EWHC 799 (QB) at [223].

⁶⁸ *NT1 and NT2* [2018] EWHC 799 (QB) at [224].

⁶⁹ *NT1 and NT2* [2018] EWHC 799 (QB) at [226].

an order for delisting in respect of the remaining articles.⁷⁰ However, the Court found Google had taken reasonable care, and that as a result the claimant was not entitled to either compensation or damages.⁷¹

5. Analysis of the judgment

The decision in *NT1/NT2* is particularly relevant given the traditional hostility of common law jurisdictions to rights of privacy that extend to historical criminal convictions.⁷² Common law jurisdictions have traditionally privileged principles of open justice in contrast to the approach of many civil law jurisdictions which, in general, opposes punitive shaming and presumes criminal records to be confidential.⁷³ The civil law approach is reflected in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as well as the Data Protection Directive art.8(5) and the General Data Protection Regulation.⁷⁴

NT1/NT2 thus represents an explicit departure from traditional common law attitudes toward criminal histories. However, several aspects of the judgment deserve particular attention in relation to the potential of the decision to act as a useful precedent.

The most evident issue is that the judgment has been anonymised and referred to the convictions and circumstances of the claimants' crimes as well as the impact on their private and family lives in a manner sufficiently broad so as to preserve their identities. The emphasis placed by Warby J on the personal dispositions of both claimants and the absence of detailed evidence presented in the case make this problematic. The result is a judgment whose criteria are largely subjective, and whose findings are rendered in broad strokes, lacking a nuanced analysis of the specific details, or levels of detail, futile to future claimants.

In particular, the anonymisation poses challenges in distinguishing the criteria which will be considered sufficient to trigger a "grave" interference with arts 7 and 8, though this may also be attributable to the paucity of evidence offered by the claimants themselves. As a result of the anonymisation it is difficult to determine accurately which, if either, is the case.

In relation to the criteria associated with a criminal offence which favour delisting, Warby J centred his analysis on the guidelines established by the Working Party, of which the presence of criminal convictions is an aspect. However, his judgment neglected to establish a more specific set of criteria.

Based on Warby J's remarks, it appears that the length of the sentence and its relative placing on the scale of offences which may become "spent" will be relevant. However, Warby J specifically noted that a spent conviction would not be determinative and would be merely "weighty" in balancing individual rights and the public interest. There was no clarification of whether convictions which were not, and would not, become spent would be amenable to delisting though given the differentiation between NT1 and NT2 based in part on the severity of their sentences such convictions would implicitly not be amenable to delisting.

The judge also referred in his decision regarding NT2 to the fact that the crime at issue was not one of "dishonesty". However, there was no discussion of whether the differentiation as between a crime of dishonesty and other crimes was a determinative factor. Again, the implication from the judgment is that, as with a spent conviction, this will be a consideration rather than determinative factor.

⁷⁰ *NT1 and NT2* [2018] EWHC 799 (QB) at [224]-[226].

⁷¹ *NT1 and NT2* [2018] EWHC 799 (QB) at [227], [228], [230].

⁷² For a comparative analysis as between a common law and civil law jurisdiction see J.B. Jacobs and E. Larrauri, "Are criminal convictions a public matter? The USA and Spain" (2012) 14(1) *Punishment and Society* 3. On the still recent change in the Irish position, see T.J. McIntyre, "Criminals, Data Protection and the Right to Second Chance" (2017) 58 *The Irish Jurist* 27.

⁷³ J.B. Jacobs and E. Larrauri, "European Criminal Records & Ex-Offender Employment" *New York University Public Law and Legal Theory*, http://lsr.nellco.org/nyu_plltwp/532/ [Accessed 25 May 2018].

⁷⁴ Article 6 provides that criminal convictions "may not be processed automatically unless domestic law provides adequate safeguards".

A more helpful analysis would arguably have focused solely on the public interest guaranteed by maintaining the listings. While the judgment emphasised differential impacts on the public in its discussion of the offences of both claimants it muddied the waters by introducing dishonesty as a factor. The result is an unclear *mélange* of a public interest test with a categorical sliding scale of offences defined in relation to their relative degrees of deception. The implication that a conviction for a violent crime committed without deception would be more favourably treated than a non-violent offence of dishonesty is problematic on a public policy basis.

Moreover, as criminal acts generally involve an individual recklessly or knowingly breaking the law, invariably in a manner which seeks to avoid detection, the merits of using honesty as a distinguishing metric is of questionable merit.

The most substantively considered and most portable aspect of the judgment is its treatment of self-help. Both claimants, on the advice of reputation management professionals, had generated content with the express aim of influencing Google's list of returned results prior to the decision in *Google Spain*. In differentiating between the legitimate self-help employed by NT2 and the misleading information promulgated by NT1, Warby J clarified that self-help can be counted against claimants only where it is deliberately misleading.

Conclusion

The decision in *NT1/NT2* is somewhat confined to its facts due to the emphasis placed by the judge on a subjective assessment of credibility and remorse. Despite this, the case offers a tentative first step towards clarifying the criteria for a delisting order in cases involving criminal convictions and offers a significant endorsement of the right to be forgotten in such cases.

The decision in relation to NT1 may be clarified on appeal. However, the trial judge's comments on the claimant's credibility and the paucity of evidence offered would seem to make the likelihood of a successful appeal remote. Furthermore, the High Court case has generated significant media attention and an appeal to the Supreme Court would likely generate still more. In such circumstances were the reporting restrictions to be lifted following an appeal NT1's conviction would, somewhat ironically, be more public than if he had chosen not to pursue a delisting, as indeed was the case with the original appellant in *Google Spain*.

Case and Comment

Selected decisions from the European Court of Human Rights for January and February 2018

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Protection of whistleblowers

Whistleblowing—dismissal—reinstatement—public interest—freedom of expression—freedom to impart information—art.10—new issues for adjudication—compliance with the Court's decisions—art.46

☞ Dismissal; Freedom of expression; Journalists; Moldova; Whistleblowing

Guja v Republic of Moldova (No.2) (Application No.1085/10)

European Court of Human Rights (Second Section): Judgment of 27 February 2018

Facts

The applicant, Mr Iacob Guja, a Moldovan national and journalist formerly employed as Head of the Press Department in the Prosecutor General's Office, alleged that his art.10 right to freedom of expression had been violated as a result of his dismissal in contravention of the previous judgment of the European Court of Human Rights (the Court) delivered on 12 February 2008. Mr Guja was initially dismissed in 2003 for sharing material detailing the attempts of government officials to influence the prosecutorial decisions in cases concerning the alleged misconduct of police officers with two newspapers, an act the Prosecutor General found to be in contravention of departmental regulations.

The applicant challenged his dismissal before the domestic courts, arguing that the information had been shared with the aim of tackling corruption. The domestic courts, however, upheld the decision of the Prosecutor General's Office to dismiss on the basis of the applicant's failure to adequately consult with colleagues internally and to comply with the duty of confidentiality his role entailed. Lodging an initial complaint before the Court, the applicant argued that his art.10 right to freedom of expression had been violated. The Court in its judgment of 12 February 2008 held that the dismissal had amounted to a

violation of art.10. The Court held that although the measure was prescribed by law and pursued a legitimate aim within the meaning of art.10(2), the measure was incommensurate with what is “necessary in a democratic society”. The Court referred to the applicant’s lack of alternative means of disclosing the information and to the public interest in being informed of wrongdoing within the Prosecutor General’s Office. Following the judgment, the Supreme Court of Moldova ordered the applicant’s reinstatement and on 5 June 2008 he was ordered reinstated by the Prosecutor General.

The applicant alleged that he was not given access to an office or allocated tasks. On 16 June 2008, the applicant was subsequently presented with a dismissal order subject to the Public Service Act which had been granted the requisite trade union approval. The applicant’s further challenges before the domestic courts were unsuccessful, the Court of Appeal and Supreme Court citing the reinstatement of the applicant following the 2008 judgment and the compliance with domestic law requirements of the Prosecutor General’s Office in ordering his subsequent dismissal. Lodging a complaint before the Court, the applicant alleged that the actions of his employers in ordering his dismissal for a second time and in failing to comply with the Court’s 2008 judgment, constituted a new breach of his art.10 right.

Held

- (1) The application was admissible (unanimous).

In its consideration of admissibility, the Court took the opportunity to clarify the consequences of a failure by High Contracting Parties to comply with judgments of the Court. In accordance with art.46 of the Convention, it was affirmed that respondent states are under an obligation to abide by the Court’s judgments and to adopt any necessary measures with the aim of providing full restitution to applicants. Although the Committee of Ministers remains primarily responsible for evaluating the compliance of High Contracting Parties with judgments of the Court under art.46, it was affirmed that this shall not prevent the Court from choosing to examine applications relating to the state’s execution measures for a previous judgment, if new information on an issue not previously adjudicated upon is presented. The existence of new issues for consideration by the Court are to be determined contextually on a case-by-case basis. In the present circumstances, the Court held that the application related to new proceedings before the domestic courts and to the dismissal of the applicant for a second time, matters which were not addressed in its previous judgment and were therefore eligible for consideration. The complaint was further held not to be manifestly ill-founded for the purposes of art.35(3) or to be inadmissible on any other grounds.

- (2) There had been a violation of art.10 (unanimous).

The Court held that the central issue to be determined was whether the second dismissal of the applicant was motivated by his decision to share information with the press in 2003 and therefore amounted to a new interference with his right to freedom of expression. The Court, in rejecting the argument of the respondent government that the second dismissal was unrelated to the applicant’s former actions, cited the fact that the applicant was the first employee to be dismissed pursuant to the Public Service Act in the period 2003–2008 which had seen the appointment of two new Prosecutors General. It was further noted that the trade unions’ approval to dismiss the applicant had been sought on the day of the applicant’s reinstatement, and that the respondent government had failed to present evidence in support of their rebuttal of the applicant’s claims that he had not been allocated an access badge, an office or any tasks upon his return.

In relation to the domestic proceedings, the Court underlined the failure of the Prosecutor General to offer the same justification for the dismissal of the applicant offered by the

respondent government in its submissions. Consequently, the Court concluded that there were “sufficiently strong grounds” to infer that the applicant’s dismissal in 2008 had not been because of a reshuffle in the wake of the appointment of a new Prosecutor General, but rather could be viewed as a retaliatory response to his actions in 2003. The failure of the domestic courts to consider the applicant’s allegations that he had been effectively excluded from work on his reinstatement and any further interference with his art.10 right was cited as a crucial factor influencing the Court’s conclusion. Accordingly, it was held that the actions of the respondent authorities amounted to an interference with the applicant’s art.10 freedom to impart information, and that this interference could not be justified as necessary in a democratic society.

- (3) The respondent state was obliged to pay €10,000 in respect of pecuniary and non-pecuniary damages in addition to any tax due, within a period of three months (unanimous).
- (4) The respondent state was obliged to pay €1,500 in respect of costs and expenses in addition to any tax due, within a period of three months (unanimous).
- (5) The remainder of the applicant’s claim for just satisfaction was dismissed (unanimous).

Cases considered

- Bochan v Ukraine* (2015) 61 E.H.R.R. 14
- Egmez v Cyprus* (No.2) (App. No. 12214/07), judgment of 18 September 2012
- Emre v Switzerland* (2014) 59 E.H.R.R. 11
- Guja v Moldova* (2011) 53 E.H.R.R. 16
- Liu v Russia* (No.2) (App. No. 29157/09), judgment of 26 July 2011
- Marckx v Belgium* (1979–80) 2 E.H.R.R. 330
- Nikolov v Bulgaria* (App. No.38884/97), judgment of 30 January 2003
- Piersack v Belgium* (1985) 7 E.H.R.R. CD251
- Scozzari v Italy* (2002) 35 E.H.R.R. 12
- Sidabras v Lithuania* (2017) 65 E.H.R.R. 11
- Verein gegen Tierfabriken Schweiz (VGT) v Switzerland* (2011) 52 E.H.R.R. 8

Commentary

The judgment of the Court in the present case is both substantively and procedurally significant. The Court’s previous judgment in *Guja v Moldova* delivered in 2008 served to develop key points of law in relation to the protection of whistle-blowers, in particular on the balancing of duties of discretion held by public servants and the public interest in the disclosure of information. Public servants disclosing information in the public interest were held to be subject to duties to report wherever possible in the first instance to superiors, to verify the authenticity of the information, and to act in good faith. Meanwhile, it was held that the Court should balance the public interest in disclosure against any damage suffered by the authority in question prior to making a determination on the permissibility of any interference with an applicant’s right to freedom of expression. These key points of law were subsequently collated, along with those emerging in the case-law that followed, by the Committee of Ministers in the form of Recommendation CM/Rec (2014) on the protection of whistle-blowers. The Court took the opportunity in the present case to reaffirm its previous reasoning, yet it was simultaneously careful to stress the limitations on its jurisdiction in relation to art.46 and questions surrounding the execution of its previous judgments which fall within the remit of the High Contracting Parties and the Committee of Ministers.

The decision of the Court on admissibility therefore raised some interesting questions, particularly in light of the execution procedure for the Court’s 2008 judgment before the Committee of Ministers which

remained ongoing when the judgment was issued. The Court can be seen to have trodden a careful line between the defence of its competence to examine new issues arising in relation to a previous case on the one hand, and acknowledging the limitations upon its jurisdiction, notably in the responsibility of the Committee of Ministers for monitoring the execution of judgments, and the discretion enjoyed by states to decide upon their own compliance measures on the other. It is clear that the Court wished to retain a broad discretion in this respect, holding that the existence of a new issue engaging its competence will depend upon the circumstances in question and be decided on a case-by-case basis.

The strongly worded reasoning of the Court on the merits raises similar points of contention. For the purposes of establishing whether the applicant's second dismissal amounted to an unjustified interference with his freedom to impart information under art.10, the Court chose to focus exclusively upon the second ground capable of justifying an interference under art.10(2), namely that of being "necessary in a democratic society", deeming it unnecessary to consider whether the interference was prescribed by law or in pursuit of a legitimate aim. The conclusions drawn with respect to the actions of the respondent state authorities were heavily critical, the Court arguing that "the Prosecutor General did not even attempt to maintain the impression of a simple labour dispute" and that the actions taken made it "obvious" that the applicant was not welcome to return to work. The findings were similarly critical of the domestic courts which it was held had "paid no attention at all" to the applicant's allegations regarding his reinstatement and thereby failed in their duties to examine the protection afforded under art.10.

Once again, however, the strong wording of the reasoning was tempered by a recognition of the discretion of the domestic authorities with respect to labour procedures, the Court stressing that "the obligation to reinstate does not preclude future dismissal on another, justified ground". This case evidences the difficulties faced by the judges in balancing the interests of the domestic authorities and jurisdictional boundaries with the Court's own desire to secure comprehensive and effective protection for the art.10 rights of whistle-blowers, an issue which in the intervening period since its 2008 judgment, has been the subject of increasing international attention, including by the Council of Europe's own Committee of Ministers.

Hidden cameras

Hidden recordings—public figures—public interest—legitimate expectation to privacy—responsible journalism—right to information—freedom of expression—art.10—length of proceedings—sanctions—right to a fair trial—art.6

☞ Broadcasters; Freedom of expression; Greece; Public figures; Right to respect for private and family life; Surveillance; Surveillance cameras

Alpha Doryforiki Tileorasi Anonymi Etairia v Greece (Application No.72562/10)

European Court of Human Rights (First section): Judgment of 28 February 2018

Facts

The present case concerns a conflict of rights between the right to freedom of expression and the right to privacy, regarding the use of hidden recordings and broadcasting of the images obtained through those means with respect to a politician's private behaviour.

The applicant is a Greek company owner of the television channel ALPHA. The conflict regarded the broadcasting of three videos recorded using hidden cameras. The first video showed a member of parliament, AC, and chairman of the inter-party committee on electronic gambling, entering a gambling arcade and

playing on two machines. The second video showed AC meeting with associates of the television host and watching the first video. The third video showed the discussion between AC and the host of the programme held at the latter's office. In this video AC requested the said host to present the footage to imply that he was first-hand experiencing with gambling to understand the problem as the chair of the parliamentary committee, in exchange for which he would attend their programme as an interviewee.

The National Council of Radio and Television sanctioned the company for the use of hidden cameras—which this public body estimated should be restricted to situations such as national security or crime prevention—and the entrapment of AC. This decision was confirmed afterwards by the Minister of Press and Media.

The applicant company lodged an application for annulment before the Supreme Administrative Court. In this court's assessment, a legitimate use of hidden cameras refers to reporting on specific news whose main source was the image of a specific person recorded by secret means, whereas an illegitimate use of those means refers to the broadcasting of the relevant and secretly recorded image as, in principle it violates a person's right to her or his own image. Therefore, the sanction had been imposed exclusively for the broadcasting of the images and not because of the transmission of the news about those images. A concurring opinion considered that the use of hidden cameras violated the right to dignity, as AC was reduced to an instrument for the applicant's goals. The dissenting opinions contended the distinction used by the majority, as in the case of television broadcasting the image went together with broadcasting the news itself. Furthermore, AC, as a public figure, does not enjoy the same absolute level of protection of his right to his own image, particularly as the images were obtained in public spaces and it was of public interest to inform about them considering the role that AC was expected to play with respect to prospective legislation on electronic gambling. The Supreme Court dismissed the application for annulment by a majority of its members, therefore exhausting domestic remedies.

The applicant alleged that the sanctions imposed by the domestic authorities violated its rights as guaranteed in art.10 of the Convention. Those sanctions consisted of €100,000 for each of the two television shows during which the videos were shown and the obligation to broadcast on three days in a row on its main news show the content of that decision. Additionally, the applicant claimed there was a violation of art.6 of the Convention—the right to have a fair trial within a reasonable time—considering the excessive length of the procedures which led to the imposition of the sanctions and its dismissed application for annulment before the Supreme Administrative Court, respectively, as they prolonged for seven years and two months.

Held

- (1) The Court declared the complaint admissible (unanimous).
- (2) There had been a violation of art.10 with respect to the first video (unanimous).
The Court initiated its assessment using two main approaches to evaluate if the Greek authorities had properly balanced the rights to freedom of expression and privacy. The first regards its institutional role within the Convention's system, where for these matters its subsidiary role consists of a supervisory function for reviewing if the balancing process followed by the national authorities has been compatible with the provision of the Convention. If the domestic authorities have not considered one of the fundamental rights at stake, the Court would be less deferential, adopting a narrower margin of appreciation over their decision. On the contrary, if the national authorities have followed the criteria set by the Court, only if there exist strong reasons the Court could intervene substituting the domestic authorities' view. The second approach regards the actual criteria set in previous case-law for balancing these competing rights: the contribution to a debate of public interest; the degree to which the person affected is well-known; the subject of the news report; the method

of obtaining the information and its veracity; the prior conduct of the person concerned; the content, form and consequences of the publication; and the severity of the sanction imposed. In its assessment of the first and second criteria, the Court retorted to a highly deferential approach, as the domestic decisions did not explicitly consider them. Accordingly, the Court considers that, by applying the relevant legislation as well as from the conclusion that news whose source was the videos could be legitimately broadcast, the domestic authorities have implicitly addressed that the report concerned a matter of public interest and the public figure status of AC. Furthermore, the Court agrees with the distinction between news broadcasting and broadcasting of the videos itself as one grounded on the Court's previous case-law "since the audio-visual media have often a much more immediate and powerful effect than the print media". As regards the criteria of prior conduct of the person concerned, the Court concurred with the absence of comment from both the authorities and the parties especially as it has previously upheld that toleration or accommodation with regard to publications on an individual's private life does not deprive her or him of the right to privacy. With respect to the content, form and consequences of the broadcast, the Court acknowledges that they have not been contested by the parties and that the removal of AC from the parliamentary group has been a serious consequence which affected him directly.

The Court also considered that the domestic authorities failed to take into account the circumstances under which it was obtained. The first video, though it was filmed using hidden cameras, was recorded in public premises and, considering the public status of AC, he could not have the same legitimate expectation of privacy regarding the monitoring of his conduct and to have it recorded on camera. Therefore, the domestic authorities did not strike a reasonable balance of proportionality between the restrictions on the applicant's freedom of expression and the legitimate aim pursued.

- (3) There had been no violation of art.10 with respect to the second and third video (unanimous). With respect to the second and third video, the Court argued that AC was entitled to have a legitimate expectation of privacy as he entered private spaces and to not have his conversations recorded without his consent. The Court links this feature with its understanding of the concept of responsible journalism, to determine whether the journalists involved in this case behaved in good faith. This standard of conduct governs the contents of the information which is collected and/or disseminated by journalistic means as well as the lawfulness of the conduct of the journalists involved. In this second scenario, the locus of the second and third videos, the journalists did not act in good faith as the aim of these recordings was to exercise pressure on AC. This was a decisive element in the domestic authorities' consideration, as they had labelled a situation of entrapment. As professionals, argues the Court, they should have been aware of the relevant law governing their performance provision, as with their behaviour they were breaching both professional ethics and criminal law. To justify its position, the Court distinguished this case from two previous ones. *Alpha Doryforiki* is distinguishable from *Haldimann* as the applicant did not make any effort to compensate for the intrusion into AC's private life—in *Haldimann* the applicants had taken measures to protect the subject's image. With respect to *Radio Twist*, where the illegal recording in question was undertaken by third parties, in the present case the applicants' employees did the recording.

- (4) There had been a violation of art.6 with respect to the length of the domestic procedures (unanimous).

The Court reasoned that length of the proceedings was excessive, particularly as only for one instance the proceedings lasted more than seven years.

- (5) The Court awarded €33,000 in pecuniary damages as the applicant had paid only half of the fine and only the first video was found a violation of art.10 of the Convention. With respect to the severity of the sanction, the Court agreed that, though significant, it was not disproportionate, and that the domestic authorities have evaluated several factors before deciding on the appropriate sanction: the gravity of the offence, the number of viewers, the size of the investment that the applicant had made and the fact that the company had been repeatedly sanctioned for the same offence in the past. In addition to the previous factors, the Court concluded that the sanctions have not had a deterrent effect on the press reporting on matters of public interest, particularly as they were not imposed on the journalists but on the applicant company.
- (6) The Court awarded €7,000 in non-pecuniary damages to the applicant for the harm caused to the company's reputation and prolonged uncertainty.

Cases considered

Axel Springer AG v Germany (2012) 55 E.H.R.R. 6

Haldimann v Switzerland (App. No.21830/09), judgment of 24 February 2015

Handyside v United Kingdom (1976) 1 E.H.R.R. 737

Jersild v Denmark (1995) 19 E.H.R.R. 1

Radio Twist, AS v Slovakia (App. No.62202/00), judgment of 19 December 2006

Stoll v Switzerland (2007) 44 E.H.R.R. 53

Von Hannover v Germany (No.2) (2012) 55 E.H.R.R. 15

Commentary

Alpha Doryforiki is illustrative of the delicate task that requires balancing a conflict between the rights to freedom of expression of the press in a democratic society to report on political actors' private behaviour which may affect their official duties, and the latter's right to privacy. The Court attempts to strike a balance between both rights by attending to the location where the footage was obtained. By proceeding this way, the Court safeguards that public interest information such as that concerning public authority's potential contradicting behaviour between their public stances and their private conduct are imparted to the public, reducing the risk of further exploitation of that situation through clandestine recordings obtained in private spaces. Nonetheless, the legitimacy of covert filming is still an open issue, as the Court does not state a general opinion regarding the adequacy of these journalistic methods with respect to the rights guaranteed by the Convention, or about the criteria that national jurisdictions may need to follow to adapt their legislation to the standards set by human rights.

Expulsion proceedings of terrorist suspects

Permanent residence permits—migration authorities—expulsion—terrorist suspects—assurances—right to freedom from torture—art.3

☞ Deportation; Inhuman or degrading treatment or punishment; Sweden; Terrorism

X v Sweden (Application No.36417/16)

European Court of Human Rights (Third Section): Judgment of 9 January 2018

Facts

The applicant, who had been residing in Sweden since 2005 was granted permanent residence in 2007 and had married a non-Swedish national in 2009, who also held a permanent residence permit in Sweden. In March 2016 the Swedish Security Service applied to the Migration Agency requesting the applicant's expulsion to Morocco. The applicant applied for asylum claiming that he would be forced to confess acts of terrorism and would be at risk of torture, if expelled. In April 2016 the Agency rejected the applicants claim for asylum noting that the human rights situation in Morocco had improved significantly. The Agency found no reason to question the Security Service's assessment and found the applicant lacked credibility, as information provided by him had contradicted information of the Security Service. The Agency also found that the applicant had not justified the claim that he risked persecution upon return to Morocco, taking into account that "no objective evidence suggested that the Moroccan authorities were aware of his case". This led the Agency to conclude there were grounds to expel the applicant, reject his claim for asylum and international protection, revoke his permanent residence, order his expulsion and impose a lifelong ban on returning to Sweden. The applicant appealed, claiming the Agency had not conducted a careful examination and that the proceedings had been unfair and partial; with this leading to the Agency forwarding the case to the Migration Court of Appeal. The Agency maintained its stance and the Security Services stated that, while being as transparent as possible, they could not reveal their working methods and sources. On 22 June 2016 the Court of Appeal recommended that the Agency's decision be upheld and found that "there was nothing to support that the applicant at that point in time was known by the Moroccan authorities and of interest to them."

Subsequently, the applicant applied to the European Court of Human Rights (the Court) on the 27 June 2016 claiming a violation of arts 3 and 8. On 8 September 2016 the government upheld the Agency's decision in full. However, after interim measures indicated by the Court, on 22 September the government decided to stay the enforcement of the expulsion order until further notice. On 3 November 2016 the complaint concerning art.3, relating to his expulsion to Morocco, was communicated to the government and the remainder of the application was declared inadmissible.

Held

- (1) The application was admissible (unanimous).
- (2) The implementation of the expulsion order against the applicant would give rise to a violation of art.3 (unanimous).

In assessing relevant general principles, the Court noted that art.3 implies an obligation to not deport a person to a country where they face a real risk of being subject to treatment contrary to art.3. This is absolute and cannot be weighed against reasons put forward for the expulsion. The Court recognised that the national authorities are best placed to assess the facts in such cases, but they must be satisfied that their assessment is adequate and sufficiently supported by materials originating from other reliable and objective sources. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case. A full examination is required, which requires taking into account information that has come to light after the final decision by the domestic authorities. The Court's assessment must focus on the foreseeable consequences of the applicant's expulsion, taking into consideration the general situation there and the applicant's personal circumstances. It is the applicant who must adduce evidence capable of demonstrating that there are substantial grounds for believing they would be exposed to a real risk of being subject to treatment contrary to art.3, with the respondent state responsible for dispelling any doubts raised by the applicant's evidence. The Court accepts that this

involves a “certain degree of speculation” and does not require the applicant to necessarily provide clear proof of their claim.

In applying these general principles, the Court noted that, as seen within a series of cited international materials, the human rights situation in Morocco has indeed improved. The Court also recognised that the applicant had failed to show that he was of previous interest to the Moroccan authorities, citing his ability to freely travel in and out of Morocco as well as to use his passport to travel internationally. Consequently, the Court found that there were “no indications that the applicant would be detained and ill-treated by the Moroccan authorities upon return for any reason unrelated to his being considered a security risk in Sweden”. This led to the Court assessing whether his return for being a security risk in Sweden would result in the applicant facing a real risk of being subject to ill-treatment or torture. The analysis began with the applicant’s claim that, as the Moroccan authorities know he is considered a Swedish security threat, he will be arrested on return and subject to torture. It was recognised by the Court that the government had acknowledged that the Security Services have informed the Moroccan authorities about the applicant, thus making them aware that he was considered a security threat in Sweden. Having had regard for reliable international sources that showed arbitrary detention and torture continue to occur in Morocco in cases concerning persons considered security threats and suspected of terrorism, the Court found that the applicant has shown that there is a risk of him being subjected to treatment contrary to art.3 if expelled to his home country.

At the same time, the Swedish authorities failed to dispel the doubts raised by the applicant. The Court noted that both the decision of the Migration Agency and Court of Appeal were made without knowledge of the Security Services having contacted Morocco and informing it of the applicant’s expulsion. As a result, the Court found that it could not rely on those decisions. The Court also noted that the government had seen no reason to take special measures to ensure the applicant was not subject to treatment contrary to art.3, despite their recognition of the risk of ill-treatment during detention of suspected terrorists in Morocco. The Court considered that the migration authorities lack of access to all relevant and important information raises concern as to the rigour and reliability of the domestic proceedings. Furthermore, the Court highlighted that, although the human rights situation is improving in Morocco, the relevant authorities had given no assurances concerning the safety of the victim should he be expelled. As a result, the Court concluded that the applicant’s expulsion to Morocco would involve a violation of art.3.

- (3) It indicated to the government that is desirable in the interests of the proper conduct of the proceedings not to expel the applicant until such time as the present judgment becomes final or until further order under r.39 of the Rules of Court.

Cases considered

Assenov v Bulgaria (1999) 28 E.H.R.R. 652

Chahal v United Kingdom (1997) 23 E.H.R.R. 413

FG v Sweden (App. No.43611/11), judgment of 23 March 2016

Hirsi Jamaa v Italy (2012) 55 E.H.R.R. 21

Maslov v Austria (App. No.1638/03), judgment of 23 June 2008

Othman (Abu Qatada) v United Kingdom (2012) 55 E.H.R.R. 1

Paposhvili v Belgium (App. No.41738/10), judgment of 13 December 2016

Saadi v Italy (2009) 49 E.H.R.R. 30

Salah Sheekh v Netherlands (App. No.1948/04), judgment of 11 January 2007

Trabelsi v Belgium (2015) 60 E.H.R.R. 21
Vilvarajah v United Kingdom (1991) 14 E.H.R.R. 248

Commentary

This case provides interesting insights into the Court's considerations with regards to cases concerning expulsion to countries where applicants could be at risk of being subjected to torture or other ill-treatment. A particular area of interest is the extent to which the Court might use its own investigations to challenge the proceedings of a state in expulsion cases. The Court recognised within the case that, "as a general principle, the national authorities are best placed to assess" such cases, though such assessments should be both "adequate and sufficiently supported". However, the Court also accepts that, in cases such as this, it has to carry out a full and *ex nunc* evaluation of the foreseeable consequences of the applicant's removal in light of the human rights situation in a country and of his/her personal circumstances. In this case, this evaluation led the Court to consider information not available to the Migration Agency of the state, leading to the conclusion that the government's activities raise concern as to the rigour and reliability of the domestic proceedings. This resulted in the finding that the Court could not rely on the domestic decisions, which in effect led to the Court's analysis substituting that of the national authorities when finding that expelling the applicant would violate art.3. Although the lack of communication and transparency between the national Security Services and Migration Agencies certainly made the domestic proceedings inadequate, it is still notable that the Court has taken such an active role. It is questionable whether making use of its full and *ex nunc* evaluations the Court could in future end up substituting a respondent state's domestic decisions in expulsion-related cases. What is undeniable, however, is the approach of the Court that the protection of art.3 is absolute and that security or terrorist threats cannot be used as an excuse for restricting its absolute nature.

Pre-trial detention of minors and right to freedom of peaceful assembly

Pre-trial detention of minor—propaganda—terrorist organisation—Kurdish Working Party (PKK)—Abdullah Öcalan—Turkey—right to liberty—art.5—right to freedom of peaceful assembly—art.11

☞ Demonstrations; Detention; Freedom of peaceful assembly; Minors; Pre-trial procedure; Right to liberty and security; Turkey

Agit Demir v Turkey (Application No.36475/10)

European Court of Human Rights: Decision of 27 February 2018

Facts

In December 2009, the pro-Kurdish Democratic Society Party organised a demonstration in Cizre, Turkey, against the detention conditions of the leader of the Kurdistan Workers Party (PKK), Abdullah Öcalan. The applicant, who was 13 years old at the time, was suspected of propaganda in support of the PKK and of having stood against security forces by use of arms. After being arrested in January 2010, the applicant confessed to waving a portrait of Abdullah Öcalan. However, he denied having thrown stones at the security forces. He was placed in pre-trial custody. A criminal action was opened against him in February 2010 for participating in an illegal demonstration called upon by the PKK and for membership of this organisation. The applicant claimed before the Court of Assize of Diyarbakir that he was coming back

from school when he found himself in the middle of the demonstrators and had only picked the sign with Öcalan's portrait up from the floor. The Court of Assize of Diyarbakir declined jurisdiction in December 2010, considering that it was a matter for the Correctional Tribunal of Cizre as a juvenile court. An expert report on the video records confirmed that the applicant was among the demonstrators, waved a portrait of Abdullah Öcalan and threw a stone at the security forces. He was sentenced in March 2012 by the tribunal to a year and 15 days imprisonment for propaganda in support of a terrorist organisation and participating in a violent demonstration. However, the tribunal decided to stay the judgment for a period of three years and the applicant was acquitted from the charge of membership of a terrorist organisation.

The applicant claimed that his pre-trial detention was in violation of art.5(1)(c) of the Convention, on the ground that it was not a measure of last resort. He also complained about the length of his detention under art.5(3), as well as a violation of his right to have an effective remedy under art.13. Moreover, he alleged violations of arts 10, 11, 3, 6, 7, 8 and 14.

Held

- (1) The Court declared the complaint regarding art.5(1)(c) admissible (unanimous).
- (2) There had been a violation of art.5(1)(c) (unanimous).

The Court reiterated that one of the main elements to be considered when assessing the legality of the detention was the absence of arbitrariness. The deprivation of liberty cannot be ordered unless other less severe measures have been contemplated by the judge and deemed insufficient in the safeguard of the personal and public interest. The Turkish Criminal Procedure Code provides that a person can be placed in detention if two cumulative conditions are met: there must be a strong suspicion that the individual committed the alleged offence; and there must be a ground of detention. However, even if those conditions are met, the judge is still under an obligation to search for less severe alternative measures. The Court noted that, in this case, the applicant was a minor and had been detained for more than two months, mainly on accusation of propaganda in support of a terrorist organisation through his participation in a demonstration. The Turkish legislation guarantees that the detention of a minor must be a measure of last resort. In the circumstances of the case, the judge did not appear to have considered alternative measures.
- (3) There was no need to examine art.5(3) (unanimous).

The Court considered that the complaint in relation to the length of detention under art.5 need not be examined. It further contended that the allegation of violation of art.5(4), which is the *lex specialis* of art.13 and guarantees that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court, was inadmissible. The Court relied on its earlier jurisprudence in which it concluded that the procedure that was available under Turkish law to oppose decisions of detention did not meet the requirements of art.5(4) in that it was not judicial in nature and did not present the procedural guarantees required for a deprivation of liberty. However, the legislation was amended in 2004. Since then, detainees can be heard by the judicial authority during the examination of the opposition request. The Court concluded that the opposition procedure constituted a proceeding within the meaning of art.5(4), and that the applicant had failed to oppose any of the detention decisions that were taken against him.
- (4) There had been a violation of art.11 (unanimous).

Although this was not expressly invoked in the applicant's complaint, the Court decided to examine the potential existence of a violation of his right to freedom of peaceful assembly under art.11, in light of art.10 of the Convention. The applicant's conviction for propaganda

in support of a terrorist organisation implicitly put into question his right to freedom to peacefully protest.

The Court declared that the circumstances of the case were similar to the ones in the *Gülcu* case, in which it concluded that the detention and conviction of M. Gülcü constituted an interference with the latter's right to freedom of assembly. The interference in the present case was provided for by the law and pursued the legitimate aim of the protection of national security and public order. However, the Court had already held in its previous case-law that the mere act of waving a portrait of Abdullah Öcalan during a demonstration was neither a form of expression inciting to violence, to armed resistance or to insurgency, nor constituted hate speech. The Court recognised the Contracting State's margin of appreciation in deciding which measures the national authorities could use to protect the judicial and public order. Although the applicant's judgment was stayed for three years, this did not lessen the fact that he had been detained for over two months and was threatened with a three-year imprisonment sentence, especially since he was only 13 years old at the time. Hence, the measures taken were not proportionate to the legitimate aims pursued.

- (5) The complaints under arts 3, 8, 2 of Protocol No.1 to the Convention, and 6, 7 and 14 were rejected.
- (6) The state was ordered to pay €7,500 for non-pecuniary damage.

Cases considered

- Altinok v Turkey* (App. No.31610/08), judgment of 29 January 2011
Ambruszkiewicz v Poland (App. No.3879/03), judgment of 4 May 2006
Bağriyanık v Turkey (App. No.43256/04), judgment of 5 May 2007
Bolech v Switzerland (App. No. 30138/12), judgment of 29 October 2013
Centre for legal resources on behalf of Valentin Câmpeanu v Romania [GC] (App. No.47848/08), judgment of 17 July 2014
DG v Ireland (2002) 35 E.H.R.R. 33
Faruk Temel v Turkey (App. No.16853/05), judgment of 1 February 2011
Ezelin v France (1992) 14 E.H.R.R. 362
Fressoz and Roire v France [GC] (2001) 31 E.H.R.R. 2
Gavril Yosifov v Bulgaria (App. No.74012/01), judgment of 6 November 2008
Gülçü v Turkey (App. No.17526/10), judgment of 31 August 2012
Jėčius v Lithuania (2002) 35 E.H.R.R. 16
Kadem v Malta (2003) 37 E.H.R.R. 18
Kasparov v Russia (App. No.21613/07), judgment of 3 October 2013
Khayredinov v Ukraine (App. No.38717/04), judgment of 14 October 2010
Konolos v Romania (App. No.26600/02), judgment of 10 March 2011
Korneykova v Ukraine (App. No.39884/05), judgment of 19 January 2012
Kudrevicius v Lithuania [GC] (2016) 62 E.H.R.R. 34
Ladent v Poland (App. No.11036/03), judgment 18 March 2008
Lütfiye Zengin v Turkey (App. No.36443/06), judgment of 14 April 2015
Müdüür Duman v Turkey (App. No.15450/03), judgment of 6 October 2015
Murat Vural v Turkey (App. No.9540/07), judgment of 21 October 2014
Nikolova v Bulgaria (2001) 31 E.H.R.R. 3
Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım AŞ v Turkey (App. Nos 64178/00, 64179/00, 64181/00, 64183/00 and 64184/00), judgment of 30 March 2006
RT v Greece (App. No.5124/11), judgment of 11 February 2016

Sayık v Turkey (App. Nos 1966/07, 9965/07, 35245/07, 35250/07, 36561/07, 36591/07 and 40928/07), judgment of 8 December 2009

Schwabe and MG v Germany (2011) 59 E.H.R.R. 28

Şık v Turkey (App. No.53413/11), judgment of 8 July 2014

Sevim v Turkey (App. Nos 7540/07, 7859/07 and 11979/07), judgment of 5 January 2010

Suso Musa v Malta (App. No.42337/12), judgment of 23 July 2013

Valada Matos das Neves v Portugal (App. No.73798/13), judgment of 29 October 2015

Women on Waves v Portugal (App. No.31276/05), judgment of 3 February 2009

Yılmaz et Kılıç v Turkey (App. No. 68514/01), judgment of 17 July 2008

Commentary

The decision of the Court in this case is relatively straightforward in that the Court was unanimous and essentially reaffirmed its existing jurisprudence. The judges firmly asserted that the detention of a minor could only be for a short time. The Court drew a comparison with the *Gülcu* case, in which a minor was detained for two years after he participated in a demonstration in Diyarbakir. The facts were very similar, in that M. Gülcü had also thrown stones at the security forces. He was convicted of membership of the PKK and of propaganda in support of a terrorist organisation and resistance to the police. The Court had denounced the harshness of the sentences imposed on him. In the present case, the Turkish judge appears not to have considered alternative measures, even though this is required by the law. Beyond the severity of the sentences, this case reflects a wider political debate. The applicant did not invoke art.11 in his application and expressly claimed a violation of art.11 in later observations. However, the Court drew from the fact that he was detained for membership of a terrorist organisation and propaganda in support of the PKK a substantial claim that his right to freedom of assembly had been breached. Many people have been detained and convicted on similar charges for taking part in pro-Kurdish protests in Turkey. This case may be even more significant in the current context of emergency state which was proclaimed after the attempted coup in July 2016. Since then, the Turkish government has brought criminal proceedings against numerous people accused of defamation or based on terrorist charges. This case thus falls within the scope of an ongoing political repression of freedom of speech and assembly in Turkey.

Providing care for the children of arrested parents

Arrest—caring responsibilities—children—best interests—positive obligations—right to family—art.8

☞ Bulgaria; Children's services; Children's welfare; Right to respect for private and family life

Hadzhieva v Bulgaria (Application No.45285/12)

European Court of Human Rights (Fifth Section): Judgment of 1 February 2018

Facts

The present case concerns a claim brought by a child of Russian and Turkmen nationality, Ms Dzheren Annadurdievna Hadzhieva (the applicant) against the Republic of Bulgaria for a breach of art.8. Originally from Turkmenistan, the applicant, along with her parents, moved to Bulgaria in late 2001. Whilst in Turkmenistan the applicant's father was the deputy chair of the Central Bank of Turkmenistan and a critical opponent of the domestic legal regime. On 22 October 2002 the applicant's father and mother

were charged with embezzlement of \$40 million and the prosecutor of Turkmenistan ordered their detention and sought an extradition order from Bulgaria. On 4 December 2002 the applicant, whilst at home by herself, was confronted by around 10 police officers who had arrived at her home, seeking to arrest her parents. The applicant rang her parents and they returned home also bringing their lawyer with them. Upon their return, they were immediately arrested. The next day, after previously having a 24-hour detention order set aside for lack of legal grounds, the applicant's parents were served with a new 72-hour detention order and again immediately detained. On 6 December 2002, the detention order was extended to a period of 30 days by the Varna Regional Court. During the hearing, in accordance with domestic legislation, the judge sought to discover whether there would be anybody available to care for the applicant whilst her parents were detained. It is alleged by the applicant that when asked by the judge whether there would be anybody to care for her the mother simply "shook" her head which in Bulgaria is used to signify agreement whilst "nodding" is used to signify disapproval. As such, it is alleged by the applicant that the judge mis-recorded her mother's response when he noted that there was somebody available to care for the applicant.

In the 13 days between 4 and 17 December 2002, the applicant alleges that there was nobody to take care of her. Due the hastiness of the arrest, her parents had no chance to leave her any money and she was required to attempt survival on the 15 levs (around €7) which she had found in the house. She further alleges that as a result of having been left alone without supervision she suffered from insomnia or nightmares during the rare instances when she could sleep. Further, she was also constantly worried about being sent back to Turkmenistan where her family had faced persecution. The applicant also alleged that she had to ask neighbours how to get to school as she did not know the way and was, at some point, bitten by a stray dog on the leg—a wound which went untreated until 18 December when her mother took her to hospital.

After a previous failed attempt due to the misinterpretation of points of law the applicant brought a claim to the Varna Regional Court on 25 October 2007 alleging a breach of the Bulgarian Child Protection Act. A psychiatric-psychological report was prepared which diagnosed the applicant with post-traumatic stress disorder. This report was confirmed by a second report prepared in 2009. However, during these proceedings the Regional Court also heard evidence from the applicant's teacher who stated that she could not remember a time when the applicant had missed class or gone hungry at school as alleged by the applicant. Based on the above evidence, the Varna Regional Court rejected the applicant's claim on the basis that it had not been proven that she was left on her own during the time her parents were detained. The applicant appealed to the Varna Court of Appeal which affirmed the findings of the lower court. Following that decision, the applicant appealed to the Supreme Court of Cassation which rejected her appeal on the grounds that there were no points of law on which to advance an appeal.

The applicant then complained to the European Court of Human Rights (the Court) that the failure of domestic authorities to provide her with care whilst her parents were detained constituted a breach of art.8.

Held

- (1) There had been a violation of art.8 during the first two days for which the applicant's parents were detained (four votes to three).

The Court affirmed that although art.8 is primarily concerned with preventing arbitrary interference with a citizen's private life by state officials those negative obligations are also accompanied by positive obligations inherent in an effective respect for private and family life. The Court also reaffirmed its previous jurisprudence and stated that the positive obligations upon the state under art.8 in the context of minors require that the best interests of the child be respected.

The Court noted that the police had not notified the relevant authorities that the parents of a minor were being detained, and that this meant she was subsequently left unattended. The Court also considered that the first time the domestic authorities had enquired into the care of the applicant was at the hearing which took place two days after her parent's arrest. Based on these facts, the Court took the view that the domestic authorities had a positive obligation to either allow the applicant's parents to arrange care for her when they were taken into custody or to do so themselves. Accordingly, the Court found that there had been a breach of art.8 between 4 and 6 December.

- (2) There was no violation of art.8 for the period after the 6 December (unanimous). In relation to the period after 6 December, the Court noted that the applicant's parents were represented at all of their hearings by a lawyer who was also a family friend and neighbour. The Court also noted that the applicant's parents were highly educated professionals from a prominent background and that her mother had confirmed that there was someone available to care for their daughter. In any event, the parents had not raised the question of the applicant's care with any of the authorities and had not sought to correct the misinterpretation of the domestic court's record which would have been sufficient to alert the authorities. Taking these points together the Court found that the domestic authorities had no reason to assume or suspect that after 6 December 2002 the applicant was uncared for, and as a result the positive obligation to ensure the child was cared for was not relevant.

Cases considered

- Bevacqua and S v Bulgaria* (App. No.71127/01), judgment of 12 June 2008
Ioan Pop v Romania (App. No.52924/09), judgment of 6 December 2016
Haase v Germany (2005) 40 E.H.R.R. 19
Mayeka v Belgium (2008) 46 E.H.R.R. 23
X v Netherlands (1986) 8 E.H.R.R 235

Comment

The judgment is significant as it demonstrates the extent to which art.8 can be interpreted to go outside of its ordinary meaning. The majority had no hesitation in interpreting previous jurisprudence of the Court in a way that supports the activation of art.8 in circumstances in which children whose parents are arrested are uncared for. Judges Møse, O'Leary and Rousseva, however, contended that the question of whether a state has fallen short of its positive obligations under art.8 requires a careful case-by-case analysis. They therefore argued that the cases relied upon by the majority should have been distinguished from this case because of their very different set of facts. The dissenting opinion placed more emphasis on the lack of evidence to suggest that the parents had enquired the arrangements which had been made for their daughter. When the above fact was coupled with the prominent and well-educated background of the applicant's parents, the dissenting judges found this sufficient to find that the domestic authorities had not failed to discharge their obligations under art.8. In practical terms, the case confirmed the approach of the Court that art.8 should be interpreted to protect children's best interests, while also reiterating that the positive obligations of states under art.8 cannot be unlimited.

Right to stand for election

By-elections—general elections—party unrepresented in Parliament—prohibition of discrimination—art. 14—right to free elections—art. 3 of the Protocol to the Convention

☞ By-elections; Discrimination; Election candidates; Right to free elections; Romania

Cernea v Romania (Application No.43609/10)

European Court of Human Rights (Fourth Section): Judgment of 27 February 2018

Facts

The applicant, M. Remus Florinel Cernea, is Romanian national residing in Bucharest. At the material time, he was the Executive President of Partidul Verde, a political party affiliated with the European Green Party.

In 2008, Partidul Verde fielded candidates for the legislative elections but none of them obtained a seat. A year later, a seat became vacant in a Bucharest constituency, and by-elections were organised on 17 January 2010 in order to fill that seat. Partidul Verde presented the applicant as its candidate for these by-elections but the Electoral Board rejected the candidature on the ground that the party was not represented in Parliament. This was justified by the Parliamentary amendments to Law No.35/2008 that made it impossible for a party not represented in Parliament, or for an independent candidate, to respectively field candidates or to run for by-elections.

M. Cernea contested before the Bucharest County Court the decision to reject his candidature arguing that art.48(17) of Law No.35/2008 was unconstitutional. He alleged in particular that the impossibility for candidates of a party not represented in Parliament and for independent candidates to run for by-elections infringed the right to free elections and created an unjustified discrimination vis-à-vis parties represented in Parliament. The county court referred the case to the Constitutional Court which dismissed the exception of unconstitutionality. In March 2010, the county court followed the Constitutional Court's reasoning and dismissed the case arguing that Partidul Verde could not field candidates for the by-elections because it had not passed the electoral threshold at the general legislative elections.

The applicant complained before the European Court of Human Rights (the Court) that art.14 (prohibition of discrimination) read in conjunction with art.3 of Protocol 1 to the Convention (right to free elections) have been breached by Romania.

Held

- (1) There had been no violation of art.14 read in conjunction with art.3 of Protocol 1 (unanimous). The Court reiterated that discrimination consists of treating differently, without an objective and reasonable justification, persons in comparable situations. A differential treatment is devoid of an objective and reasonable justification when it does not pursue a legitimate aim, or the means employed are disproportionate to the aim pursued. First, the Court noted that the differential treatment provided for by law had prevented M. Cernea from running for the by-elections because his party was not represented in Parliament. The Court also noted that the Constitutional Court had responded to the applicant's argument concerning the Venice Commission's recommendation on electoral matters. Indeed, the

Venice Commission's Code of Good Practice in Electoral Matters which recommends to either avoid amending the electoral law less than a year before any elections or writing the amendments in the constitution or at a level higher than ordinary law, had been respected since Law No.35/2008 was amended under an organic law which, in the Romanian Constitution, requires a broader consensus than ordinary law. Moreover, the particular context of by-elections which are not supposed to be held at regular and foreseeable intervals and which randomly depend on seats falling vacant in Parliament, was also taken into account by the Court.

Second, concerning the legitimate aim of the different treatment, the Court agreed with the Romanian government that the aim of the amendment was to reinforce the expression of the opinion of the people in the choice of the legislature. The objective was to preserve the structure of Parliament and to prevent the fragmentation of the political views following the general elections.

Concerning the proportionality of the different treatment, the Court noted that the by-elections had been organised only for one vacant seat in a Bucharest constituency. The limitation of the applicant's right must therefore be relativised, especially since he, together with his party, had not reached the electoral threshold to enter Parliament in the 2008 general elections. As the Constitutional Court had noted, the aim of by-elections is certainly not to open a backdoor to a party which had previously failed to obtain seats in Parliament.

The Court concluded that the amendment of Law No.35/2008, which has limited the applicant's right to run for the by-elections, had been objectively and reasonably justified. The amendment did not violate the essence of the people's right to freedom of expression of their opinion in the choice of the legislature and was consequently not disproportionate to the legitimate aim pursued.

Cases considered

Andrejeva v Latvia (2010) 51 E.H.R.R. 28

Dupré v France (App. No.77032/12), judgment of 3 May 2016

Etxeberria v Spain (App. Nos 35579/03 and three others), judgment of 30 June 2009

Mathieu-Mohin v Belgium (1988) 10 E.H.R.R. 1

Matthews v United Kingdom (1999) 28 E.H.R.R. 361

Özgürlik ve Dayanışma Partisi (ÖDP) v Turkey (App. No.7819/03), judgment of 22 October 2012

Sejdic and Finci v Bosnia-Herzegovina (App. Nos 27996/06 and 34836/06), judgment of 22 December 2009

Soukhovetski v Ukraine (App. No.13716/02), judgment of 28 March 2006

Yumak and Sadak v Turkey (App. No.10226/03), judgment of 8 July 2008

Commentary

In the present case, the Court reiterated that the terms "free expression of the opinion of the people" contained in art.3 of Protocol 1 to the Convention mean that no pressure shall be put on the electors in the choice of one or more candidates, and that the electors cannot be unduly induced to vote for one party or another. The word "choice" means that political parties should have a reasonable opportunity to field their candidates to the elections. However, the rights contained in art.3 of the Protocol are not absolute and the Contracting States have a wide margin of appreciation in this regard. Moreover, concerning the right to stand for election, the Court considers it should be especially cautious when examining limitations in that context. With that in mind, the Court considered that the restriction on M. Cernea's right to stand in the

by-elections, arising from the law, was justified by the aim of preserving the structure of Parliament and preventing major change in its political composition obtained after the general elections. The restriction was not considered disproportionate by the Court since the by-elections were organised only for one vacant seat and M. Cernea had had the opportunity to stand for the general elections. Therefore, the restriction attached to right to stand as a candidate for elections in this case did not infringe the essence of the rights at stake.

Involuntary hospitalisation of mentally ill individuals

Compulsory treatment—Involuntary hospitalisation—Consent—Criminal offenders—Judicial authorisation—Deprivation of liberty—art.5

☞ Detention in hospital; Personality disorders; Right to liberty and security; Russia

X v Russia (Application No.3150/15)

European Court of Human Rights (Third Section): Judgment of 20 February 2018

Facts

Mr X, a Russian national born in 1995 and residing in Moscow, is the applicant and has requested anonymity. He was diagnosed with schizotypal personality disorder (date unspecified) and was being voluntarily treated for this.

On 24 April 2014, Mr X was in the Bibirevo district of Moscow and arrested for allegedly harassing an underage teenager. He was taken to a local police station, but later transferred to Central Clinical Psychiatric Hospital of the Moscow Region. The ambulance service reported Mr X to be “mentally alert [and] aware of his surroundings”. However, the applicant was unwilling to engage in contact, but acknowledged the existence of the teenager and the repeated instances of sexual harassment. The psychiatrist responsible for admitting Mr X to the hospital reported him “ask[ing] for some time to spend with boys” and on the following day the applicant was jointly assessed with another psychiatrist. Mr X revealed that for the past three years he had been “fixated on these thoughts” of “feeling the desire to be in contact with boys, to look like a girl” and he had “started contemplating the possibility of gender reassignment”. On this same day, the applicant requested to be discharged from the hospital, but to no avail. A medical counselling panel of the hospital’s resident psychiatrists insisted Mr X to be a danger to himself and others, in need of involuntary placement and treatment.

On 25 April 2014 the hospital also applied for judicial authorisation to involuntarily hospitalise the applicant under s.29(a) and (c) of the Psychiatric Assistance Act 1992. On 5 May 2014 the Savyolovskiy District Court of Moscow held a hearing which was attended by the applicant, his mother and father, the attending psychiatrist (Mr P), the head of a hospital department (Mr L) and a representative of the hospital (Mrs K), along with the prosecutor. All medical staff insisted Mr X needed treatment for the organic delusional disorder they had diagnosed him with and should he go untreated, Mr X would risk deterioration. The applicant and his parents denied that Mr X was unwell. After considering all statements, the police report and medical opinions, the district court authorised involuntary hospitalisation. Mr X’s father appealed on the grounds of inconsistencies in evidence and that the court had mainly relied on psychiatric assessments.

On 20 May 2014 the applicant was discharged from the hospital after his mental health improved. The applicant complained to the European Court of Human Rights (the Court) that his involuntary placement

in a psychiatric facility had been in breach of art.5 (1) and (4) because it failed to meet the substantive and procedural requirements for involuntary hospitalisation.

Held

- (1) There had been a violation of art.5(1) (unanimous).
The Court reiterated that a person's physical liberty is fundamental to the protection of physical security of the individual. Only "very weighty reasons" can justify a restriction of one's rights and only in a situation where less severe measures have been deemed inadequate in upholding personal and public safety. Detention of a person of unsound mind can only be lawful under art.5 in an emergency situation, when the mental disorder is of a kind that warrants compulsory confinement, or where continued confinement is due to the persistence of the disorder. Domestic proceedings in such cases must offer the applicant "fair and proper procedure" and satisfactory protection against deprivation of liberty.
There was no need to separately examine the complaint under art.5(4) that there had been procedural shortcomings in the judicial authorisation of his involuntary hospitalisation.
- (2) The state is to pay the applicant €7,500 in respect of non-pecuniary damage (unanimous).
- (3) The remainder of the applicant's claim for just satisfaction was dismissed (unanimous).

Cases considered

- Alajos Kiss v Hungary* (2013) 56 E.H.R.R. 38
- Herz v Germany* (App. No.44672/98), judgment of 12 June 2003
- Karamanof v Greece* (App. No.46372/09), judgment of 26 July 2011
- Luberti v Italy* (1984) 6 E.H.R.R. 440
- McKay v United Kingdom* (2007) 44 E.H.R.R. 41
- Mifobova v Russia* (App. No.5525/11), judgment of 5 February 2015
- Ruslan Makarov v Russia* (App. No.19129/13), judgment of 11 October 2016
- Shtukaturov v Russia* (2012) 54 E.H.R.R. 27
- Vasileva v Denmark* (2006) 40 E.H.R.R. 27
- Winterwerp v Netherlands* (1979) 2 E.H.R.R. 387
- Zagidulina v Russia* (App. No.11737/06), judgment of 2 May 2013

Commentary

The Court's decision on this case was unanimous. Unfair and improper procedure can be observed in several aspects of the case. This can be seen in both the domestic court, which had based their judgment entirely on the evaluations of the resident psychiatric staff, but also in the hospital's conduct towards the applicant.

The police report regarding Mr X's arrest on 24 April 2014 failed to detail the events which led to the applicant's arrest—or even whether the arrest was prompted by a complaint made by the teenage boy involved or another member of the public. The local police station's certificates, issued in May 2014, stated that the applicant had not committed any administrative or criminal offence. In light of this, one begs the question of why Mr X was arrested in the first place. The domestic courts failed to independently establish whether or not he posed a real threat to himself or others. The hospital had also failed to explore other treatment avenues before they insisted on involuntary hospitalisation and their decision of treatment was based on the failure of the applicant to clearly answer questions regarding the incident with the teenage boy.

In light of these failures, the decision of the Court is a strong reminder of the safeguards needed for depriving mentally ill individuals of their liberty. The case is also important both because of the legal regulation of mental healthcare and the treatment of homosexuals in Russia. Under the Russian Criminal Code, compulsory treatment can be given to patients with a mental illness who commit socially dangerous acts. This requires the police to confirm that an individual poses threats to the public and a psychiatric expert who assesses and confirms the risk. This means that it is the duty of the police to prove that an individual is dangerous, which did not happen in this case. Given the treatment of homosexuals in Russia, it is unsurprising both that the police found against the applicant without any evidence and that the applicant was anxious about answering questions regarding his relationship with the teenage boy. The case is therefore important not only for mentally ill individuals, but also for those individuals whose personal circumstances might make them even more vulnerable.

Expropriation of property for commercial use

Expropriation of property—public interest—commercial use—delayed compensation—right to fair trial—art.6—right to property—art.1 Protocol 1

☞ Expropriation; Malta; Protection of property; Right to fair trial

Galea v Malta (Application No.68980/13)

European Court of Human Rights (Fourth Section): Judgment of 13 February 2018

Facts

The applicants were six Maltese nationals who held *utile dominium* over a piece of land in Zabbar, Malta, since 2002. The land had previously been held by generations of their family for 150 years, and their rights over the land were due to expire in 2047. On 7 May 1965 the government took possession of an 80 m² part of the land, including a shop building which was being rented out to third parties, by way of the Land Acquisition (Public Purposes) Ordinance, to build a civic centre and servicing roads.

The shop was demolished, but subsequent changes to the building plans in 1972 meant that a new (larger) shop building was built, partly on the land which previously belonged to the applicants, to service the civic centre. The shop was leased to the same third party, and the remaining land which was not used for the shop and had previously belonged to the applicants was returned to them in 1988. Compensation of €13,000 was finally offered in October 2010.

The applicants sought return of the property used to build the shop by way of extra-judicial requests and filed constitutional redress proceedings. The extra-judicial requests were unsuccessful, but the application for constitutional redress was successful at first instance, and the Civil Court (First Hall) annulled the Governor's original declaration of May 1965 taking possession of the property, on the basis that the delayed compensation had denied the opportunity to appeal the amount, and that the land had not been taken in the public interest as it had been leased to third parties as a shop (therefore for commercial purposes).

This decision was appealed by the government to the Constitutional Court, which reversed part of the first instance decision. It held that the taking of the property had been in the public interest despite its change in use in 1972. While upholding that the applicants' property rights had been violated by the delay in compensation, they reversed the remedy offered by the first instance court, annulling the return order for the property and offering non-pecuniary damages less than the value of the property (€10,000).

The applicants complained before the European Court of Human Rights (the Court) that the expropriation of their property without compensation was a violation of their right to property.

Held

- (1) The Court decided to join to the merits the government's objection concerning the applicants' lack of victim status and dismissed it after considering the merits (unanimous).
The government argued that the application was inadmissible as manifestly ill-founded on account of the applicants' lack of victim status. They claimed that this was lost following the Constitutional Court judgment, which granted them compensation for violations of art.6 and art.1 of Protocol No.1 of the Convention. The applicants claimed that the judgment by the Constitutional Court, in not awarding pecuniary damage, had not sufficiently rectified the violation of their property rights. They also disputed that their art.6 claim had been examined by the Constitutional Court, but the government claimed that this had been done together with art.1 of Protocol No.1. The Court considered the government's objection to be closely linked to the substance of the applicants' complaints, and so examined this with the merits.
- (2) The Court declared the application admissible in so far as it refers to the period after 23 January 1967 (unanimous).
The appropriation of the applicants' property had occurred in 1965, prior to Malta becoming party to the Convention in 1967. On this basis, they argued that no consideration was owed prior to 1967. The Court acknowledged that deprivation of property is viewed as an instantaneous act rather than a continuing situation but found that the applicants' complaint related to the failure of the Constitutional Court to order payment of pecuniary damage. The Court found themselves able to examine the failure to pay final compensation with respect to the events taking place after Malta's 1967 accession to the Convention but upheld the government's objection with respect to the period before that date.
- (3) The Court held that there was a violation of art.1 of Protocol No. 1 (unanimous).
The Court held that there was a violation of the applicants' right to property on the basis that compensation still had not been paid to the applicants five decades after the property had been taken. The Court considered that compensation could provide a justification for interference, but that the government's undue delay in providing compensation diminished its adequacy, owing to the reduction in value and uncertain position in which the applicants were for that time.
The Court noted that non-pecuniary damage had been offered but refused, and considered that regardless of the adequacy of this, the delay would constitute a violation. They did, however, consider that the solely non-pecuniary damage (with potential to bring compensation proceedings 45 years after the taking) was not sufficient, and therefore dismissed the government's objection as to the victim status of the applicants.
- (4) The Court awarded €21,000 in respect of pecuniary damage to the applicants.
- (5) Having held that failure to grant pecuniary damage by the Maltese Constitutional Court constituted a violation of art.1 of Protocol No.1, the Court awarded this, but held that the offer of €13,000 in non-pecuniary damage should also be maintained so that the applicants may benefit from this also.
With respect to the calculation of pecuniary damage, the applicant offered valuation based on market value of the property with the original shop building, whereas the government offered a counter-valuation of a lesser sum, and argued that, the taking being lawful and in

the public interest, the applicants should not be entitled to the market value, and they should not be entitled to loss of rent, but instead the value of the property.

The Court found that the property had originally been taken in the public interest, but that with the change of use in 1972 the property had been held for commercial gain. As such, they opted to adjust the valuation for pecuniary damage according to this factor, as well as the returning of partial title, the increased rent from the building of a new shop, and the nature of the title held by the applicants.

- (6) The Court dismissed the remainder of the applicants' claim for just satisfaction (unanimous).

Cases considered

- Abdilla v Malta* (App. No.38244/03), judgment of 3 November 2005
- Aka v Turkey* (2001) 33 E.H.R.R. 27
- Akkuş v Turkey* (2000) 30 E.H.R.R. 533
- Garrett v Portugal* (2002) 34 E.H.R.R. 23
- Bezzina Wettinger v Malta* (App. No.15091/06), judgment of 22 February 2012
- Curmi v Malta* (App. No.2243/10), judgment of 22 November 2011
- Frendo Randon v Malta* (App. No.2226/10), judgment of 22 November 2011
- Former King of Greece v Greece* (2001) 33 E.H.R.R. 21
- Jahn v Germany* (2006) 42 E.H.R.R. 49
- James v United Kingdom* (1986) 8 E.H.R.R. 123
- Malhous v Czech Republic* (App. No.33071/96), judgment of 12 July 2001
- Mason v Italy* (App. No.43663/98), judgment of 24 July 2007
- Schembri v Malta* (2011) 52 E.H.R.R. SE2

Commentary

This case features a unanimous decision of the Court intervening to protect the applicant's property rights. The taking of the property itself was not so much an issue as this happened prior to the accession of Malta to the Convention, however, the commercial gain by the state from the appropriated land after its change of use was. The Court circumscribes the principle that the taking of the property is an instantaneous act and is not a continuing situation of deprivation by centring the discussion in the case around the process of obtaining compensation, to dispense with the *ratione temporis* objection. While this, as the applicants often argue, could be construed as an art.6 issue with relation to the failure to properly administer justice, the Court chose to look at this solely with respect to art.1 of Protocol No.1.

The Court also notes that the taking of the property, while originally in the public interest, was solely being used for commercial purposes when the new shop was rented back to the third party after 1972. This holding is used solely in the context of the calculation of compensation, as they neglect to examine the lawfulness of the deprivation itself as discussed above. The Court acknowledged that the public interest can be inclusive of economic and social benefit (relevant could have been the use of the shop for lorry drivers at the civic centre), however, the result of this decision to grant higher compensation is perhaps understandable, as the Court stresses many times that the applicants had to wait over five decades for it.

Book Reviews

The United Nations Convention on the Rights of Persons with Disabilities: A Commentary, by Valentina Della Fina (ed.), Rachele Cera (ed.) and Giuseppe Palmisano (ed.), (Springer, 2017), 804 pages, hardback, £128, ISBN: 978-3-31-943788-0.

The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol was adopted on 13 December 2006. Its purpose is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. The CRPD achieved the highest number of signatories recorded for a UN Convention on its opening day. It was the first comprehensive human rights treaty of the 21st century, and broke new ground by being open for signature by regional organisations, such as the EU which ratified it on behalf of all of its Member States. The CRPD entered into force on 3 May 2008.

The CRPD, as a human rights instrument, is explicit in its social development aim and dimension. It achieves this by recognising and promoting a new human rights model for disability in order to ensure that disabled people are treated as individuals with rights, and as active participants and members of society. This is reflected both in the Convention’s protocols and within the substantive body of the treaty. An integral feature of the Convention lies in its recognition that the removal of societal barriers for disabled people is a critical factor in promoting and achieving equality.

In this weighty textbook, the editors, who are based at the Institute for International Legal Studies in Rome, have sought to produce an in-depth scholarly analysis of the Convention’s provisions and Protocol marking its 10th anniversary. They provide a comprehensive analysis of the law and jurisprudence relating to the CRPD, including by reference to relevant international human rights norms. They consider the process and debate which led to the creation of this treaty, a detailed analysis of the treaty articles, as well as its continuing evolution as a result of the recommendations of the Committee on the Rights of Persons with Disabilities (CRPD Committee) and its opinions on individual or group complaints under the Optional Protocol. They also consider the interpretations provided in the Committee’s General Comments, such as General Comment No.1 on women and girls with disabilities and No.2 on the right to inclusive education of persons with disabilities. The Convention’s provisions are examined also as they have been applied and interpreted pursuant to EU law.

The early chapters provide useful context and historical background of the struggle for the recognition of the rights of persons with disabilities at the United Nations and the emergence of the disability rights movement internationally and then later the period in which international disability policy developed into a rights-based policy. It was this new rights-based approach that led to the human rights model of disability which the Convention enshrines and promotes. That model is explored at the outset of book, and examines why the human rights model represents an improvement on the social model of disability. This is a conceptually important lens through which to interpret the CRPD’s provisions. As domestic judges are invited more frequently to consider the CRPD, this informative but succinct chapter may prove to be a useful theoretical introduction as to why the human rights model succeeds where the social model only partially meets and confronts current challenges. Whereas the social model is intended to explain disability, the human rights model places dignity for disabled people at its heart. Whilst the social model of disability supports anti-discrimination frameworks, the human rights model goes further and includes not only civil and political human rights, but social and economic rights as well in recognition of their interdependence and indivisibility.

This background material then leads on to a detailed analysis of the Preamble and each Convention article. It considers the normative content, interpretation, concepts and difficulties arising from each article, as explored against human rights instruments and a wide variety of relevant case-law.

The international range of editors and contributors to this volume is impressive and includes respected academics and lawyers, steeped in disability law and policy, as well as individuals who participated in the negotiations and drafting of the CRPD itself. The material is formatted in an accessible and user-friendly manner. Whilst this is no doubt an academic text, it is a practical and valuable resource for practitioners and scholars alike, drawing together the editors' and contributors' own cumulative expertise and experience in order to improve knowledge and promote more extensive use of the CRPD as an important tool to strengthen disability protections worldwide. It will prove to be an important contribution to disability rights law and increased understanding of this ground-breaking Convention.

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The Rule of Law in the European Union: The Internal Dimension, by Theodore Konstadinides, (Oxford: Hart, 2017), pp.200, £55, ISBN: 9781849464703.

At the risk of portentousness, the Rule of Law in the European Union might be thought to be under considerable strain. Recent events in Hungary and Poland concerning judicial independence, the response to the migration challenges, the Eurozone crisis, and Brexit—the modern legal equivalent of the internet's Godwin's Law—may well lead some to that conclusion. Indeed, it has been said that the Rule of Law in the European Union is under a process of “backslicing”.¹ In such circumstances—and whether or not such a description is ultimately accurate—a book considering the rule of law in the European Union could not be timelier.

The Rule of Law in the European Union: The Internal Dimension by Theodore Konstadinides (Senior Lecturer in Law at the University of Essex) purports, in its Preface, to be an “overarching guide to the rule of law in the EU”. It achieves that aim comprehensively, yet concisely. The monograph begins, in Part 1, by exploring the design of the rule of law in the EU—its foundations (both descriptively and normatively), evolution and geography. Part 2 is more likely to appeal to the practitioner, exploring how the rule of law is enforced in the EU—first against EU institutions (Ch.4), and secondly against Member States (Ch.5).

Across these two parts, a number of interweaving themes begin to emerge. The first theme is that of evolution of the very concept of the rule of law as applied in the EU across time. Konstadinides states his aim to explore what he calls “the EU rule of law” (p.15). This, he states, “does not imply the creation of a new concept of the rule of law but rather a system where laws are applied and enforced as opposed to a system characterised by arbitrary rule” (p.15). That may well be so, but—as is acknowledged—the rule of law lacks a formal definition in the Treaty on European Union. The textual support is located in parts 2, 4(3) and 19(1) of the TEU, and (now also) the Charter of Fundamental Rights of the European Union. That leaves something of a conceptual vacuum, however, which has been filled, or perhaps simply covered, somewhat haphazardly over time.

Konstadinides acknowledges that the rule of law conceptually is something of a “puzzle” (p.9) or a “stretch concept” (p.38) and “an empty vessel or a legal zeitgeist, depending on one's view” (p.1). He attempts to fill this vacuum by an exploration of the underpinning values and meaning of the EU rule of

¹ See further: Kim Lane Schepppele, <https://verfassungsblog.de/what-is-rule-of-law-backsliding/> (2 March 2012), *verfassungsblog.de* (Accessed 21 May 2018).

law in Ch.2 by addressing whether the EU rule of law is formal (focusing just on the manner in which law is made or promulgated) or substantive (adding in content as well as the form of the law). He concludes that it is both, and that the rule of law—in practice—can be located not just in the TEU and Charter (and the substantive rights contained within), but also the constitutional principles of sincere co-operation, consistency, legitimate expectations, legal certainty, legality, and proportionality as developed over time (Ch.3). It strikes me, however, that this conception of the rule of law ought not to be “stretched” (to use Konstadinides’s term) too far. Konstadinides may himself do so: he claims that it “follows” from the fact that EU law has enriched UK law with rights that “the quality of the rule of law would be negatively affected when the UK decides to leave the EU due to the effect of such departure upon … EU-conferred rights” (p.27). Whatever one’s views on Brexit—and the consequences thereof—to claim that the very essence of the rule of law is thereby necessarily infringed as a result is probably a stretch too far.

The second theme—closely connected to the first—is the *mode* of the aforementioned evolution. The development of the EU rule of law’s application in practice has been spearheaded not just by legislative development (e.g. the Charter), but primarily by the CJEU in well known cases beginning with *Les Verts* and developed thereafter, most recently in C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (decided after publication of the monograph). The role of the CJEU in this development and its utilisation of the EU rule of law is not without critics, a theme explored in Ch.4 rehearsing the well-trodden criticisms of, for example, the restrictive test for individual standing in direct actions. As Konstadinides states, the EU has a “newly-usurped rule-of-law guardian role” (p.3) and the CJEU plays a “pivotal role” in fulfilling that function (p.30). Whether that is desirable is a somewhat evolving matter open for further exploration, as evidenced by the difference in approaches to the situations in Hungary and Poland (and the differences between the art.7 TEU and art.258 TFEU procedures).

The third theme is that of the tensions and contradictions within what the author calls “the EU rule of law” (p.15). This is evidenced across the monograph by various examples. First, as discussed in Ch.5, the gradual formulisation and judicialisation of the EU rule of law (especially with regard to holding EU institutions to account), compared with the increasing use of soft law and political means to promote the rule of law at the same time (particularly in relation to the Member States’ adherence to the rule of law). Second, the asymmetry between the use of the rule of law internally in the EU, and the external standards settings in the EU’s external relations. Third, the “double standards” in the rule of law’s application (p.6): as Konstadinides acknowledges, “the EU institutions” acts tend to be less prone to review compared to those of the Member States”. Finally, there is an inherent tension between the EU rule of law being located in the concept “as it is commonly understood in the Member States and charges them with its promotion” (p.1), against the “EU offer[ing] a dynamic way of extending the rule of law principles beyond the strict bounds of the nation state” (p.1). This has created a “somewhat cryptic” (p.101) understanding of the EU rule of law such that Konstadinides is surely right to opine that “the adaptation of the rule of law to the supranational level is a work in progress” (p.101). To end where this review began—the rule of law within the EU is a work in progress which is under strain. Anyone interested in that work in progress (or, indeed, examining or resolving those strains) would be well served by reading Konstadinides’ contribution to the debate.

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Opinion

The Case for a More Ready Resort to Derogations From the ECHR in the Current “War On Terror”

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Comparative law; Deprivation of citizenship; Derogations; Detention; EU law; France; Human rights; Prevention of terrorism; Terrorism prevention and investigation measures; Turkey

Abstract

Over the last four to five years the terrorist threat faced by the contracting states of the European Convention on Human Rights (ECHR) has intensified and become more widespread. The threat has come to a significant extent from their own citizens, and since suspect nationals usually cannot be deported, it might have been expected that detention or control measures, requiring derogations under art.15 of the ECHR, would have been put in place. It is therefore of interest to note that very few derogations have been sought, despite the significant rise in recent terrorist activity. This article considers why derogations have not played a pivotal role in the current “war on terror”, and connects the answer to some of the advantages of relying on derogations as opposed to exploring alternative ways of evading the ECHR guarantees. It argues that derogations are not currently playing the role envisaged for them by the founders of the ECHR, and that there is a case for resorting to reliance on them more readily in the current situation.

1. Introduction

Over the last four to five years the terrorist threat faced by the contracting states of the ECHR has intensified and become more widespread. The threat has come to a significant extent from their own citizens, whether from the far right or from jihadist Islamist groups. Since suspect nationals usually cannot be deported, it might have been expected that detention or control measures, requiring derogations under art.15 of the ECHR, would have been put in place in a number of the states. It is therefore of interest to note that very few derogations have been sought, despite the significant rise in recent terrorist activity. At present, only one derogation is in place in the contracting states, i.e. Turkey.

This article considers why derogations have not played a pivotal role in the current “war on terror”, and connects the answer to some of the advantages of relying on derogations as opposed to exploring alternative ways of evading the ECHR guarantees. It argues that derogations are not currently playing the role envisaged for them by the founders of the ECHR, and that there is a case for resorting to reliance on them more readily in the current situation.

2. Methods of evading or minimising ECHR guarantees absent a derogation

The threat from ISIS-supporting nationals and from the far-right in ECHR contracting states has led them to consider and introduce an increasing array of counter-terror measures, including non-trial-based measures, creating tensions with human rights norms. If the terrorism threat comes from a state's own citizens, they have to be retained within its borders (with some exceptions), prompting the search for counter-terror measures that can be used to control their activities. But such measures may come into conflict with the ECHR guarantees, in particular that of the right to liberty under art.5. If no derogation from art.5 or other derogable articles is sought, other methods of evading their strictures may be explored.

One such method takes the form of liberty-invading non-trial-based executive measures. Clearly, such measures tend to be in tension with domestic and international human rights law, but they have often been presented as reconcilable with them, via downgrading recalibrations of human rights, as was necessitated by control orders, and similar measures, which have recently spread from the UK to other contracting states. The UK was the first European state to introduce such measures, but recently, as pointed out by Amnesty International in a report concerning counter-terror measures in 14 European countries,¹ a number of other Member States have followed suit, or are about to do so. The report found that the adoption of various legislative measures has resulted in a downgrading of safeguards for rights to privacy, expression and liberty across Europe, disproportionate to the terrorist threat.² The report noted that "In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law" contrary to the temporarily and operationally limited understanding of derogations in the context of the ECHR and other international human rights instruments. The report highlighted the specific issue of control orders and related measures,³ the use of citizen-stripping measures, and measures that temporarily exclude suspected foreign fighters from the country, mentioned below.⁴

As is well known, in the UK after the decision in *A v SSHD*,⁵ a further non-trial-based measure emerged unaccompanied by a derogation in the form of control orders applicable to suspect nationals and non-nationals alike under the Prevention of Terrorism Act 2005 (PTA). Control orders, and the measure that replaced them in the UK in 2011—Terrorism Prevention and Investigation Orders (TPIMs)—are non-trial-based executive measures which have provided the model for the introduction of such measures in a number of the ECHR contracting states in Europe. The 2017 Amnesty report criticised "the regional trend [in Europe] of using such measures instead of charging and prosecuting people in the criminal justice system".⁶ In the UK they are imposed by the Home Secretary, with court review, on a low standard of proof and enable individuals to be subjected to significant restrictions on liberty, including house detention, but not to imprisonment. Measures on the control orders model rely on targeting terrorist suspects to curtail their liberty without the need for a criminal trial, by imposing specific restrictions on them, related to the particular types of activity it is thought that they might engage in (due to previous behaviour), with the aim of preventing future terrorist activity before it occurs.

Control orders as non-trial-based counter-terror measures were designed to approach or possibly overstep the limits of human rights law, in particular of the substantive rights to liberty under art.5 of the ECHR, to private life under art.8 and to a fair trial under art.6. The courts were impliedly required to reinterpret art.5 in a minimising fashion in relation to the content of control orders and to do the same in respect of art.6 in respect of the process of reviewing them. Minimising human rights via reinterpretation,

¹ Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (17 January 2017), available at <https://www.amnesty.org/en/documents/eur01/5342/2017/en/> [Accessed 1 August 2018].

² Amnesty International, *Europe: Dangerously disproportionate*, p.19.

³ Amnesty International, *Europe: Dangerously disproportionate*, pp.48–56.

⁴ Amnesty International, *Europe: Dangerously disproportionate*, pp.62–63.

⁵ *A v SSHD* (2004) UKHL 56.

⁶ Amnesty International, *Europe: Dangerously disproportionate*, p.48.

rather than openly departing from them via a derogation, implies that a re-balancing between societal needs and individual rights *should* occur, in effect emptying the right of part of its content.

But in response the courts relied on arts 5 and 6 of the ECHR to bring the control orders scheme into closer compliance with their demands, meaning that the scheme itself became, in various respects, less repressive. However, the courts also partially acquiesced in the notion of finding that the ECHR could accommodate the scheme by accepting somewhat recalibrated versions of arts 5 and 6. Thus reconciliation with human rights law was achieved by relying on a degree of recalibration of the rights, although not of the extensive nature demanded by the initial iteration of the scheme. In other states, schemes on the control orders model are being introduced without being covered by a derogation. So it is worth considering whether such schemes do necessitate a derogation, due to the damage done to certain Strasbourg concepts if they are introduced and operated without one.

A further means of evading the ECHR guarantees arises via a citizenship-deprivation order. Reliance on citizenship deprivation to protect security is currently being introduced and explored in a range of democracies, including the ECHR-contracting states. If a terrorist suspect is stripped of citizenship and deported to a non-ECHR state (or is already in that state when the citizenship-deprivation occurs) he or she cannot—or is less likely to be able to—rely on the ECHR against the depriving state. Use of citizenship-stripping has become much more prevalent in Europe (and globally) recently as an aspect of the escalating “war on terror” and offers another means of evading ECHR safeguards without seeking a derogation.

But states have not sought to issue citizen deprivation orders against mono-nationals who are suspected terrorists even when facing an influx of foreign terrorist fighter returnees, and even in the face of the terrorist attacks and plots in Europe in 2015–2018. In the UK, citizenship can be stripped from a national if his actions are “seriously prejudicial to the vital interests of the UK”, and he is a dual national, or “the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory” under the British Nationality Act 1981.⁷ Therefore, persons covered by those provisions can be stripped of citizenship and have their passports withdrawn while inside or outside the UK.

In France, the Constitutional Reform Bill 2016 considered measures for removing citizenship from French mono-nationals who were convicted as terrorists in the wake of the 2015 Paris attacks. While a clear majority of MPs in the lower House of Parliament approved the measures, they were ultimately abandoned. Dual nationals convicted on terror charges in Belgium face losing their Belgian citizenship, while Bulgaria, Denmark, Macedonia, the Netherlands, Romania and Spain have similar laws.

The UK has also introduced temporary exclusion orders (TEOs) under the Counter-terrorism and Security Act 2015, which reportedly have already been used, although sparingly. They operate on the basis that while the TEO subject is outside the UK, he or she is outside the UK’s ECHR jurisdictional competence. Therefore, if that position is correct, the state which has control over the suspect at the time when the TEO is imposed, not the UK, is responsible for any violations of the ECHR that occur.

It is arguable that a reluctance to seek to rely on a derogation may have prompted an exploration of these other methods of evading the ECHR—which in some instances would also allow evasion of non-derogable rights. If so, that would support the case for resort to derogations more readily, the point pursued further below.

⁷ Section 40(4A), (s.4A(c)) after amendment by the Immigration Act 2014 s.66).

3. The contrasting role of derogations in the UK, France and Turkey in the “war on terror”

For the purposes of the argument being put forward in this article, it is argued that some lessons can be learnt from the use of derogations in the UK, France and Turkey in the current “war on terror”.

As is well known, in the UK, immediately post-9/11, reconciliation between reliance on a non-trial-based measure and human rights law was sought by use of a derogation from art.5 of the ECHR in 2001. That reconciliation failed since detention without trial under Part 4 of the Anti-Terrorism Crime and Security Act 2001 (ACTSA) for non-national terrorist suspects was abandoned after the House of Lords invalidated the derogation in *A v United Kingdom* on grounds of proportionality, and the Strasbourg Court later confirmed that finding.

In *A v United Kingdom*,⁸ the first test under art.15 was found to be satisfied—it was accepted, conceding a wide margin of appreciation to the state, that an emergency had been in being. But the Strasbourg Court then went on to consider whether the Part 4 measures had been strictly required by the exigencies of the situation. The Court reiterated that when it comes to consider a derogation under art.15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency, but stated that it was ultimately for the Court to rule whether the measures were “strictly required”. The Court found that it had not been provided with any evidence which could persuade it to depart from the conclusion of the House of Lords that the difference in treatment between suspect nationals and non-nationals was unjustified, so the measures were not found to be strictly required by the exigencies of the situation.

The derogation relied on by France in 2015 may be contrasted with the one in the UK on a number of grounds—it did not create discrimination on grounds of nationality, it was introduced in the wake of terrorist attacks on French soil, and it was abandoned by the government after two years. France instituted a number of emergency measures (*etat d’urgence*) in 2015 after the Paris attacks accompanied by a derogation under art.15 of the ECHR. The Constitutional Reform Bill (to create changes to arts 16 and 36) came before the Senate in France on 10 February 2016 and a clear majority of MPs in the lower House of Parliament approved the measures. They were intended to enshrine the state of emergency powers into the constitution, allowing a government to call on the powers in a time of crisis. The expanded emergency powers allowed the government to: impose immediate house arrest without authorisation from a judge, if persons were considered a risk; impose traffic restrictions, and prohibitions on public assembly; order closure of public spaces; requisition property; prohibit entry into or residence of certain persons; conduct searches without a judicial warrant and seize any computer files found; and to block websites deemed to glorify terrorism, without prior judicial authorisation. These powers created interferences with the rights to liberty, security, freedom of movement, privacy, and freedoms of association and expression and so required the derogation under art.15. The length of the state of emergency was criticised by Amnesty International, but France eventually abandoned the derogation on 1 November 2017.

Turkey’s recent reliance on a derogation contrasts strongly with that of France in a range of respects. A group of members of the Turkish armed forces attempted to seize power in Istanbul on 15–16 July 2016. The attempted coup involved soldiers in an attack on several key state buildings, including Parliament and the Presidential compound, and the Chief of General Staff was captured and taken as a hostage.⁹ It was reported that more than 300 people were killed during the coup and 2,500 people were injured. The Turkish government alleged that the coup attempt was linked to Fetullah Gülen and allegedly master-minded by the Gulenist terrorist group. On 21 July 2016 the government declared a national state of emergency pursuant to art.120 of the Turkish Constitution of 1982 to last for three months, which has subsequently been extended. Subsequently, Turkey formally notified the Council of Europe that it intended to derogate

⁸ *A v United Kingdom* (2009) 49 E.H.R.R. 29.

⁹ *Mehmet Hasan Altan v Turkey* (App. No.13237/17), judgment of 20 March 2018 at [15].

from the ECHR under art.15 but, unusually, no specific measure was identified in the notice, such as detention without trial, and no article of the Convention was identified as having been derogated from.¹⁰

In two cases in 2018, *Mehmet* and *Sahin v Turkey*¹¹ the Strasbourg Court found that “the attempted military coup and its aftermath have posed severe dangers to the democratic constitutional order and human rights, amounting to a threat to the life of the nation” and, noting the broad margin of appreciation accorded to the state in relation to the judgement that such a threat existed, accepted that the derogation was relevant to its assessment of the merits of the applicant’s complaint.¹² The Court in *Mehmet* and in *Sahin* reaffirmed the approach to the margin of appreciation and the stance taken as to the question of whether the measures taken were “strictly required” in *A v United Kingdom*. *Mehmet* and *Sahin* were both journalists who were critical of the government. Both applicants were subject to criminal proceedings on the basis of contravention of art.309 of the Criminal Code—attempting to overthrow the constitutional order—due to their alleged connections and sympathies with the Gulenist movement, despite there being no evidence linking them to the coup attempt, or to active participation in the movement. *Mehmet* had been held in pre-trial detention for over a year prior to being sentenced to life imprisonment (subject to ongoing appeals) and *Sahin* had been held for a similar period, although his trial had yet to be heard at the time of the Court judgment. Both *Mehmet* and *Sahin* involved claims of compensation for a lengthy period of pre-trial detention. The Turkish Constitutional Court, taking a stance similar to that of the House of Lords in the UK in *A*, had also accepted that there was a “public emergency” within the terms of art.15, but had also gone on to find that that the measures were not strictly required by the exigencies of the situation. Since the derogation was found to be invalid domestically, a violation of the applicants’ art.5(1) rights was found in both cases.

The European Court of Human Rights had regard to these findings. Unlike *A v United Kingdom*, however, in which the UK’s derogation referred to specific measures of pre-trial detention, in *Mehmet* and *Sahin* the derogation did not refer to such measures. Another crucial distinction is that in *Mehmet* and *Sahin* there was limited evidence that the two applicants had had any involvement in terrorist activity, and therefore the Court found that the pre-trial detention was not “lawful”, nor effected “in accordance with a procedure prescribed by law” due to the lack of reasonable suspicion, and thus could not “be said to have been strictly required by the exigencies of the situation”.¹³ So the derogation was *not* found to justify the treatment of the applicants in *Sahin* or *Mehmet*, as the measures taken were not “strictly required by the exigencies of the situation”. The Court thus found violations of art.5. In this regard the European Court agreed with the Constitutional Court’s finding in relation to art.5(1) that “if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless”.¹⁴

In *Mehmet* and in *Sahin* the European Court of Human Rights also considered the question of whether the interference with the applicants’ art.10 (freedom of expression) rights was justified as a measure “strictly necessary” due to the exigencies of the situation. This issue was raised because the imposition of pre-trial detention had been linked explicitly to both applicants’ critical statements about the government in relation to the events leading up to and in response to the coup. The Court considered that:

“... even in a state of emergency—which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights ... the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the

¹⁰ *Mehmet* (App. No.13237/17) at [81].

¹¹ *Sahin Alpay v Turkey* (App. No.16538/17), judgment of 20 March 2018.

¹² *Mehmet* (App. No.13237/17) at [92]; *Sahin* (App. No.16538/17) at [76].

¹³ *Mehmet* (App. No.13237/17) at [140]; *Sahin* (App. No.16538/17) at [119].

¹⁴ *Mehmet* (App. No.13237/17) at [36]; *Sahin* (App. No.16538/17) at [32].

threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.”¹⁵

The Court observed that detention of journalists in part for publication of articles and providing commentary created a “chilling effect” on the press. The Court therefore found a violation of art.10 in both cases. The Court awarded non-pecuniary compensation to the victims due to the lack of evidence that either applicant was associated with terrorism or otherwise with violent opposition to the state. The applicants in *Mehmet* and *Sahin* were granted €21,500 in non-pecuniary damages.

It is clear that the actions taken in Turkey, including arresting and imprisoning thousands of academics, civil servants and journalists, could not be covered by a derogation from arts 5 or 10, as the Strasbourg Court found in the 2018 cases considered, because they are clearly disproportionate to the threat in question. So it appears that Turkey is no longer adhering to the ECHR in a range of respects, and although it has openly declared that that is the case via the derogation, its engagement with the demands of art.15, and of the ECHR in general, may be viewed as a tokenistic one. The situation is precisely the one that art.15 was designed to avoid. So while the vast majority of the ECHR-contracting states have not sought a derogation in the face of the “war on terror”, the only derogation currently in existence in a contracting state relates instead to an attempted internal coup and shows little allegiance to ECHR values.

4. Why have states largely avoided reliance on derogations?

If further states had sought derogations in the last five years from art.5 to cover detention without trial, or to introduce lengthy periods of house arrest likely to create a “deprivation of liberty”, the Strasbourg Court would have been likely to uphold them, provided the measures were compatible with the state’s other international legal obligations, depending on the precise measures introduced, given the relative ease with which it is possible to satisfy the jurisprudence governing the tests under art.15. The Court has tended to defer to the state’s judgment as to the existence of a state of emergency (the first question under art.15). Initially it appeared, as evidenced in certain decisions, such as *Brannigan v United Kingdom*,¹⁶ that the Court would take the view that the margin of appreciation conceded would not differ in respect of the second question regarding proportionality. So the margin of appreciation conceded at Strasbourg on the “emergency” point meant that it was hard to challenge the state’s view as to the measures needed to combat the threat, and in most cases, until recently, once the emergency point was conceded, so was the point as to the measures needed to combat the emergency. But in more recent cases—*Aksoy v Turkey*¹⁷ and *A v United Kingdom*—a change in that stance became apparent and the margin appears to have narrowed at the second step, enabling the Court to come to a judgment differing from that of the Member State. That stance was then confirmed in *Sahin Alpay v Turkey* and *Mehmet Hasan Altan v Turkey* in 2018. The Court is showing a greater determination to scrutinise the measures taken; it is subjecting them to a more intensive review, having reduced the margin conceded on this issue. A divide between the width of the margin conceded as to making a determination as to an “emergency” and the margin conceded regarding the proportionality analysis is apparent.

It is possible that the reluctance of the contracting states to seek derogations from the ECHR post 9/11, even in the face of the increase in terrorist activity in Europe in 2015–2018, may have been influenced by the diminished deference shown in the case of *A v United Kingdom* (and perhaps to a lesser extent by that of *Aksoy v Turkey*, in which the measures also failed the proportionality test). That stance of the Strasbourg Court, evident in *A v United Kingdom* in 2004, and its counterpart decision at Strasbourg in 2010, may have sent a signal to the other states that use of derogations can be risky and—since they may

¹⁵ *Mehmet* (App. No.13237/17) at [210]; *Sahin* (App. No.16538/17) at [180].

¹⁶ *Brannigan v United Kingdom* (1994) 17 E.H.R.R. 539.

¹⁷ *Aksoy v Turkey* (1997) 23 E.H.R.R. 553.

be invalidated—de-stabilising to counter-terror efforts. If, combined with reluctance to rely on a derogation, other methods of evading or minimising the ECHR guarantees are available, the basis for seeking a derogation could appear to be undermined. Clearly, that suggestion must be treated with caution since if no derogation is in place, counter-terror measures can be tested directly against the standards maintained under the relevant ECHR guarantees, which can also be de-stabilising to counter-terror efforts. But the perception that derogations are of value to the Member States in aiding in combatting terrorism appears to have undergone some revision, and it would be strange if that was not connected to the recent adoption of stricter scrutiny of proportionality under art.15 at Strasbourg.

A further reason for a reluctance to seek a derogation in the Member States may be due to fear of reputational damage and of handing a propaganda victory to ISIS and similar groups. If the “war on terror” relies on maintenance of a moral difference between a state and terrorist groups that threaten it, then an announcement that human rights are to be partially abandoned may appear to fail to aid that enterprise. The risk that a derogation might be invalidated would add a further concern: unsuccessful reliance on a derogation, as found in *A v United Kingdom*, would create even greater reputational damage.

5. The case for resorting to derogations more readily

Although the risk of terror attacks may be overstated by governments and the media, and the human rights of suspects can be portrayed as needlessly interfering with a state’s ability to combat terrorism, that has not led in the last five years to a rush in most of the contracting states to deploy derogations to introduce the most draconian measures. The existence of a state of emergency is a necessary precondition for derogation—it does not mandate it, and a state which seeks to adhere to the Convention, despite the fact that it could probably defend a derogation at Strasbourg, may be said to deserve credit for doing so. However, if in the absence of a derogation other methods of evading the ECHR are resorted to, the option of openly declaring that certain ECHR standards are not being maintained, on a temporary basis, may create less damage to human rights in the long run. In other words, if art.15 is relied on in a manner that takes its demands seriously, and with a view to returning to normal human rights standards as quickly as possible, as was arguably the case in France (and reiterated in *Mehmet* and in *Sahin*), resort to a derogation may have advantages over more stealthy departures from rights’ standards.

So it is argued that current counter-terrorism debate needs to consider more openly the impact of non-trial-based liberty-invading measures as one aspect of the solution to the current terrorist threat in order to question whether there is a case for openly seeking a derogation to protect such measures. It should be asked whether, given the principles underlying the current conception of international human rights law, the cost of relying on such measures without a derogation from art.5 is out of proportion to their value, since in particular they tend to lead to recalibration of the concept of “deprivation of liberty”. There is a case for contending that such measures should be covered by a derogation, which also requires that they should be non-discriminatory and proportionate to the specific threat emanating from members and supporters of ISIS and similar groups, as well as from far-right secular groups. In general, reliance on a derogation is more transparent than relying on the other methods considered here of reconciling such measures with human rights law, and less likely to lead to normalisation of such measures. A derogation must be openly declared and therefore is less insidious in eroding rights-adherence than the stealthy avoidance of human rights laws via recalibrations of rights or by seeking to place suspects outside the area of a state’s jurisdictional responsibility.

Use of a derogation would also show respect for the mechanisms that international human rights law has provided for crisis situations, for use even against a state’s own citizens. Availability of derogations under the ECHR (and other international human rights’ instruments) means that states are encouraged, even when facing crisis situations, to remain within the ECHR system rather than considering withdrawal.

But the derogation is still policed by the Court, and, as seen in *Aksoy, A v United Kingdom, Mehmet and Sahin*, is not always accepted.

Reliance on derogations when a state is or perceives itself to be in a state of emergency arguably means that the actions of the state still retain legitimacy (including satisfying the needs of transparency) since it can only derogate to the extent, and for the period of time, that will satisfy the demands of proportionality under art.15, and that judgment is likely ultimately to be made by the Strasbourg Court. If a derogation was continued after the point when the state of emergency had diminished, those demands would not continue to be satisfied. But reliance on derogations means adhering to transparency and proportionality as demanded by art.15—the converse of the current position Turkey appears to be in in relation to art.15 and the ECHR in general. Turkey has purported to remain within the Convention system by relying on a derogation, but the connection between the emergency caused by the attempted military coup and the widespread arrest and detention of journalists, academics and others apparently linked to Gulenism is not apparent. Even if it was apparent, such arrests would not be viewed as a proportionate response to the emergency, while the purported derogation appeared to be intended to obscure rather than reveal adherence to the ECHR.

6. Conclusions

Despite the advantages of the use of derogations, this piece has explored the question why, in the face of the current and increasing terrorist threat in Europe, derogations have not on the whole been sought, so they have not played a pivotal role in the “war on terror” in Europe. As discussed, reliance on evasion or recalibration of the ECHR guarantees may lead to protracted court action, continued tension with human rights law and an insidious undermining of respect for such law in the UK and elsewhere. Thus, art.15 is not fulfilling the role it was originally intended to have, since it is either largely being sidelined in the “war on terror”, or misused as in Turkey at the present time.

So this article has put the case for the open use of derogations as opposed to the use of more covert methods of evading the impact of the ECHR. It acknowledges that so doing could encourage the use of more repressive measures (so long as the demands of proportionality were met) and would not necessarily inhibit states from embracing the use of measures such as citizenship-stripping, but at the least it asks that debate as to the role of art.15 in the current situation, and in future, should be initiated.

Point of View

Brexit, Human Rights and Self-determination—a Perfect Storm in the British Crown Dependencies and Overseas Territories?

Susie Alegre*

Brexit; British overseas territories; Constitutional law; Crown dependencies; European Development Fund; European Union; Human rights; Self-determination

As the UK tears itself apart over Brexit, scrapping the human rights protections in the EU Charter and limiting the powers of Parliament in a bid to “take back control,” we should not forget that the ripples of Brexit reach far beyond the shores of Britain. The UK is responsible for the international obligations of three Crown Dependencies and 14 Overseas Territories (CDOTs) around the world. Their citizens are all British but, except for Gibraltar, because they have never been part of the European Union, they were excluded from voting in the referendum despite the impact the result would have on them.

Each CDOT is unique in its historical, geographical, social and cultural make-up and this has influenced the different ways they have developed their relationships with the UK and Europe. Some rely on international arrangements to function as financial centres or to sell their produce into the European Union, others rely on UK and European development aid to help keep them sustainable. Some are geographically European like the Isle of Man; the Channel Islands; Akrotiri and Dehekelia; and Gibraltar. Others are far from Europe in the Caribbean, or isolated in the Pacific and South Atlantic with complex historical identities and interests. It is impossible to generalise about the CDOTs, but one thing they do have in common is that, through Brexit, they have lost their voice.

The Overseas Territories are, in many ways, the last remnants of Britain’s imperial past. Those with permanent resident populations are classified as “non-self-governing territories” for the purposes of the UN Charter¹ and the Special Committee on Decolonisation². The UK has assumed the responsibility for these territories recognising

“the principle that the interests of the inhabitants of these territories are paramount, and accept[ing] as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement,”³

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¹ Charter of the *United Nations* (UN Charter), Ch. XI, United Nations, <http://www.un.org/en/sections/un-charter/chapter-xi/index.html> [Accessed 1 August 2018].

² *United Nations* and Decolonization, United Nations, <http://www.un.org/en/decolonization/nonsselfgovterritories.shtml> [Accessed 1 August 2018].

³ UN Charter, art.73, *United Nations*, <http://www.un.org/en/sections/un-charter/chapter-xi/index.html> [Accessed 1 August 2018].

The UK's relationship with the Crown Dependencies of the Isle of Man and the Channel Islands derives from historical links to the Crown rather than to Britain's colonial past. But they have a significant amount of independence internally and in recent years, the UK has supported the development of their international identity. In a framework for developing the international identity of the Isle of Man⁴ signed in 2007 the UK committed to not acting internationally on behalf of the Island without prior consultation and recognised, in particular, that the interests of the Island may differ from the interests of the UK in relation to the EU.

Gibraltarians were able to vote in the referendum and voted over 96% in favour of remaining in the EU—a reflection of the importance of the EU to their society and their livelihoods. Shortly after the vote, the Chief Minister of Gibraltar said that a hard Brexit was an “existential threat to Gibraltar’s economy”⁵. The fate of the thousands of workers who cross the border with Spain on a daily basis and their contribution to life on the rock still remains unclear.

For those in Overseas Territories who did not get to vote, the impact of Brexit on their rights and their ability to sustain themselves may be equally dramatic. The Falkland Islands have seen new threats to their security as a result of Brexit with Argentina sensing that Britain may lose the support of the European Union for its control of the islands.⁶ Their fishing industry, which accounts for 41% of their economy and two-thirds of the corporation tax they collect, relies almost entirely on tariff free access to the EU market with 94% of their products being sold in the EU.⁷ Other territories that rely on aid from the EU and the UK to sustain themselves and provide basic services like health and social care to their populations such as St Helena, Montserrat and Pitcairn will see their aid budgets cut significantly when they are no longer eligible for EU development aid as overseas countries and territories of the EU. Under the 11th European Development Fund British Overseas Territories will receive a total of 76.8 million Euros until 2020. For small communities development funding may be crucial for their continued viability. After Brexit the special relationship will be broken and it remains to be seen how the UK will plug the financial gap to ensure it fulfils its obligations to guarantee the economic, social and cultural rights of its citizens in those territories.

And yet, the interests of the CDOTs were not taken into account in the decision to hold a referendum on UK membership of the EU despite the obvious impact it would have on them. This is not just a question of politics; it is an issue that will fundamentally affect their rights, including the economic, social and cultural rights, of people in the CDOTs in some ways more acutely than it will those in the UK. The scale of small island economies means that they are more vulnerable to shocks and less able to diversify. Their Governments understand this, but their input has been minimal.

The right to self-determination is a core principle of international law arising out of customary international law and recognised in the United Nations Charter⁸ and the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights.⁹ It is the right of all peoples to define their destiny in the international order and it has increasingly been recognised as including “internal” self-determination and intra-State relations.

The peoples of the British CDOTs have their own governments and the UK has a responsibility to support them in the development of their right to self-determination. But while the UK has dedicated time and effort to supporting the internal constitutional development of the OTs with the introduction in recent

⁴ Statement of intent agreed on 11 January 2006, the Chief Minister of the Isle of Man and the UK Secretary of State for Constitutional Affairs, <https://www.gov.im/media/622895/iominternationalidentityframework.pdf> [Accessed 1 August 2018].

⁵ A. McSmith, “Gibraltar faces ‘existential threat’ to its economy if there’s a ‘hard Brexit’ deal, its chief minister warns” (20 August 2016), *Independent*, <https://www.independent.co.uk/news/uk/gibraltar-existential-threat-economy-hard-brexit-deal-eu-fabian-picardo-a7201211.html> [Accessed 1 August 2018].

⁶ R-J Bartunek, “Argentina eyes Brexit advantage in Falklands dispute”, (20 April 2017), *Reuters.com*, <https://www.reuters.com/article/us-britain-eu-argentina-falklands-idUSKBN17M2AW> [Accessed 1 August 2018].

⁷ J Stone, “Brexit: Falkland Islands government sounds alarm on leaving single market” (12 May 2018), *Independent*, <https://www.independent.co.uk/news/uk/politics/brexit-falklands-islands-single-market-trade-eu-fishing-loligo-squid-government-a8347696.html> [Accessed 1 August 2018].

⁸ See UN Charter art.1(2) and art.55.

⁹ Identical arts 1(3) in the ICCPR and the ICESCR.

years of new constitutions enshrining human rights domestically in several OTs such as the Cayman Islands and St Helena, there has been very little development of the right to self-determination in terms of the territories' ability to engage internationally and define their own destiny while continuing to be British.

In past decades, some OTs like the Falkland Islands and Gibraltar have voted overwhelmingly to remain British in domestic referenda on independence. But for some, remaining British without the benefits of EU citizenship and special access to the EU, may be a very different proposition. And Brexit is not the only issue that has moved the right to self-determination up the political agenda in CDOTs.

In May of this year Westminster passed the Sanctions and Anti-Money Laundering Act 2018 which gave the British Government powers to require Overseas Territories to introduce publicly accessible registers of the beneficial ownership of companies if they have failed to do so by the end of 2020.¹⁰ Interestingly, these powers applied only to Overseas Territories, not Crown Dependencies. It has been argued that this was due to the different constitutional relationships the UK has with its Crown Dependencies which would make it impossible to legislate in this way for them without sparking a constitutional crisis.¹¹ However, in those Overseas Territories in the Caribbean most acutely affected, there have been allegations that this distinction has more to do with the fact that the Crown Dependencies are European than any real constitutional difference.¹²

Douglas Parnell, the Chairman of the ruling party in the Turks and Caicos Islands said

“.... this action highlights for us as a people the attitude towards us. If it suits their interests, an Order in Council is easily passed. Our constitution is an Order in Council and could just as easily be changed if there was the political will in the UK. It is time that we seriously consider a different, more empowering relationship with the UK. This should be seen for what it is – a constitutional smack down by our overseers ...”¹³

And the Deputy Prime Minister of the British Virgin Islands (BVI), Dr Kedrick Pickering, addressing a crowd protesting about the legislation said BVI was “declaring war” on the UK, spoke of the need to discuss divorce from the UK and called for experts from across the world to consider new constitutional options for the BVI separate from the UK.¹⁴ Their concerns were reflected in the recent Joint Ministerial Council meeting in London where the OTs put the question of their constitutional relationship with the UK firmly on the agenda with assertions that the recent action of the “UK Parliament to impose legislation on the OTs was undemocratic, a step backwards and a clear contradiction to UK policy statements and commitments to the OTs and the UN.”¹⁵

For some OTs, this incursion on their sovereignty represents a tipping point. As the benefits of being British become less clear against the backdrop of Brexit, with the loss of EU citizenship and preferential access to EU markets, it seems likely that the constitutional fallout of the decision to leave the EU may not be restricted to relationships between the “home countries” in the UK. The mantra that Brexit would

¹⁰ Section 51 of the Sanctions and Anti-Money Laundering Act 2018

¹¹ See : <https://www.gov.uk/news/2018/may/10/chief-minister-statement-on-uk-sanctions-and-anti-money-laundering-bill-and-beneficial-ownership-registers> [Accessed 1 August 2018]

¹² See : “OECS Urges UK Parliament To Reject Discriminatory Amendment To Anti-Money Laundering Bill” (2 May 2018), Caribbean360, <http://www.caribbean360.com/news/oecs-urges-uk-parliament-to-reject-discriminatory-amendment-proposal-to-anti-money-laundering-bill> and “Overseas territories react to UK legislation requiring public disclosure of beneficial ownership” (3 May 2018), Caribbean News Now, <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/> [Both accessed 12 July 2018].

¹³ Reported in “Overseas territories react to UK legislation requiring public disclosure of beneficial ownership” (3 May 2018), Caribbean News Now, <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/> [Both accessed 12 July 2018].

¹⁴ E Durand “UK put on notice, BVI has ‘declared war’ — Pickering” (25 May 2018), bvinews.com, <http://bvinews.com/new/uk-put-on-notice-bvi-has-declared-war-pickering/> [Accessed 1 August 2018]

¹⁵ Discovermni team, “Premier Romeo Meets with OT and UK Ministers at Pre-JMC in London” (21 June 2018), discovermni.com, <https://discovermni.com/2018/06/21/premier-romeo-meets-with-ot-and-uk-ministers-at-pre-jmc-in-london/> [Accessed 1 August 2018].

allow Britain to “take back control” has shown the people of the British CDOTs how little control they really have within their current constitutional relationships.

While the needs and desires may vary significantly between territories, what is clear is that the UK must pay attention to its obligations under international law to listen to the aspirations of the people in its CDOTs and to ensure their well-being and human rights are protected as a matter of urgency. Brexit may have started with ideas of British sovereignty and exiting the EU, but it may well end with a new constitutional map to guarantee the right to self-determination in the UK and its dependent territories.

Bulletin: European Court of Human Rights and Council of Europe

The Court issued, inter alia, judgments and decisions in the following cases in April–May 2018:

Articles 2, 3, 5, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 6

- *Al-Nashiri v Romania*, finding multiple violations where Romania permitted the CIA to transfer the applicant, a suspected terrorist, onto their territory to be held in a secret detention centre where he was subject to ill-treatment; he was then transferred to a detention centre under US jurisdiction where he is at risk of flagrant violations of art.6 and imposition of the death penalty.

Article 3

- *Karachentsev v Russia*, finding principally that it was degrading for the applicant to be held in a cage when he appeared via videolink for his appeal;
- *Pocasovschi and Mihaila v Moldova and Russia*, finding a breach in respect of the former state where the applicant prisoners were held in conditions without water, power or heating due to supplies being cut by the Transnistrian authorities (“MRT”); the complaints against Russia, in overall control of the “MRT”, were rejected as out of time.

Articles 3, 5, 8 and 13

- *Abu Zubaydah v Lithuania*, finding breaches where Lithuania permitted the CIA to hold the applicant, a suspected terrorist, at a secret detention centre on its territory where he was ill-treated and later transferred to detention within Afghanistan where he was exposed to further ill-treatment.

Article 3 and 8

- *N.T.P. v France*, finding no breach of art.3 arising from the accommodation and support provided to the applicant and her children while waiting to lodge an asylum request.

Articles 3, 8 and 35(1)

- *Khaksar v United Kingdom*, rejecting the complaints of the applicant, who had suffered serious injuries in a bomb incident, about his removal to Afghanistan as he had not raised the issues before the High Court as required by the obligation to exhaust domestic remedies.

Articles 3 and 34

- *A.S. v France*, finding no breach of art.3 due to expelling the applicant to Morocco but finding that the method—serving the decision on the applicant shortly before the expulsion despite it having been taken some time previously—deprived him of the possibility of applying to the Court to suspend the measure.

Article 5(1) and 6(1)

- *Paci v Belgium and Italy*, finding no violations arising out of the conviction and sentencing of the Italian applicant surrendered to the Belgian authorities for trial on arms trafficking offences;

- *Pirozzi v Belgium*, finding no violations arising out of the execution by the Belgian authorities of a European Arrest Warrant to send the applicant to Italy on drug trafficking offences.

Article 5(1) and (4) and Article 18

- *Mammadi v Azerbaijan*, finding that the arrest and detention of the applicant, a civil rights activist, and the lack of judicial review of these measures, was unjustified and disclosed abuse of power by the authorities.

Article 5(3) and (4)

- *Gafa v Malta*, finding a breach where the applicant was held for more than 20 months in pre-trial detention when he was unable to pay the deposit on the bail bond.

Article 6(1)

- *Zubac v Croatia* (Grand Chamber), finding no violation where the Supreme Court refused to admit an appeal, as the value of the claims was below the statutory threshold;
- *Gospodinov v Bulgaria*, finding a lack of impartiality where the court sitting on the applicant's criminal trial was the subject itself to civil claims lodged against it by the applicant;
- *Chim and Przywieczerski v Poland*, finding a violation of the criterion "tribunal established by law" arising out of irregularity in the appointment of the judge in a trial for corruption of state officials, but no violation as regarded allegations as to his independence or impartiality due to comments that he had made to the press or due to his role as advisor to parliament in the drafting of legislation in issue in the case;
- *Ovidian Cristian Stoica v Romania*, finding a breach where the appeal court convicted the applicant, acquitted at first instance, without rehearing the witnesses;
- *Baydar v Netherlands*, finding no violation where the Supreme Court refused a request for preliminary ruling by the ECJ in summary terms;
- *Gulamhussain and Tariq v United Kingdom*, rejecting as inadmissible the applicants' complaints about procedures applicable to the withdrawal of their security clearance, due to alleged associations with those implicated in terrorism, which led to the loss of their posts in the civil service.

Article 6(1) and (3)(a)

- *Uche v Switzerland*, finding violation of art.6(1) due to the failure of the Federal Supreme Court to give a reasoned response to the applicant's complaints about the lack of adversariality in his criminal proceedings but no violation of art.6(3)(a).

Articles 6(1) and (3)(c)

- *Correia de Matos v Portugal* (Grand Chamber), finding no violation where the applicant, a lawyer charged with insulting a judge, was unable to defend himself in the criminal proceedings;
- *Juresa v Croatia*, finding that the Supreme Court's reversal of case-law in a property inheritance case did not disclose a breach of legal certainty;

Article 8

- *Lazoriva v Ukraine*, finding a breach where the wishes of the applicant to adopt her nephew, placed instead with a couple outside the family, were not taken into account;

- *Gulyiyev and Sheina v Russia*, finding a breach where the first applicant, an Azeri citizen, was subject to expulsion and a five-year residence ban, separating him from his wife, the second applicant, who is a Russian citizen, and their three children;
- *Benedik v Slovenia*, finding a breach where police, investigating child pornography, accessed information about the applicant from subscriber information associated to a dynamic IP address without a court order;
- *Lozovyye v Russia*, finding a breach where the authorities did not take steps reasonably available to them to contact the applicants and inform them of the murder of their son;
- *Hoti v Croatia*, finding a violation due to the failure of the authorities to regularise the status of the applicant, a stateless migrant, who had lived many years in Croatia;
- *Ivan Mohamed Hasan v Norway*, finding no violation where the applicant's children were placed in care and adopted after incidents of violence involving the father and courts' finding that the applicant was unable to protect the children;
- *Laurent v France*, finding a breach where a police officer intercepted and read a note passed by a lawyer to his clients, under police escort, in a court building;
- *Gulbahar Yözer and Yusuf Ozer v Turkey*, finding a breach where the authorities confiscated the bodies of the applicants' children, killed by soldiers, to prevent the applicants burying them in the cemetery of their choice.

Article 10

- *Nix v Germany*, rejecting as inadmissible complaints by the applicant about his conviction for posting pictures of Himmler in Nazi uniform on his blog;
- *Ottan v France*, finding a violation, in the context of the trial of a gendarme for killing a young man of foreign origin, where the applicant, a lawyer for the father of the victim was subject to disciplinary sanction for commenting that the acquittal of the gendarme was not surprising given that the jury were all "white";
- *Stomakhin v Russia*, finding a violation where the applicant was convicted for statements in a newsletter about the Chechen conflict which had not gone beyond the limit of acceptable criticism (other statements had been found to incite hatred and violence) and for which he had received the excessive punishment of five years' imprisonment;
- *Unifaun Theatre Productions Limited and Others v Malta*, finding a violation where the authorities banned performance of a play "Stitching" by a Scottish playwright, Antony Nielson, on the grounds of blasphemy, vilification of women and children and the glorification of sexual perversion;
- *Roj TV A/S v Denmark*, rejecting as inadmissible the applicant TV company's complaint about revocation of its license and finding that it could not rely on art.10 due to art.17, in particular since it had been found to have supported and issued propaganda for, a terrorist organisation, namely the PKK.

Article 10 and Article 13

- *Hajibeyli and Aliyev v Azerbaijan*, finding violations arising out of the applicants' complaints that they had not been admitted to the Bar Association because of their critical comments about the state of the legal profession in the country.

Article 11

- *Bektashi Community and Others v the former Yugoslav Republic of Macedonia*, finding a violation arising out of the refusal to maintain the status of the applicant, a religious

association community, and accept a fresh application for registration on the ground that its name and doctrinal sources were identical to an already existing religious association which might cause confusion to believers.

Article 1 of Protocol No. 1

- *Zelenchuk and Tsytsyura v Ukraine*, finding that the absolute ban on sale of agricultural land failed to strike a fair balance between the general interests of the community and the applicant's property rights.

Article 1 of Protocol No. 1 and Article 6

- *Čakarević v Croatia*, finding that requiring the applicant, who was ill and without income, to repay three years of unemployment benefit paid due to a mistake of the authorities imposed an excessive burden on her;
- *Bikić v Croatia*, finding no violation from the refusal to allow the applicant to buy her socially-owned apartment.

Article 1 of Protocol No. 7

- *Ljatifi v the former Yugoslav Republic of Macedonia*, finding that the domestic courts had not properly scrutinised the authorities' decision to expel the applicant, of Serbian origin, on alleged security grounds.

The Court held hearings in the following cases in April–May 2018:

- in *Z.A. and Others v Russia* (Grand Chamber) concerning complaints under arts.3 and 5 by four applicants kept for long periods in the transit zone of Moscow airport;
- in *Ilias and Ahmed v Hungary* (Grand Chamber) concerning complaints under arts 3, 5(1) and (4) and 13 of the Convention by two Bangladeshi nationals concerning their detention in a Hungarian border transit zone and the way in which they were sent back to Serbia placing them at risk of a chain of *refoulement*;
- in *Georgia v Russia (II)* (Grand Chamber) where the applicant state had lodged complaints under arts 2, 3, 5, 8 and 14 and arts 1 and 2 of Protocol No. 1 arising out of the 2008 conflict in South Ossetia.

CPT

From April–May 2018, the CPT made the following visits: a nine-day ad hoc visit to Turkey to inspect psychiatric and social welfare institutions; a nine-day ad hoc visit to Greece to inspect psychiatric institutions and places of detention for aliens; a seven-day ad hoc visit to Lithuania largely to follow up on its earlier findings.

It issued the following reports: its preliminary observations on its April 2018 visit to Greece, noting inter alia the overcrowded and unhygienic conditions at various locations for the detention of aliens; its report on the 2017 visit to Albania, noting inter alia the unacceptable conditions for forensic psychiatric patients; its report on its 2017 visit to Bulgaria, finding inter alia that the conditions of social welfare institutions could be considered as inhuman and degrading; its report on its 2017 visit to Cyprus, highlighting persistent allegations of police brutality and lack of effective investigative follow-up; and its report on the 2017 visit to the "hotspots" for migrants and removal centres in Italy.

Council of Europe

Dunja Mijatović (Bosnia-Herzegovina) was elected as Commissioner for Human Rights. She is the first woman to hold this post.

The Committee of Ministers adopted a recommendation on terrorists acting alone, identifying measures to tackle the problems of returning terrorist fighters and lone wolf attacks (CM/Rec(2018)6).

The Member States adopted the Copenhagen Declaration, identifying principles and measures necessary to strengthen human rights protection and the functioning of the Court in Strasbourg.

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during April–May 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 16, 17, 37 and 52

- *Bayer CropScience v Commission* (T-429/13 and T-451/13), 17 May 2018, misuse of plant protection products led to losses of honeybee colonies, which eventually led to Implementing Regulation 485/2013 which prohibited use and sale of seeds treated with plant protection products that contained specific active substances. Bayer argued that this breached their right to conduct business and the right to property, which was rejected as they remained free to carry on their business despite the Regulation.

Article 21

- *SB v EUIPO* (T-200/71), 3 May 2018, the applicant was a temporary staff member of the European Union Intellectual Property Office (EUIPO) for three years, and her contract was then renewed for a further five. She sought a second renewal to indefinite status, but was rejected. The claim that the EUIPO were discriminating on the grounds of age was rejected, instead the EUIPO was seeking to ensure flexibility through temporary staff contracts, not discriminating on age.

Articles 41, 47, 7 and 17

- *Kaddour v Council* (T-461/16), 31 May 2018, a Syrian businessman in the tobacco and automotive sectors was subject to an arms embargo from the EU and was placed on a list of persons subject to restrictive measures. The applicant sought annulment of this decision, first alleging misuse of powers by continuously including him on the list. This claim was rejected because the decision was based on different evidence, though with the same reasons. The decision was also found to be proportionate.

Article 41

- *Josefsson v Parliament* (T-566/16), 17 May 2018, the applicant was recruited by the Greens/European Free Alliance as a temporary member of staff, but due to a restructure, was served notice. The claim that the applicant's right to be heard was infringed was upheld. The contested decision was annulled.
- *Lufthansa v Commission* (T-712/16), 16 May 2018, 16 May 2018, Lufthansa concluded a bilateral alliance agreement with Scandinavian Airlines System (SAS) and Polskie Linie Lotnicze LOT (LOT), then sought to acquire control of Swiss International Airlines. Lufthansa wanted a waiver of fare commitments for the ZRH-STO and ZRH-WAW routes, which the Commission would only agree to if they modified their codeshare agreements with SAS and LOT. Lufthansa refused, so the Commission refused to grant their waiver. The appellant argued that the Commission made this decision without conducting a serious investigation of the facts and was biased. This claim was rejected.
- *Vincenti v EUIPO* (T-747/16), 23 April 2018, the applicant, an official of the EUIPO suffered an accident at work and took sick leave with a total of more than 12 months in a three-year period. The EUIPO referred his case to the Invalidity Committee which declared him

permanently invalid and suggested he be retired automatically. The EUIPO did not follow this opinion on the grounds that there was not a verification of the lawfulness of the considerations or procedure followed by the Committee. The applicant failed to prove that the EUIPO's statement of reasons pertaining to the Invalidity Committee was inadequate.

Article 42

- *Malta v Commission* (T-653/16), 3 May 2018, Greenpeace sent information to the Commission regarding an irregular shipment of live bluefin tuna from Tunisia to a fish farm in Malta. Greenpeace requested access to various documents regarding a discussion between Malta and the Commission. Malta sought to contest the decision to allow access to Greenpeace of the documents, which was upheld. Regulation 1224/2009 on compliance with common fisheries policy did not undermine the right to access documents disproportionately.

Article 44

- *One of Us v Commission* (T-561/14), 23 April 2018, "One of Us", a European Citizens' Initiative (ECI), was proposed to protect the dignity, right to life and integrity of every human being, particularly the human embryo. Annulment was sought of this ECI's communication, on grounds that the ECI must enjoy a higher degree of judicial protection than the right of petition. This claim was rejected.

Article 47

- *RENV H v Council* (T-271/10), 11 April 2018, a European Union Police Mission (EUPM) was established to follow on from the UN International Police Task Force in Bosnia and Herzegovina. An Italian judge seconded to the EUPM in Sarajevo was then redeployed to Banja Luka. The applicant sought to annul this decision and compensation for harm suffered. The argument was that there was a manifest error of assessment that there was no urgent need the post to be filled. This claim was rejected.

The Court of Justice of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during April–May 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 4

- *MP* (C-353/16), 24 April 2018, the claimant, a Sri Lankan national in the UK sought asylum for fear of prosecution if he returned to Sri Lanka for being a Tamil. This was rejected for not being able to prove that he would be at risk. The claimant appealed, citing serious effects on his mental health, which was rejected again by the UK, arguing art.3 of the ECHR (freedom from torture) was not intended to cover risk of suicide. It was held that if there is a serious risk of committing suicide if he was returned, then he would be eligible for subsidiary protection, and that this was a matter for the national court to determine.

Article 7 and 24

- *KA* (C-82/16), 8 May 2018, in which the applicants were all third-country national family members of Belgian citizens who had not exercised rights to free movement or establishment, and were subject to entry bans. Attempts to challenge the bans all failed. Applications for

residence on grounds of family reunification were not examined because all applicants were subject to entry bans. This national practice was found to be contrary to the right to private and family life and rights of the child. It was held that the right to respect for family life and the child's best interests must be considered.

Article 7

- *K* (C-331/16 and 366/16), 2 May 2018, the claimants, a Croat Bosnian-Herzegovinian and Afghan national both sought asylum in the Netherlands. When Croatia became an EU Member State, the first claimant applied for his entry ban to be lifted. The Netherlands considered that he was an undesirable immigrant and rejected his request on the grounds that he was involved in war crimes and crimes against humanity. The second claimant was also said to be involved in war crimes. It was held that the Member State could not consider that the mere presence of a person with that kind of history automatically justified adoption of measures on grounds of public policy or public security. The Member State must weigh the protection of fundamental interests of society and the right to respect for private and family life.

Article 10

- *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C-426/16), 29 May 2018, concerning a contested decision that only allowed ritual slaughter in the Flemish region of Belgium in approved slaughterhouses for the Muslim Feast of Sacrifice. The claim that this rule restricted the freedom to exercise religion was not upheld.

Articles 16 and 51

- *Consorzio Italian Management e Catania Multiservizi* (C-152/17), 19 April 2018, in which the applicants were awarded contract for services related to cleaning and maintenance of public areas and sought to review the previously agreed price, which review was denied. They sought to annul their original contract but were denied on the basis that their contract price could not be reviewed as it was for "special sectors". It was held that Directive 2004/17 coordinating procurement procedures of the water, energy, transport and postal services sectors was not applicable and therefore the Member State was not implementing EU law under art.51.

Articles 21 and 47

- *Egenberger* (C-414/16), 17 April 2018, the claimant, of no religious denomination, applied for a post offered by Evangelisches Werk, but was not invited to interview. The successful candidate had stated in his church membership that he was Protestant Christian and active in church. His claim was of discrimination on the grounds of religion (or lack thereof). It was held that criteria for selection of a role on the grounds of religion can be justified if it is a genuine, legitimate and justified occupational requirement, which it was in this case. National courts hearing a dispute of this sort are obliged to consider non-discrimination under the Charter and disapply any contrary provisions of national law.

Article 22

- *Azoulay v Parliament* (C-390/17 P), 30 May 2018, the claimants had children registered at schools in Belgium. The cost of this education was reimbursed before 2014/15, but not in 2015/16. The claimants sought to challenge the decision not to reimburse them for these

costs. It was held that, on the right to respect for cultural, religious and linguistic diversity, there were no pleas to which to respond. The claim was rejected.

Article 24

- *A and S* (C-550/16), 12 April 2018, the claimants (daughter of A, a minor at the time, and S) arrived unaccompanied in the Netherlands. Asylum was sought and granted, so an application was then submitted for family reunification for the parents and minor brothers, which was rejected because at the time they had both reached the age of majority. It was held that the claimants were to be considered minors if, when they entered the territory of the Member State, they had not yet reached age of majority.

Article 47

- *Hassan* (C-647/16), 31 May 2018, in which the claimant was arrested in France, but had applied for international protection in Germany, and so a request was submitted to Germany to transfer him back for administrative detention. The claimant challenged this request. It was held that the Dublin III Regulation precludes Member States from submitting requests to another Member State and notifying the affected individual before it is agreed to by the other Member State.
- *Donnellan* (C-34/17), 26 April 2018, an Irish driver of heavy goods vehicles collected 23 pallets of olive oil from a Greek trader. Upon inspection at the port, contraband cigarettes were discovered and the claimant was arrested and imprisoned. He was later released but was charged an administrative penalty that he was not made aware of until it had increased substantially. It was held that, because he was not properly notified of the fine before the request for recovery was made, Ireland could refuse to enforce the request.

European Court of Human Rights

The European Court of Human Rights issued, inter alia, judgments and decisions in the following during April–May 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 47

- *Zubac v Croatia* (App. No.40160/12), judgment of 5 April 2018 (GC), in which the Grand Chamber reversed a Chamber judgment on access to justice. The Croatian Supreme Court had refused to hear an appeal in a property dispute because the value of the dispute was less than the threshold amount. The Grand Chamber held that there had been no violation of art.6(1) of the ECHR.

Articles 47, 48 and 52

- *Correia de Matos v Portugal* (App. No.56402/12), judgment of 4 April 2018 (GC), in relation to the prosecution, for insulting a judge, of a defendant who was a lawyer by training but an auditor by profession. The law did not permit him to conduct his own defence, as it required counsel to be lawyers. It was held that there was no violation of art.6(1) or (3) of the ECHR.

UK appellate courts

The appellate courts in the UK issued, inter alia, judgments and decisions in the following during April–May 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 4, 6 and 18

- *ZN (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1059, in which the Court of Appeal refused to award costs to two asylum seekers. The two had withdrawn their appeals on the basis of a consent order wherein the Secretary of State also withdrew certification of their asylum claims under the Dublin III Regulation. The appellants sought to appeal the refusal to make an order for costs. The Court of Appeal dismissed the appeal on the basis that, although they had arrived at a satisfactory conclusion of their dispute, this was done by agreement with the Secretary of State, and they had not been “successful” on the legal merits of the case.

Article 18

- *Ararso v Secretary of State for the Home Department* [2018] EWCA Civ 845 (24 April 2018), in which a Mr GA was to be returned to Malta under the Dublin II Regulation. It was held by the High Court that the detention of Mr GA was unlawful. The Secretary of State appealed, and the appeal was upheld, with Mr GA’s cross-appeals being dismissed. However, the Court noted that as Mr GA had not been removed to Malta in the requisite period of time, his application for asylum had been reconsidered, and he now held refugee status.

Articles 20 and 21

- *M Najib & Sons Ltd v Crown Prosecution Service* [2018] EWCA Crim 909 (26 April 2018), in which the appellant company is a slaughterhouse operator. Its appeal against a conviction for failure to assist in the taking of samples from animals was upheld as there was no lawful basis for the conviction.

The First Infringements Proceedings within the European System of Human Rights:

Using the Court as the Last Bastion for the Credibility of the Council of Europe

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✉ Azerbaijan; European Court of Human Rights; Infringement; Politics and law

Abstract

The aim of this article is to explore why, in the Ilgar Mammadov v Azerbaijan case, the use of infringements proceedings has been possible for the first time in the history of the organisation. It will show that the identity of the applicant himself, of the state, as well as the political context, have made possible this first use, rather than it being the consequence of a new strategy adopted by the Committee of Ministers. It will conclude that the European Court of Human Rights is being used here as one of the last bastions in defending the credibility of the Council of Europe in the context of the biggest scandal the organisation has ever faced.

For the first time since it was set up in 2010, the Committee of Ministers decided, on 5 December 2017, to launch infringements proceedings against Azerbaijan¹ under art.46(4) of the European Convention on Human Rights (ECHR), due to the authorities' persistent refusal to release Mr Ilgar Mammadov following judgment delivered by the European Court of Human Rights in 2014. Imprisoned since 4 February 2013, the applicant was sentenced to seven years' imprisonment on 17 March 2014 under arts 220.1 (mass disorder) and 315.2 (resistance to or violence against public officials, posing a threat to their life or health) of the criminal code.

The purpose of this article is to explore how it has been possible to launch the infringement proceedings for first time. Does it mean a more offensive and punitive strategy adopted by the Committee of Ministers with regard to the implementation of the European Court's judgments? Rather, this analysis will show that the identity of the applicant himself, of the state, as well as the political context have made possible this first use. It will conclude that the Court is being used here as one of the last bastions in defending the credibility of the Council of Europe, in the context of the biggest scandal the organisation has ever faced.

I. The Ilgar Mammadov case and the refusal of a full compliance by the authorities

The applicant has been detained since 2013 following protests in the town of Ismayilli, and, on 17 March 2014, was condemned by the Sheki Court of Serious Crimes to a seven-year prison sentence because of his conviction of mass disorder and violence against public officials. In a first judgment delivered on 22

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¹ Azerbaijan became the 43rd Member State of the Council of Europe on 25 January 2001.

May 2014, the European Court of Human Rights unanimously concluded violations of arts 5(4), 5(1)c, 6(2) and 5 combined with 18² together, alleging that (at [99]) “... no specific facts or information giving rise to a suspicion justifying the applicant’s arrest were mentioned or produced during the pre-trial proceedings”. The Court also made it clear that it was called to “examine whether the deprivation of the applicant’s liberty during the pre-trial period was justified” (at [100]). The Court ordered the respondent state to pay the applicant €20,000 (the exact amount he had claimed) in respect of non-pecuniary damage, without recommending any other measure.

A. Constant position adopted by the Committee of Ministers

The Committee has always shared the view that:

“The violations found by the Court, in particular that of Article 18 taken in conjunction with Article 5, cast doubt on the merits of the criminal proceedings instituted against the applicant and that it follows that the authorities are required to ensure the applicant’s immediate release and to adopt the other individual measures necessary to erase for him the consequences of the violations.”³

The case has been placed under enhanced supervision because of the complex problem and urgent individual measure. Three regular interim resolutions called for the authorities to release Ilgar Mammadov and adopt general measures using a *crescendo* word register. In the Interim Resolution of March 2015,⁴ the Committee, concerned about the decision of the Supreme Court to postpone sine die its decision, “reiterated with insistence its call to the authorities to ensure without further delay the applicant’s release ...”. In the second interim resolution of 2015⁵ the words are different: the executive body now recalls the obligation of each Member State under art.3 of the Statute of the Council of Europe, “called on the authorities of the Member States and the Secretary General to raise the applicant’s situation with the highest authorities in Azerbaijan in order to get him released”, and “invited the observer States to the Council of Europe and international organisations to do the same”. In the interim resolution adopted in June 2016,⁶ the Committee decided to examine the applicant’s situation at each of its regular and human rights meetings until Ilgar Mammadov is released. It recalled that: “It is intolerable that, in a State subject to the rule of law, a person should continue to be deprived of his liberty on the basis of proceedings engaged, in breach of the Convention, with a view to punishing him for having criticised the government”. It also stated that: “the Committee’s resolve to ensure, with all means available to the Organisation, Azerbaijan’s compliance with its obligations under this judgment”.

On 20 September 2016, the Court communicated the second application brought by Ilgar Mammadov to the government.

B. Partial compliance and arguments used by the Azerbaijani authorities

The Azerbaijani authorities submitted a first action plan on 26 November 2014⁷ (just within the six-month post-judgment time-limit), but the content was quite deceptive, with references only to training sessions and the announcement of the examination of the applicant’s cassation appeal.⁸ More than 26 months after

² “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

³ Council of Europe, CM/Notes/1273/H46-3, 9 December 2016. CM/Notes/1288/H46-2, 1288th DH Meeting, 6–7 June 2017.

⁴ Council of Europe, CM/ResDH(2015)43, 12 March 2015.

⁵ Council of Europe, CM/ResDH(2015)156, Interim Resolution, 24 September 2015.

⁶ Council of Europe, CM/ResDH(2016)144, Interim Resolution, 8 June 2016.

⁷ Council of Europe, DH-DD(2014)1450, 26 November 2014.

⁸ The application was lodged on 14 November 2014 after the Sheki Court of Appeal upheld the judgment of the Court of First Instance on 24 September 2014. The completion of the criminal proceedings on 18 November 2016 before the Supreme Court did not result in the applicant’s release: Council of Europe, CM/Notes/1273/H46-3, 9 December 2016, 1273rd Meeting, analysis of the Secretariat, p.5.

this submission, and one month after a visit by the Secretary General using the art.52 enquiry procedure, a revised action plan was submitted. The updated action plan⁹ mentions a 10 February 2017 executive order by the president of Azerbaijan to prevent arbitrary arrests and “which foresees the elaboration within two months of draft laws notably on: the decriminalisation of certain crimes, in particular in the economic field; a greater recourse to alternatives to imprisonment” and a “wider application of substitution of remainder of imprisonments by lighter punishment, parole and suspended sentence”.¹⁰ Consequently, the Secretariat noted that “the recent adoption of the Presidential Executive Order appears to be a promising development”.¹¹ Furthermore, the government’s refusal to release the applicant is based on two grounds.

First, the Court has neither recommended nor ordered the applicant’s release as it did in other cases. The just satisfaction (€20,000) was paid to the applicant on 25 December 2014 to cover non-pecuniary damage. Nevertheless, the previous practice has shown that such recommendations made by the Court are sporadic and do not follow a well-structured or systematic approach, something which has been criticised. Thus the payment of just satisfaction which was made does not necessarily compensate the whole damage suffered by Ilgar Mammadov.

Secondly, for the authorities:

“The violation of Article 18 taken in conjunction with Article 5 found by the Court concerned the applicant’s arrest and pre-trial detention and they recalled that a second application, concerning the applicant’s conviction, was currently pending before the Court.”¹²

In fact, the Court recently delivered the second *Ilgar Mammadov* judgment¹³ and concluded that a violation of art.6(1) had occurred, as the criminal proceedings did not comply with the guarantees of a fair trial. Once more it is highly regrettable, having in mind the context of the second judgment, that the Chamber only ordered the government to pay €10,000 to the victim.¹⁴ The applicant’s representatives have also omitted to ask the Court to recommend his release in the operative part of the judgment. Yet the chamber has cautiously not referred the issue to the Grand Chamber (although a crucial question on the applicability of arts 18 and 6 combined was raised) probably not to delay Ilgar Mammadov’s release. So far, however, the government’s response has not changed. For the Committee of Ministers, the obligation to release the applicant after the first judgment cannot be disputed and so the executive body would not have seized the Court under art.46(3) of the ECHR to ask the Court to interpret the previous judgment.

Other similar cases, where the Court found a violation of arts 5 and 18 and where the applicant was released, can be called on to serve as good practice for other states. It is crucial to refer here to the *Lutsenko v Ukraine* case where the Court found violations of arts 5 and 18, as the applicant’s detention was aimed at punishing him for publicly disagreeing with accusations against him. Being arrested on 27 December 2010, the applicant was paid €15,000 for non-pecuniary damage on 17 January 2013, more than six months after the Court’s judgment, and he finally benefited from the President’s pardon on 7 April 2013. The Secretary General of the Council of Europe noted that “[i]t follows the spirit of the judgment of the European Court of Human Rights”, although the Court had only ordered the payment of just satisfaction.¹⁵ The *Jafarov* case will be mentioned as another example later in this article.

⁹ Council of Europe, DH-DD(2017)172.

¹⁰ Council of Europe, CM/Notes/1280/H46-2, 10 March 2017, 1280th DH meeting.

¹¹ Council of Europe, CM/Notes/1280/H46-2, 10 March 2017, 1280th DH meeting.

¹² Council of Europe, CM/Notes/1294/H46-2, 22 September 2017, 1294th meeting.

¹³ *Ilgar Mammadov v Azerbaijan (No.2)* (App. No.919/15) judgment of 16 November 2017.

¹⁴ The joint concurring opinion made by four judges only discusses the applicability of art.18 and not the issue under art.46.

¹⁵ *Lutsenko v Ukraine* (App. No.492/11) judgment of 3 July 2012, and status of execution available at: [http://hudoc.exec.coe.int/eng%22EXECIdentifier%22:\[%22004-32285%22\]](http://hudoc.exec.coe.int/eng%22EXECIdentifier%22:[%22004-32285%22]) [Accessed 1 August 2018].

II. First use of infringement proceedings: why has it been made possible?

Is the first use of infringement proceedings the result of a new strategy adopted by the Committee to deal with unimplemented serious cases? This part will show that, on the contrary, the rationale for the proceedings is not part of a broader strategy, but is instead on the facts of the case.

A. The Ilgar Mammadov case: not just any common applicant

Ilgar Mammadov is an emblematic figure for the Council of Europe. He has extensively collaborated with various actors and bodies at the Council of Europe. He was appointed the director of the Council of Europe School of Political Studies in Baku. Moreover, he has not only been the chairman of the opposition Republican Alternative (REAL) party, but also a presidential candidate in 2013 and is a potential presidential candidate for the coming elections in October 2018. Thus he is considered as one of the main outspoken critics of the Aliyev government.¹⁶ Ilgar Mammadov has regularly directly written to the department of the execution of judgments of the European Court of Human Rights (not a common practice), his letters being transmitted by his representative under r.9 of the article 46 Rules of the Committee.

B. Azerbaijan: the worst country in terms of its compliance rate with the judgments of the European Court of Human Rights

More broadly, selecting a case against Azerbaijan was the fairest and most indisputable choice to make—here figures speak for themselves. Out of the 194 Azerbaijan cases transmitted for supervision to the Committee, only three have been closed so far by final resolutions.¹⁷ By contrast with the other 46 countries, checking all the country factsheets and calculating the average rate of compliance for each state and all the states together,¹⁸ Azerbaijan is indisputably the worst country in terms of average compliance with an incredible percentage of 1.5%, the second worst being Ukraine (14.28%), followed by Republic of Moldova (22.72%), Albania (23.53%) and Russian Federation (26.53%).¹⁹ The average for the 47 countries amounts to 72.62%.²⁰ Azerbaijan is now in the top seven countries in terms of pending cases before the European Court of Human Rights.²¹ With a population of less than 10 million people, it accounts for about 1.2% of the population of the 47 Member States of the Council of Europe but has 4% of the pending cases before the Committee of Ministers.²²

C. Lacking convergent external pressure

The fact that Ilga Mammadov has been a political leader has undoubtedly served to crystallise international mobilisation. NGOs have relayed the call to release the applicant.²³ There has also been a request by the

¹⁶ Article 19 and Sport for Rights, “Full-throttle attack on human rights, What reporters of F1 Baku Grand Prix should know” (June 2016), p.13, https://www.article19.org/data/files/mediabinary/38402/a19_full_throttle_azerbaijan_FINAL.pdf [Accessed 1 August 2018].

¹⁷ One in 2012, one in 2013 and one in 2015. 181 cases were pending in 2017: factsheet on Azerbaijan: https://www.echr.coe.int/Documents/CP_Azerbaijan_ENG.pdf [Accessed 1 August 2018].

¹⁸ See <https://www.coe.int/en/web/execution/country-factsheets>, last update 1 October 2017 [Accessed 1 August 2018].

¹⁹ Seven countries have a proportion of compliance worse than 50%; unsurprisingly five of these seven countries (Azerbaijan, Hungary, Italy, Russian Federation and Ukraine) are in the top worst records before the European Court of Human Rights in terms of pending cases.

²⁰ Twenty-eight out of the 47 countries are over the average of 72.62%. Fifteen states are over 90%, the top countries being: Andorra (100%), Denmark (97.05%), France (96.32%), Luxembourg (100%), Norway (100%), Sweden (97.22%) and the UK (96.31%). The statistics are the author’s and are drawn from the numbers available on the website dedicated to the implementation of the judgments.

²¹ European Court of Human Rights, Statistics for 2017, Hungary, Romania, Turkey, Russia, Ukraine, Italy and Azerbaijan account for 77.9% of the pending cases, http://www.echr.coe.int/Documents/Stats_pending_2017_BIL.pdf [Accessed 1 August 2018].

²² Council of Europe, Committee of Ministers, 10th Annual Report (2016), p.64.

²³ Joint statement, 24 June 2015, online, Human Rights House.org. More recently, Report issued on 3 April 2017, “Nations in Transit 2017—Azerbaijan”, <http://www.refworld.org> [Accessed 1 August 2018]. On a rate of 1 to 7 (7 being the worst), the democratic score has constantly been depreciated/downgraded from 6.00 in 2008 to 6.57 in 2012 and 6.93 in 2017.

Civic Solidarity Platform and the Sports for Rights Coalition to launch infringement proceedings.²⁴ A bill was also adopted by the US Congress entitled “Azerbaijan Democracy Act of 2015”, with sanctions being envisaged until notably “Azerbaijan has made significant progress in … the release of individuals in Azerbaijan who have been jailed based on political or religious beliefs or expression”.²⁵ The issue was raised before the UK Parliament in 2016 and it appears that the situation of Ilgar Mammadov has been raised several times at ministerial level during bilateral meetings.²⁶ The UN has also regularly criticised the human rights situation in Azerbaijan.²⁷

Nevertheless, external pressure has not always been constant or unanimous. Since mid-2017, there has been renewed “pressure of the West on the regime” after “a long peaceful pause” from mid-2016 to mid-2017 “in exchange for promises of various reforms”.²⁸ The Azerbaijani authorities had also tried to use the political context of war against Muslim extremists and war against Armenia on the disputed Nagorno-Karabakh territory to defer pressure. More importantly, by contrast to what has happened in previous cases, not much pressure has been exerted by the EU. The dialogue, frozen since 2012, was reopened in February 2017, with the desire to negotiate a new partnership agreement to enhance political and economic ties in order to replace the 1999 Partnership and Cooperation Agreement.

Azerbaijan “uses” a few arguments, notably that it “is an important actor in ensuring energy security of Europe as an alternative to Russian gas and oil” and that it “is a stabilising force balancing out Russian, Iranian, and radical Islamic influences in the region”.²⁹ Some calls were launched by NGOs³⁰ to the EU leaders to raise human rights concerns. Yet, a press release dated 20 December 2017, after mentioning that “Azerbaijan is an important partner for the European Union”, briefly mentions that “the EU has continued to call for Azerbaijan to comply with judgments of the European Court of Human Rights”.³¹ Thus, the EU has ignored the invitation launched by the Committee of Ministers, notably to international organisations, “to raise the applicant’s situation with the highest authorities in Azerbaijan to get him released”.³² Thus external pressure cannot have been an impetus for a new strategy adopted in this case.

D. Consistent and permanent pressure by the various actors of the Council of Europe: A question of credibility for the ECHR system³³

A unanimous internal pressure from the bodies at the Council of Europe needs to be noted, although no concerted and coordinated declarations or activities were conducted. These various actors have always ensured they were pushing in the same direction, which they did.

The Parliamentary Assembly of the Council of Europe used to be a strong advocate for better implementation of judgments. For reasons which will be clarified in the following part, the Assembly has now been much more cautious. In a document issued on 25 September 2017³⁴ and prepared by Alain Destexhe, who had to resign a few days before its adoption, being accused of being part of the “caviar

²⁴ “Azerbaijan: time for Justice for Ilgar Mammadov”, 22 May 2017, <http://iphronline.org/azerbaijan-time-justice-ilgar-mammadov.html> [Accessed 1 August 2018].

²⁵ HR 4262, 114th Congress (2015–2016), s.6, <https://www.congress.gov/bill/114th-congress/house-bill/4262?r=55> [Accessed 1 August 2018]. s.6. Sections 4 and 5 detail the sanctions which include “Denial of entry into the United States of senior leadership of the Government of Azerbaijan and others”, “Prohibition on loans and investment” and “Blocking of assets and other prohibited activities”.

²⁶ See <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-05-04/HL8201> [Accessed 1 August 2018].

²⁷ A/HRC/34/52/Add.3, 20 February 2017, para.112. A/HRC/36/37/Add.1, 2 August 2017, “Report of the working group on Arbitrary Detention on its Mission to Azerbaijan”.

²⁸ Azertimes.com/politics, “A look back at important political events in Azerbaijan in 2017”, 30 December 2017.

²⁹ European values bought and sold, March 2017, p.12.

³⁰ Joint NGO Letter to the European Union Officials—Regarding Azerbaijan President Aliyev’s Visit to Brussels, 1 February 2017, <https://www.ecoi.net> [Accessed 1 August 2018].

³¹ European Commission, press release, “EU Report: Azerbaijan renews engagement and dialogue”, 20 December 2017.

³² Council of Europe, Committee of Ministers, 10th Annual Report (2016), p.260.

³³ Report of the Group of Wise Persons to the Committee of Ministers (CM) (2006) 203, 15 November 2006, p.25: “the credibility of the human rights protection system depends to a great extent on execution of the Court’s judgments”.

³⁴ Council of Europe, Parliamentary Assembly, Doc.14403, “The functioning of democratic institutions in Azerbaijan”, 25 September 2017.

diplomacy” and Azerbaijani Laundromat,³⁵ the Assembly was concerned about the lack of the implementation of many judgments by Azerbaijan.³⁶ In a resolution adopted on 18 September 2017,³⁷ the Assembly “calls on the authorities to co-operate fully with the Committee of Ministers and the Department for execution of judgments of the European Court of Human Rights and to take all the necessary measures to implement quickly and fully the judgments of the Court, including the payment of just satisfaction to applicants within the time frames set out in the Court’s judgments” (para.16). It also called for Mr Mammadov’s release (para.17). Some Parliamentarians put forward a dissenting opinion to this report, an exceptional situation at the Parliamentary Assembly, “raising concerns about the independence and objectivity of the rapporteur”. Strong amendments to the resolution were finally adopted by the large majority.³⁸ Unsurprisingly, only the Bureau of the Assembly “calls on High Contracting Parties to the ECHR to apply, as soon as possible, the procedure foreseen under Article 46(4) of the Convention” on 13 September 2017.³⁹

The strongest and the most crucial mobilisation came from the Secretary General. On 3 August 2015, he sent a letter to the Azerbaijani authorities regarding his concern about two physical assaults by fellow detainees. Ilgar Mammadov had been the victim of assault and required treatment in detention “fully in line with the standards of the Council of Europe”. Incidentally, at the end of the letter, the Secretary General “take(s) the opportunity to recall the necessity of ensuring that the decision of the European Court of Human Rights with regard to Ilgar Mammadov be fully and effectively implemented without delay”.⁴⁰ But a crucial turning point then occurred that coincided with revelations and credible suspicions of the “caviar diplomacy” having impacted the Parliamentary Assembly of the Council of Europe. First, the Secretary General decided to use the art.52 inquiry procedure on 13 October 2015 in order “to seek explanations from the authorities concerning the country’s implementation of the Human Rights Convention”.⁴¹ Consequently, on 11 January 2017, the Secretary General visited Baku, and an action plan was received on 14 February 2017 addressing requirements (as to the general measures) under the judgment.⁴² Secondly, for the first time in the history of the organisation, on 13 September 2017, he “called on the member states of the Council of Europe to support an article 46(4) ECHR infringement procedure against Azerbaijan”,⁴³ should the applicant’s situation remain unchanged.⁴⁴ It is also worth mentioning that a Focal Point on reprisals has been set up within his cabinet, a system that also operates in the United Nations.

E. Beyond the Mammadov case: a question of credibility for the Council of Europe itself

Well beyond the *Ilgar Mammadov* case, even well beyond all the other cases that Azerbaijan has not complied with, this case has become a test case not only of the credibility of the ECHR system, but also

³⁵ A. Destexhe, “another leading apologist of the regime in Baku and an organiser of the notorious European Academy for Elections Observation”, “was appointed by the Azerbaijani friends” using their control of the Committee on Legal Affairs and Human Rights in March 2016. Freedom Files Analytical Centre, European Values bought and sold, p.77. *The Guardian*, “Azerbaijan revelations spark great concern” at Council of Europe, 6 September 2017.

³⁶ Para.15: so the Assembly “calls on the Azerbaijani authorities to: 15.2 review the cases of the so-called ‘political prisoners’/‘prisoners of conscience’ detained on criminal charges ..., in particular but not exclusively, Ilgar Mammadov, Ilkin Rustamzade, Mehman Huseynov, Afgan Mukhtarli and Said Dadashbayli”.

³⁷ Council of Europe, Parliamentary Assembly, Doc.14397, 18 September 2017, “Azerbaijan’s chairmanship of the Council of Europe: what follow-up on respect for human rights?”, Report and Resolution.

³⁸ Human Rights House Network, HRHN20 “Azerbaijan: no progress, no concessions”, 12 October 2017.

³⁹ Council of Europe, Parliamentary Assembly, “Call for referral of Mammadov case to the Strasbourg Court ‘as soon as possible’ on question of whether Azerbaijan has failed to abide by the judgment”, 13 October 2017.

⁴⁰ Council of Europe, Secretary General, letter to the Minister of Justice Mr Fikrat Mammadov, 3 August 2015.

⁴¹ Council of Europe, “Secretary General launches inquiry into respect for human rights in Azerbaijan”, press release, ref. DC 187(2015).

⁴² Council of Europe, Committee of Ministers, 10th Annual Report (2016), p.261.

⁴³ Amnesty International, Public Statement, “Azerbaijan’s unlawful detention of Ilgar Mammadov leads to unprecedented infringement proceedings with a referral to the Strasbourg Court”, 6 December 2017, p.2.

⁴⁴ Council of Europe, CM/Notes/1294/H46-2, 22 September 2017.

more importantly “of the legitimacy of the Council of Europe” itself.⁴⁵ The Azerbaijani authorities would be responsible for very serious allegations of “corruption and fostering of interests” made against certain members or former members of the Parliamentary Assembly.⁴⁶ Azerbaijan,⁴⁷ while chairing the Committee of Ministers in 2014 and even well before, is now considered responsible for “the biggest scandal”⁴⁸ for its “caviar diplomacy”⁴⁹ that the European organisation has ever faced. The “Azerbaijani Laundromat” has now been widely documented.⁵⁰ One of the notorious victims of this caviar diplomacy at the Parliamentary Assembly was Strasser, the rapporteur on political prisoners in Azerbaijan, who was refused a visa three times to visit the country (an unprecedented fact at the Assembly) and was then criticised for relying on NGOs’ reports and other data in his report. The January 2013 vote on this report for the Azerbaijani regime “was a triumph. For human rights activists in Baku, it was a disaster”. Ilgar Mammadov was arrested on 4 February 2013, “a few days after the vote in Strasbourg”.⁵¹

Therefore, a written Declaration (the Omtzigt-Schwabe declaration) on “Parliamentary Assembly integrity”, which gathered only 137 signatures from 35 countries out of the 324 members at the Assembly, called to:

“Establish … an external, fully independent and impartial inquiry into all allegations of improper conduct or corruption that may have sought to influence the work of the Assembly in recent years, focusing in particular on allegations surrounding the vote on political prisoners in Azerbaijan in January 2013.”⁵²

This call for an external independent body has been supported by Transparency International⁵³ and many NGOs, because of “credible allegations that PACE members from various countries and political groups received payments and other gifts with a view to influencing the appointment of Assembly rapporteurs on Azerbaijan, as well as reports and resolutions of the Assembly on Azerbaijan, most notably the PACE vote on the draft resolution on political prisoners in Azerbaijan in January 2013”.⁵⁴ Thus, the situation has become so serious that the Parliamentary Assembly had to create an independent external investigation body,⁵⁵ whose conclusions were made public in April 2018. This is an unprecedented decision

⁴⁵ Azerbaijan: Time for justice for Ilgar Mammadov, 22 May 2017, “The Council of Europe’s legitimacy at stake over Azerbaijan’s Persistent non-compliance with European Court Judgment”, <http://iphronline.org/azerbaijan-time-justice-ilgar-mammadov.html> [Accessed 1 August 2018]. Forty-four NGOs are part of this platform.

⁴⁶ Freedom Files Analytical Centre, “European values bought and sold, an exploration into Azerbaijan’s sophisticated system of projecting its international influence, buying Western politicians and capturing intergovernmental organisations”, March 2017.

⁴⁷ Within the Parliamentary Assembly, notably Elkhan Suleymanov and Muslum Mammadov (who both left the Assembly on 21 January 2018), see European Stability Initiative, “The European Swamp (Caviar Diplomacy Part 2), Prosecutors, Corruption and the Council of Europe”, ESI Report, Berlin, 17 December 2016, p.6. Luca Volonte, former member of the Assembly admitted to have received around €2,390,000 from Elkhan Suleymanov via offshore companies in 2012–2014: Part 2, Caviar Diplomacy, p.12. Luca Volonte has been prosecuted in Italy for corruption in a public function and money-laundering, <https://www.meydan.tv/en/site/news/15543/> [Accessed 1 August 2018].

⁴⁸ European Stability Initiative, “The biggest scandal”, “The Sawicki Memorandum and the way forward for the Council of Europe”, *Discussion paper DRAFT*, 27 March 2017. *The Guardian*, Jennifer Rankin, “Fresh claims of Azerbaijan vote-rigging at European Human rights body”, 20 April 2017.

⁴⁹ European Stability Initiative, “The European Swamp (Caviar Diplomacy Part 2), Prosecutors, Corruption and the Council of Europe”, ESI Report, Berlin, 17 December 2016. Part 1, 24 May 2012, “Caviar Diplomacy—How Azerbaijan silenced the Council of Europe”. A documentary called “The Caviar Diplomacy” was released on 21 November 2016 by the Italian Public broadcaster RAI 3.

⁵⁰ Notably by Transparency International and the OCCRP. Around €2.5 billion were laundered through a series of four shell companies in the UK.

⁵¹ European Stability Initiative, “The European Swamp (Caviar Diplomacy Part 2), Prosecutors, Corruption and the Council of Europe”, ESI Report, Berlin, 17 December 2016, p.16.

⁵² Council of Europe, Parliamentary Assembly, Doc.14256rev, 2nd edn, Parliamentary Assembly Integrity, Written Declaration No.624, 5 May 2017.

⁵³ Letter to Mr Agramunt Font de Mora, 19 January 2017, “given the scope and seriousness of these recent allegations …”. Transparency International explicitly requires an investigation, notably on “the roles of Elkhan Suleymanov and Muslum Mammadov”.

⁵⁴ Worldwide Movement for Human Rights, “Council of Europe: Call for investigation into allegations of corruption”, an open letter by civil society organisations to Parliamentary Assembly, 20 April 2017.

⁵⁵ The investigation body comprises three members: Sir Nicolas Bratza, former President of the European Court of Human Rights; Jean-Louis Bruguiere, former judge in France; and Elisabet Fura, former judge at the European Court of Human Rights. Terms of reference of the independent external investigation body, Appendix, Doc.14289 Add.3, 24 April 2017, Activities of the Assembly’s Bureau and Standing Committee (24 April 2017), Progress Report.

required by an exceptional situation.⁵⁶ Freedom Files Analytical Centre also called for the suspension of voting rights of the entire Azerbaijani delegation “until such time as it is clear that corruption practices have ceased”.⁵⁷ Some calls have been launched by civil society also to re-establish the mandate of the special rapporteur on political prisoners in Azerbaijan.⁵⁸

In September 2017, the Secretary General of the Council of Europe confessed to *The Guardian* that “the time has come for Azerbaijan to think hard about its obligations as a member of the Council of Europe and whether it still wants to fulfil them”.⁵⁹ The comment by a journalist was that “Jagland wants to invoke the Council of Europe convention’s article 46(4), which could ultimately lead to Azerbaijan being ejected from the human rights body”.⁶⁰

If the investigation body was to confirm that the Azerbaijani authorities are responsible for these very serious misconducts, the question of the exclusion from the organisation certainly would need to be addressed, which would facilitate a task for the European Court of Human Rights.

III. Launching the infringement proceedings for the first time: so what?

A. The peculiarities of the procedure

One week after the Secretary General’s call to refer to art.46(4), the Committee of Ministers:

“instructed the Secretariat to prepare a draft interim resolution giving formal notice to Azerbaijan, as provided for under Article 46(4) of the Convention, of the Committee’s intention to bring before the Court the question whether Azerbaijan has failed to fulfil its obligation under Article 46(1) for consideration at their 1298th (25 October 2017) meeting, should no tangible progress be made in ensuring the applicant’s release.”⁶¹

The threat to use this procedure had already been noted during the Human Rights Meeting in March 2017.⁶² The interim resolution adopted on 25 October 2017 served formal notice of the intention to refer the case to the Court at its 1302nd meeting on 5 December 2017 “and invited the Republic of Azerbaijan to submit in concise form its view on this question by 29 November 2017 at the latest”.⁶³

In the resolution, the Committee insisted that Azerbaijan infringed art.18 of the ECHR in the *Mammadov* case, speculating how serious the violation is⁶⁴ “as these actual purposes of these measures was to silence or punish him for criticising the government”. (As the case-law on art.18 is quite limited, only one case could be identified where the Court found a violation of both art.5, and art.5 in combination with art.18, and held that the finding of a violation was in itself sufficient just satisfaction. But the applicant had been illegally detained “only” three days in this case.⁶⁵) The Committee came to insist on the obligation of the state to guarantee restitutio in integrum and repeat the persistent call to release the applicant. The Committee thus considers that “by not having ensured the applicant’s unconditional release, the Republic of Azerbaijan refuses to abide by the final judgment of the Court”. It is clear from the words used that the Committee

⁵⁶ Council of Europe, Parliamentary Assembly, AS/Bur(2017)27, para.3.

⁵⁷ European values bought and sold, p.93.

⁵⁸ OMCT, “Azerbaijan: Letter to the Members of the PACE, re: bribe accusations”, 16 January 2017, <http://www.omct.org/human-rights-defenders/statements/azerbaijan/2017/01/d24302/> [Accessed 1 August 2018].

⁵⁹ *The Guardian*, Jennifer Rankin, “European Parliament calls for investigation into ‘Azerbaijani Laundromat’”, 14 September 2017.

⁶⁰ *The Guardian*, Jennifer Rankin, “European Parliament calls for investigation into ‘Azerbaijani Laundromat’”, 14 September 2017.

⁶¹ Council of Europe, CM/Del/Dec(2017)1294/H46-2, 21 September 2017, para.5.

⁶² Decision adopted on 10 March 2017, 1280th DH Meeting, H 46-2 *Ilgar Mammadov group v Azerbaijan*, CM/Notes/1280/H46-2.

⁶³ Council of Europe, Interim Resolution CM/ResDH(2017)379, 1298th Meeting, 25 October 2017.

⁶⁴ Article 18 of the ECHR, “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed”. The author found only seven cases where the Court historically concluded a violation of art.18 of the ECHR.

⁶⁵ *Gusinskij v Russia* (App. No.70276/01), judgment of 19 May 2004.

clearly invites the European Court of Human Rights to focus its examination on inappropriate individual measures, and not so much on general measures.

Views were submitted by Azerbaijan on 29 November 2017.⁶⁶ Concerning individual measures, the government recalls the final examination of the applicant's case on 29 April 2016 by the Sheki Court of Appeal considering that:

“It particularly carefully addressed the Court's conclusions drawn in the present judgment and remedied the deficiencies found in the proceedings leading to the applicant's convictions.”⁶⁷

Yet, Azerbaijan has failed to convince the Committee of Ministers that this was the case.

B. What consequences?

Unsurprisingly, this decision taken by the Committee of Ministers was welcomed by civil society.⁶⁸ Even if the votes were not made public, it needs to be emphasised that the required majority of two-thirds was achieved, which would have not been conceivable in previous years for other famous cases of non-compliance. This is instructive of the gravity of the situation. The first use of infringement proceedings is always the most difficult situation an executive body has to face. It could pave the way for other cases, unless the outcome reveals it to be a complete failure. As some previous academics rightly noted, when international reputation has already been damaged by non-execution “which is publicly known ... it is difficult to see what further *material* or *motivating* reputational damage a finding of the Court might achieve”.⁶⁹

Nevertheless, there exists great uncertainty as to the impact of this decision. Infringement proceedings normally mean the suspension of control by the Committee. Written comments can be sent by the Committee of Ministers and the government, and the Grand Chamber might decide to hold a hearing.⁷⁰ The Committee will be represented before the Court “by its Chair unless the Committee decides upon another form of representation”.⁷¹

If the Court fears having to take, for a first time, a clear and strong view on the implementation of its previous judgment,⁷² it is also a wonderful opportunity for the Court to strengthen its credibility as the last guardian of the rule of law in Europe. Whilst it is not risky to predict that the Court, whose judgment should not be delivered before the end of 2018, should confirm the non-compliance by Azerbaijan of the first *Ilgar Mammadov* case, probably both for the lack of appropriate general measures and of the applicant's release, it is much more difficult to guess the follow-up to such a judgment. In their joint letter to EU Member States, NGOs considered that the infringement proceedings “could eventually lead to the Council of Europe sanctioning Azerbaijan, for example, by suspending its voting rights in the Parliamentary Assembly”.⁷³ Suspension may be a good alternative to expulsion for the period the country does not fully

⁶⁶ Council of Europe, DD(2017)1346.

⁶⁷ Council of Europe, DD(2017)1346.

⁶⁸ Amnesty International, Public Statement, “Azerbaijan's unlawful detention of Ilgar Mammadov leads to unprecedented infringement proceedings with a referral to the Strasbourg Court”, 6 December 2017.

⁶⁹ F. de Londras and K. Dzehtsiarou, “Mission impossible? Addressing non-execution through infringement proceedings in the European Court of Human rights” (2017) 66 I.C.L.Q. 486.

⁷⁰ European Court of Human Rights, press release, “New Infringement procedure used for first time over 2014 judgment against Azerbaijan on opposition politician Mammadov”, ECHR 390(2017), 14 December 2017.

⁷¹ Committee of Ministers, “Rules of the Committee of Ministers for the supervision of judgments and of the terms of friendly settlements”, May 2006, Rule 11.

⁷² When the proposal to set up the infringement proceedings was discussed, the Court clearly showed reluctance to such a procedure: CDDH-GDR(2004)001Rev., paras 27–28.

⁷³ Joint NGO Letter on Human rights in Azerbaijan on the eve of the Eastern Partnership Summit, 27 October 2017, p.2, <https://www.hrw.org/news> [Accessed 1 August 2018], p.2. See also Human Rights Watch, “Another chance to Right a Wrong in Azerbaijan”, https://www.ecoi.net/local_link/349203/481123_en.html [Accessed 1 August 2018].

abide by the judgment.⁷⁴ The Court will probably not condemn the state to penalties or punitive damages, a power that was rejected during the drafting of Protocol 14. Azerbaijan has also agreed to pay just satisfaction to the victim.

In the meantime, the preventive effect of this infringement procedure may yet play out. So far, the applicant has still not been released.⁷⁵ As a matter of fact, “Azerbaijani legislation provides for release once two thirds of the sentence has been served, and also by presidential pardon …”⁷⁶. Two-thirds of the prison sentence was served by Ilgar Mammadov in May 2018. This seems to be confirmed by the Azeri media.⁷⁷ These various actions:

“aroused concern in the government circles, which reflected the immediate release of Mehman Aliyev, the termination of the criminal case against Turan, the readiness to resolve the issue of the release of Ilgar Mammadov, and the signing in 2018 of an agreement on strategic partnership with the European Union.”⁷⁸

Faced with a significant economic crisis, Azerbaijan is in need of European money and so the EU could play a key role in the outcome of this process.⁷⁹ Should the EU suspend the signature of the Partnership until Ilgar Mammadov is released, Azerbaijan would have no other choice than to abide by the judgment.

The authorities will certainly be reluctant to use the presidential pardon in this case. However, in a similar case, *Rasul Jafarov v Azerbaijan*, concerning the detention of a civil activist Chairman of the Human Rights Club, on the day of the adoption of the judgment (17 March 2016), Mr Jafarov was pardoned and released by the Decree of the President of Azerbaijan.⁸⁰ In his case, the Court had also found a violation of arts 5(1), 5(4), 5 and 18 and also of art.34. Azerbaijan had been ordered to pay €25,000 for non-pecuniary and pecuniary damage. The operative part of the judgment did not refer to the applicant’s release.⁸¹ Pardon has also been used in March 2017 for other activists.⁸² These events probably explain why the Committee had decided to examine, from 2017, the *Ilgar Mammadov* case in combination with the *Rasul Jafarov* case, a strategy which has so far not proved fruitful. Alternatively, the government may anticipate a debate on its expulsion and decide to withdraw from the Council of Europe, a threat that has been raised several times in the past.

IV. Conclusion

This article has shown that the infringement proceedings have been launched for the first time in a global context of a serious “crisis”⁸³ between Azerbaijan and the Council of Europe, and in a peculiar context. Thus, this event is not the consequence of a new strategy adopted by the Committee of Ministers and will

⁷⁴ C. Closa, “Securing Compliance with Democracy Requirements in Regional Organizations”, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values, Ensuring Member States’ Compliance* (Oxford: Oxford University Press, 2017), pp.363–400.

⁷⁵ Council of Europe, Committee of Ministers, 1318th Meeting, 5–7 June 2018 (DH), H46-3 *Ilgar Mammadov v Azerbaijan* (App. No.15172/13), https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168088e146 [Accessed 1 August 2018].

⁷⁶ Council of Europe, Parliamentary Assembly, Doc.14397, para.69, Explanatory Memorandum by Mr Alain Destexhe, rapporteur.

⁷⁷ “How can Ilgar Mammadov dilemma be solved?” (8 December 2017), *AzeriTmes*, <http://www.azertimes.com/politics/how-can-ilgar-mammadov-dilemma-be-solved/> [Accessed 1 August 2018]: the “authorities would be willing to solve the issue by an early release on parole (according to the new legislation into force since 1st December for those convicted of serious crimes and those who have served most of the term), or pardon may be announced (without the request of the convict who is not willing to ask for pardon), or through an appeal of the Prosecutor General’s Office to the Supreme Court”.

⁷⁸ [Azertimes.com/politics](http://www.azertimes.com/politics) [Accessed 30 December 2017], “A look back at important political events in Azerbaijan in 2017”.

⁷⁹ “A 4.7 million euros aid package from the European Union and Council of Europe on improving human rights, democracy and rule of law will run until the end of 2017, its mid-term evaluation took place less than a month after the UN Special Rapporteur on the situation of human rights defenders condemned the Azerbaijani government’s continuing criminalisation of peaceful and legitimate activities”: Freedom House, Nations in Transit 2017 Azerbaijan, p.3, www.refworld.org [Accessed 14 January 2018].

⁸⁰ Council of Europe, CM/Notes/1280/H46-2, 10 March 2017. In his case, the authorities have refused to pay just satisfaction and to reopen criminal proceedings upon the applicant’s request.

⁸¹ *Rasul Jafarov v Azerbaijan* (App. No.69981/14) judgment of 17 March 2016.

⁸² Human Rights Watch, World Report 2017 Azerbaijan, “for 13 journalists, human rights defenders, activists, and bloggers”, but they still “face travel and work restrictions and risk detention if they resume their work”, <https://www.ecoi.net> [Accessed 1 August 2018].

⁸³ “How can Ilgar Mammadov dilemma be solved?” (8 December 2017), *AzeriTmes*, <http://www.azertimes.com/politics/how-can-ilgar-mammadov-dilemma-be-solved/> [Accessed 1 August 2018].

probably not result in more infringement proceedings in the coming months. Infringement proceedings have not been used in isolation, but in combination with other attempts to restore the credibility of an organisation seriously threatened by one of its Member States. It should also be the last step before the decision to expel the country from the Council of Europe. Uncertainty exists on the impact the judgment of the Court may have. Is it the right tool to address such a political crisis? Probably not. It has been written that “if the Council of Europe is serious about tackling non-execution, then it must focus its attention on politics”.⁸⁴ This author is convinced the outcome will depend on other factors and events.

⁸⁴ F. de Londras and K. Dzehtsiarou, “Mission Impossible? Addressing Non-execution Through Infringement Proceedings in the European Court of Human Rights” (2017) 66 I.C.L.Q. 467, 490.

United Nations and HIV/AIDS: The Comic Book Experiment

Surabhi Shukla^{*}

AIDS; Books; Health; HIV; Human rights; United Nations

Abstract

On 25 September, 2015, the United Nations, through a resolution passed in the General Assembly, adopted a set of 17 Global Sustainable Development Goals. A core team consisting of PCI Media Impact and Reading with Pictures (both NGOs) in association with the United Nations Children's Fund (UNICEF) have initiated a project called Comics Uniting Nations through which artists from across the world will create comic books educating about the 17 different goals. One of these goals is to promote the “physical and mental well-being” of all. Directly within the purview of this goal fall efforts to combat HIV/AIDS. The United Nations has, once before, undertaken a project to spread awareness about HIV/AIDS through comic books. This article seeks to critically evaluate the hits and misses of that project from the perspective of public health with the aim of providing, both, a critical evaluation of the comic book project and of highlighting some important themes within the HIV/AIDS advocacy that Comics Uniting Nations must address through the new comics.

I. Introduction

“Promoting and protecting human rights in the context of HIV/AIDS is essential to ensure an effective response to the epidemic. This means not only ensuring access to treatment as part of the realization of the right to health, but equally addressing HIV-related stigma and discrimination, paying particular attention to vulnerable population groups, incorporating a gender perspective, and making sure that other related human rights aspects, such as the right to information and the right to participation, are integral components in our response to the epidemic.”¹

This was the statement made by Dr. Jim Yong Kim, Director of the World Health Organization (“WHO”) HIV/AIDS department in 2004 at the release of the comic book, *HIV and AIDS: Stand Up for Human Rights*.² This comic book was the earliest that the United Nations released as an effort to address the myriad issues surrounding HIV and AIDS. The hope was that these comic books will address various issues implicit within the HIV and AIDS paradigm, apart from just stigma and discrimination, such as: State

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¹ World Health Organization, “FIFA And WHO To Join Forces To Promote A Human Rights Approach to HIV/AIDS” (10 December 2004) World Health Organization, <http://www.who.int/mediacentre/news/releases/2004/pr90/en/> [Accessed 1 August 2018].

² World Health Organisation, *HIV/AIDS: Stand up for human rights* (Geneva: World Health Organisation, 2003).

obligations, socio-economic realities of a majority of patients, gender discrimination and issues faced by marginalised and vulnerable groups including sexuality related issues.³

However, there has been no evaluation of these comic books from a public health perspective. I argue that the comic book experiment of the United Nations, while a novel and creative effort does little more than address the issue of HIV and AIDS from the stigma and discrimination lens. Not only is this true of the earlier comics released in 2003–04 for which an argument can perhaps be made that addressing stigma and discrimination had to be the first points of entry into the HIV/AIDS debate⁴, this exclusive focus was also seen in the last of those set of comics released by the United Nations, *Score the Goals*⁵, a 2010 release. What is needed, then, is to recognise the limitation of these comic books and to expand the venture in the form of more sophisticated releases focusing on issues like gender, sexuality, government accountability and socio-economic realities (among others), surrounding HIV and AIDS (Part III). This will enable readers to get a more nuanced understanding of the disease which will ultimately help in fighting it in a more holistic manner. The release of the *Comics Uniting Nations* comics provides an excellent opportunity to take stock of, and address, these limitations.

I have picked the four comics (Part II) published by the United Nations from 2002–2010 which address the issue of HIV and AIDS. These four comics are: *The Right to Health*⁶, *HIV/AIDS: Stand Up for Human Rights*⁷, *HIV and AIDS: Human Rights for Everyone*⁸ and *Score the Goals*.⁹ No other comics have been published by the United Nations on HIV/AIDS since then and the *Comics Uniting Nations* project, as of 16 June 2018, has not published a comic on HIV/AIDS. For this analysis, I will restrict myself to comic books defined in the following way: publications that consist of multiple pages and panels that tell a story, regardless of whether they are published periodically.¹⁰ Illustrations, comic strips, and information pamphlets with drawings are excluded.

II. The International Law Framework for Health

Before delving specifically into the comic books, it would perhaps be appropriate to lay down the instrumental framework that supports this venture. Although housed in other documents,¹¹ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) is credited with having the most comprehensive definition of the right to health in the international law regime.¹² The state parties to the covenant affirm, in art.12 their recognition, of the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹³ Sub-part (2) of this article illustrates a list of non-exhaustive measures the states would take to ensure the “full realization of this right.”¹⁴ These measures are¹⁵:

³ World Health Organization, “FIFA And WHO To Join Forces To Promote A Human Rights Approach to HIV/AIDS” (10 December 2004) World Health Organization, <http://www.who.int/mediacentre/news/releases/2004/pr90/en/> [Accessed 1 August 2018].

⁴ Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

⁵ UNAIDS, *Score The Goals* (Geneva: United Nations, 2010).

⁶ World Health Organisation, *The Right to Health*, (Geneva, WHO, 2002), p.9.

⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003).

⁸ United Nation High Commission for Refugees, *HIV and AIDS: Human Rights for Everyone* (Geneva: UNHCR, 2006).

⁹ UNAIDS, *Score The Goals* (2010).

¹⁰ Robert C. Harvey, *The Art of the Comic Book: An Aesthetic History* (Mississippi: University of Mississippi, 1966) p.3.

¹¹ Constitution of the World Health Organization 1946, art.1 and Preamble. The Universal Declaration of Human Rights 1948, art.25(1). See also, Lara Stemple, “Health and Human Rights in Today’s Fight Against HIV/AIDS” 2008, 22 (Suppl 2) AIDS S113, S114. See also, Convention on the Elimination of All Forms of Racial Discrimination 1969, art.5(e)(iv); Convention on the Elimination of Discrimination Against Women 1979, arts 12 and 14; Convention on the Rights of the Child 1989, art.9; Convention on the Rights of Persons with Disabilities 2006, art.25.

¹² Committee for Economic, Social and Cultural Rights, *General Comment No.14*, para.2. See also, Stephen Marks, “The Emergence and Scope of the Human Right to Health,” in José M. Zuniga et.al. (eds.) *Advancing the Human Right to Health* (Oxford: OUP, 2013) pp.3, 7.

¹³ International Covenant on Economic, Social and Cultural Rights 1966, art.12.

¹⁴ International Covenant on Economic, Social and Cultural Rights 1966, art.12 (2).

¹⁵ International Covenant on Economic, Social and Cultural Rights 1966, art.12 (2).

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The normative content of this right is provided by the Committee on the Economic, Social and Cultural Rights (CESCR), the monitoring committee of the ICESCR through their *General Comment No.14* published in the year 2000.¹⁶ To be sure, the Committee clarifies, that “[t]he right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements.”¹⁷ Stephen Marks has succinctly summarised these freedoms and entitlements under two broad headings:

- A. Obligations on the health system; and
- B. Realization of other human rights that contribute to health.¹⁸

A. Obligations on the Health System:

The obligations on the health system are the conditions that the state must create to ensure access to a healthy life to its peoples. Most of these obligations are subject to progressive realization by the states.¹⁹ However, there are certain *core obligations* imposed on all states via *General Comment No.14*. For the purpose of this article, I will focus on how many of the core obligations have been addressed by the comic books and in what manner. These obligations are: 1. non-discrimination; 2. freedom from hunger; 3. access to basic shelter, sanitation and water; 4. essential drugs; 5. equitable distribution; and, 6. a national health plan.²⁰ *These obligations are non-derogable.*²¹

Another set of obligations accompany this list and are to be rated as “comparable”²² to this core as per the General Comment (I treat them as core too because the words “comparable” lend themselves to this simple conclusion). These obligations are: 1. maternal, reproductive and child health; 2. immunization; 3. training of health professionals; and, 4. prevention, treatment and control of infectious diseases.²³ Each of these obligations have to be discharged in accordance with the following principles *1. availability*; *2. accessibility*; *3. acceptability*; and *4. quality of care* (hereinafter “QA”²⁴).²⁵

- (1) *The principle of availability* states that not only should “public health and health-care facilities, goods and services, as well as programmes”²⁶ be available within the state but also that the “underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs”, (defined by the WHO Action Programme on Essential Drugs)²⁷ should be made available by the state.²⁸

¹⁶ Marks, “The Emergence and Scope of the Human Right to Health,” in Zuniga et.al. (eds.) *Advancing the Human Right to Health* (2013), p.9.

¹⁷ See Marks, “The Emergence and Scope of the Human Right to Health,” in Zuniga et.al. (eds.) *Advancing the Human Right to Health* (2013), p.9.

¹⁸ See Marks, “The Emergence and Scope of the Human Right to Health,” in Zuniga et.al. (eds.) *Advancing the Human Right to Health* (2013), p.9.

¹⁹ See ICESCR, 1966, art.2.1. For the normative content of “progressive realization”, see CESCR, *General Comment No.14*, para. 30–32.

²⁰ See CESCR, *General Comment No.14*, para.43.

²¹ See CESCR, *General Comment No.14*, para.47.

²² See CESCR, *General Comment No.14*, para.44.

²³ See CESCR, *General Comment No.14*, para.44.

²⁴ See CESCR, *General Comment No.14*, para.12.

²⁵ See CESCR, *General Comment No.14*, para.12(a).

²⁶ See CESCR, *General Comment No.14*, para.12(a).

²⁷ Stephen P. Marks, *Setting the context – access to medicine as a fundamental component to the full realization of the right to health*, presentation to the Expert Consultation on Access To Medicines as a Fundamental Component of the Right to Health, pursuant to Human Rights Council Resolution 12/24, 11 October 2010, Room XII, Palais des Nations, Geneva.

- (2) *The principle of accessibility* states that the above mentioned services should be made available to all, especially, the “most vulnerable and marginalised section of the population”²⁸ without discrimination on “the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status.”²⁹ Both these services and the underlying determinants of health must be within a safe physical reach for all including the vulnerable sections, marginalised groups and disabled persons.³⁰ Additionally, these services, whether publicly or privately owned,³¹ must be economically affordable for all, with the obligation on the states to provide health care and health insurance to those who cannot afford these services.³² Finally, the principle of accessibility entails the right of everyone to enquire about, receive and disseminate health related information without betraying the principle of confidentiality.³³
- (3) *The principle of acceptability* states that, medical services provided must be “respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.”³⁴
- (4) *The principle of quality of care* states that medical services must be scientifically and medically appropriate, the medical professionals must be skilled and the medicines must be unexpired.³⁵ States are obliged to “take the necessary steps to the maximum of its available resources”³⁶ to fulfil their obligations under the ICESCR. How governments are held accountable to these obligations are summarily mentioned later in the article (Part IV).

B. Realization of Other Human Rights that Contribute to Health

As per the CESCR, the right to health is “closely related to and dependent upon the realization of other human rights”³⁷ namely, 1. the right to food (also a core obligation); 2. the right to housing (also a core obligation); 3. the right to work; 4. the right to education; 5. the right to human dignity; 6. the right to life; 7. the right against discrimination (also a core obligation); 8. the right to equality; 9. the right against torture; 10. the right to privacy; 11. the right to access information; 12. the freedom of association; 13. the freedom of assembly; and, 14. the freedom of movement. For the purpose of this article, I will only analyse the comic books against core obligations.

²⁸ See CESCR, *General Comment No.14*, para.12(b).

²⁹ See CESCR, *General Comment No.14*, para.18.

³⁰ See CESCR, *General Comment No.14*, para.12(b).

³¹ See CESCR, *General Comment No.14*, para.12(b).

³² See CESCR, *General Comment No.14*, para.19.

³³ See CESCR, *General Comment No.14*, para.12(b).

³⁴ See CESCR, *General Comment No.14*, para.12(c).

³⁵ See CESCR, *General Comment No.14*, para.12(d).

³⁶ See CESCR, *General Comment No.14*, para.45.

³⁷ See CESCR, *General Comment No.14*, para.3.

II. The Comic Books

A. Why Comic Books?

Comics have come a long way from being considered “mindless pap”³⁸ to being considered agents of peace journalism.³⁹ Being easy to understand, they not only influence the way people think and change outlook, but they also employ the “universal language”⁴⁰ of visual communication.

Miriam Maluwa, at the time the Law and Human Rights Adviser for Joint United Nations Programme on HIV and AIDS (“UNAIDS”), and one of the key members of the team creating the comic book *HIV/AIDS: Stand Up for Human Rights*,⁴¹ recalls how the United Nation’s experiment with comic books started.⁴² Once a Memorandum of Understanding was signed between UNAIDS and the Office of the United Nations High Commissioner of Human Rights (“OHCHR”) to work on HIV and human rights in conjunction, the need was to get these messages across to the populations it sought to serve and to educate.⁴³ Comic books were chosen as that medium for a myriad of reasons: they were non-conventional,⁴⁴ they engaged people positively,⁴⁵ they were easily accessible,⁴⁶ perhaps more exciting to read than articles,⁴⁷ they could be used across borders with little or no alteration⁴⁸ and they appealed to peoples of all cultures, ages and countries,⁴⁹ regardless of their literacy level.⁵⁰ The goal to be achieved from this project was to educate and raise awareness about HIV and AIDS, not only among young people and pre-teens but also, hopefully, among persons of all ages, across all countries.⁵¹ This last point is important to bear in mind especially to evaluate the comics’ performance with respect to sex and sexuality.

³⁸Ellen Yamshon and Daniel Yamshon, “Comics Media in Conflict Resolution Programmes: Are They Effective in Promoting and Sustaining Peace” (2006) 11 Harv. Negot.L. Rev. 421, 430.

³⁹Yamshon and Yamshon, “Comics Media in Conflict Resolution Programmes: Are They Effective in Promoting and Sustaining Peace” (2006) 11 Harv. Negot.L. Rev. 421, 427.

⁴⁰Yamshon and Yamshon, “Comics Media in Conflict Resolution Programmes: Are They Effective in Promoting and Sustaining Peace” (2006) 11 Harv. Negot.L. Rev. 421, 431. See contra, Courtney Sloane Philips, “Do Students Retain More Information Through Real Life Images or Through Clip Art Cartoon Images”, in Deborah A. McAllister & Cortney L. Cutcher (eds.) (2011) 17 *Culminating Experience Action Research Projects* 165, 180. Courtney Sloane argues that when students are not exposed to real life information on a matter cannot relate the cartoon information to the real-life information easily. Also, scholars are of the opinion that comics and cartoons can function as a supplement for teaching but cannot function as a substitute for it. By acting as a supplement, it can help bring out the oft neglected aspects of a particular subject by picture images. See generally, Marjorie R. Pond, “Cartooning Aids” 1947 47(8) *The American Journal of Nursing* 517, 518.

⁴¹WHO, *HIV/AIDS: Stand up for human rights* (2003).

⁴²Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

⁴³Riikka Elina Rantala ET. AL., “Right to Health through Education: Mental Health and Human Rights” (2010) 1 *Human Rights in Asia Pacific* PACIFIC 188, 192.

⁴⁴Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

⁴⁵Yamshon and Yamshon, “Comics Media in Conflict Resolution Programmes: Are They Effective in Promoting and Sustaining Peace” (2006) 11 Harv. Negot.L. Rev. 421, 424.

⁴⁶Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

⁴⁷U.N. Secretary-General, “Unlearning Intolerance” Seminar on the Theme Cartooning for Peace: Introductory Remarks by the Secretary-General (16 October 2006).

⁴⁸Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011). However, in practice, the comic books were altered keeping in mind the country in which they were being distributed. For e.g. in *The Right To Health* Comic at pg.9, one of the characters says that women have the right, as men do, to decide how many children they want within the marriage. This information was modified when the comic was distributed in China which has a one child policy. As told to author in a telephone interview with Helena Nygren- Krug, Health and Human Rights Adviser, WHO, (4 November 2011).

⁴⁹Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

⁵⁰Rose Marie Beck, “Popular Media for HIV/AIDS Prevention? Comparing Two Comics: Kingo and the Sara Communication Initiative” (2006) 44 (4) *Journal of Modern African Studies* 513, 514. However, Beck argues that this sort of reasoning not only underestimates the capacity of a comic and makes paternalistic assumptions about the intellectual ability of the targeted populations, it more importantly, in her view, allows comics to transmit stereotypes in the name of simplicity.

⁵¹Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011) and telephone interview with Helena Nygren- Krug, Health and Human Rights Adviser, WHO, (4 November 2011).

B. The Comics

1. The Right to Health (2002)

The Right to Health is a 2002 publication of the WHO which, on the whole, addresses various facets of health as a human right. The story unfolds in a classroom, located probably in Africa,⁵² where young students have gathered from Asia, America, Europe and Africa.⁵³ What follows is an exchange between these students and a teacher of apparent African origin in which they discuss human rights. Human rights are understood within this comic as, “What can and what cannot be done to you, and what should be done for you.”⁵⁴ The teacher informs the students that the governments are responsible for ensuring that human rights are enjoyed by its residents.⁵⁵ The teacher notes that the governments have undertaken to ensure these rights for its residents through various treaties and covenants such as those on children’s rights, the rights of a woman, and against discrimination.⁵⁶

The conversation turns to discrimination. Upon being asked what discrimination is, one of the students replies that it is being treated in a “bad way.”⁵⁷ The teacher agrees that everyone has a right to be treated with equal respect.⁵⁸ Then one of the students of apparent Chinese origin narrates an incident of discrimination that he witnessed in his village. He narrates that the health worker in his village revealed that one of his neighbours was infected with the HIV/AIDS virus.⁵⁹ When this news became public, the neighbour lost his job and his family was evicted from the village.⁶⁰ Different members of the class have different reactions to this story. The teacher points out that the health worker should have protected the privacy of the patient who should not have been discriminated against because he was living with HIV.⁶¹ Another student joins in saying that no one should be discriminated against on the basis of religion, skin colour etc.⁶² The class then discusses other aspects of possible unequal treatment like sex discrimination. This discussion, premised on the right to privacy and against discrimination, concludes that, “men and women have the same rights all their lives.”⁶³ This includes, the right to education, the right to decide if and whom they will marry, the right to decide if, and how many children they want, and when.⁶⁴

At this juncture, the students interject and inform the class that health “depends on lots of other things ... especially living conditions.”⁶⁵ A student elaborates by way of example, “the water is dirty in my village and so we are often ill.”⁶⁶ The teacher agrees stating that “the right to health also means healthy living conditions.”⁶⁷ Another student questions what the right to health might mean if a person is ill.⁶⁸ The teacher replies that when one is ill, the right to health must include easy access to healthcare⁶⁹, caring and respectful treatment,⁷⁰ the right to information about the illness and the right to be heard by the medical practitioner.⁷¹

⁵² Although, in this comic, like all the others being studied in this Article, the geographical location is undisclosed: probably to give the comic book a more universal appeal.

⁵³ WHO, *The Right to Health*, (2002), p.4.

⁵⁴ WHO, *The Right to Health*, (2002), p.4.

⁵⁵ WHO, *The Right to Health*, (2002), p.5.

⁵⁶ WHO, *The Right to Health*, (2002), p.5.

⁵⁷ WHO, *The Right to Health*, (2002), p.6.

⁵⁸ WHO, *The Right to Health*, (2002), p.6.

⁵⁹ WHO, *The Right to Health*, (2002), p.7.

⁶⁰ WHO, *The Right to Health*, (2002), p.7.

⁶¹ WHO, *The Right to Health*, (2002), p.7.

⁶² WHO, *The Right to Health*, (2002), p.7.

⁶³ WHO, *The Right to Health*, (2002), p.8.

⁶⁴ WHO, *The Right to Health*, (2002), p.8–9.

⁶⁵ WHO, *The Right to Health*, (2002), p.p. 10.

⁶⁶ WHO, *The Right to Health*, (2002), p.10.

⁶⁷ WHO, *The Right to Health*, (2002), p.10.

⁶⁸ WHO, *The Right to Health*, (2002), p.11.

⁶⁹ WHO, *The Right to Health*, (2002), p.11.

⁷⁰ WHO, *The Right to Health*, (2002), p.12.

⁷¹ WHO, *The Right to Health*, (2002), p.12.

Thus, the teacher conveys to the students that the right to health is more than a right to medicine. The right to health is closely and practically associated with the many social entitlements listed above. The governments are responsible, the teacher states, for making healthcare affordable for all, and human rights should form the first priority when a government is deciding how to spend money.⁷² The teacher also states that rich governments have an obligation to help poor governments meet their human rights needs.⁷³ Understanding the right to health as a right contingent upon socio-economic conditions and a right to access health services, the comic book squarely places the responsibility on the government of various nations to make sure that the right to health of its citizens is maintained. The class takes a break.

2. HIV and AIDS: Stand Up for Human Rights (2003)

HIV and AIDS: Stand Up for Human Rights is a 2003 publication (updated in 2010) of the WHO, OHCHR and UNAIDS. The story unfolds on the football field,⁷⁴ once again, in an undisclosed geographical location, where a group of kids from various nationalities including European, Chinese, Indian, African etc. have gathered for a game of football. One of the friends, Freddy, however, is unable to join the game as he has to be home nursing his sick mother who is suffering from HIV/AIDS. After an initial wave of apprehension among the kids, many of whom want to ostracise Freddy and his mother owing to the “terrible”⁷⁵ disease, the focus of the story shifts to educating the kids about HIV/AIDS: how it spreads and how it does not, certain prevention techniques and more specifically, the right of those suffering from HIV/AIDS to be treated in a manner free from discrimination. The protagonist of the story, a young man of apparent European origin, elaborates that one can be infected with the HIV virus through 1. unprotected sex; 2. infected blood; and 3. needle sharing.⁷⁶ He informs us not to take drugs or share needles, to wait to have sex, to not feel compelled to have sex under any kind of peer pressure and to use a condom when we do.⁷⁷

The other players in the field are hearing such information for the first time—they are denied their right to education about HIV in their schools.⁷⁸ They are not taught that HIV does not spread by shaking hands, by hugging or kissing and the footballers now realise that they should not exclude Freddy from the game.⁷⁹ In fact, they race home to Freddy’s to help him and his mother. When they reach Freddy’s house, his mother tells them that when she visited the health centre, no one paid any attention to her and she had to wait for a long time before she was attended to.⁸⁰ When Freddy’s mother finally went up to the doctor he turned her away saying he could do nothing for her.⁸¹ The protagonist of the story points out that Freddy’s mother was being discriminated against. To this she replies that all over the world, people living with HIV/AIDS were being subject to this discriminatory behaviour: some lose their jobs,⁸² if they even get one, and some cannot attend school.⁸³

The newly enlightened children decide that they must change this. One of the players is Alisha, a young girl. When she returns home that evening, she tells her parents everything she learnt about HIV/AIDS that day and that Freddy’s mother was refused help.⁸⁴ Alisha’s father is in charge at the health centre at which Freddy’s mother was refused help. The next day, he confronts the doctor at the health centre. He tells him

⁷² WHO, *The Right to Health*, (2002), p.13.

⁷³ WHO, *The Right to Health*, (2002), p.13.

⁷⁴ In her experience on the field Miriam noticed that football was the one unifying factor among refugees from various countries who played football using coconut shells. This inspired the story to unfold on a football field.

⁷⁵ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.3.

⁷⁶ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.4.

⁷⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.4.

⁷⁸ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.5.

⁷⁹ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.5.

⁸⁰ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.7.

⁸¹ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.7.

⁸² WHO, *HIV/AIDS: Stand up for human rights* (2003), p.8.

⁸³ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.8.

⁸⁴ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.9.

that irrespective of a person's HIV/AIDS status, they should have "equal access to healthcare and treatment."⁸⁵ The doctor understands, and Freddy's mother goes back to the hospital.⁸⁶

The footballers want to do more to spread the word against discrimination of persons living with HIV/AIDS. They make posters informing others not to discriminate and that "people living with HIV are like you and me."⁸⁷ A passer-by who happens to gaze upon these posters informs the youngsters that there is much more that can be done to combat "HIV and discrimination."⁸⁸ Sex discrimination, class discrimination, race discrimination, discrimination against people who are sick and the right to refuse unsafe sex are all matters about which the young footballers and the gathered crowd educate each other.⁸⁹ It is unclear whether the passers-by and the crowd relate these other kinds of discrimination back to HIV/AIDS in any way: vulnerability to the virus, for example. Once again, the comic places the responsibility on governments to protect human rights. The concluding twist reveals that the young protagonist of the story who had educated all his friends on the football field is himself living with HIV/AIDS.⁹⁰ The last page of the comic reiterates how HIV/AIDS is spread and that everyone living with the virus has a right, to respect, to information and against discrimination.⁹¹

3. HIV and AIDS: Human Rights for Everyone (2006)

HIV and AIDS: Human Rights for Everyone is a 2006 publication of the United Nations High Commissioner for Refugees (UNHCR) which focuses on the lives of the Karagli family (a family of apparent African origin) as they flee their village which is under attack from rebel forces.⁹² As they enter a checkpoint in the neighbouring country, an official asks Papa Kargali why they had to flee. While he is narrating the incidents of carnage that took place in his country, an armed official at the checkpoint stops him and says, "Stop. You look like you have AIDS."⁹³ Just then, a UNHCR worker interjects and asserts the 1951 Geneva Refugee Convention according to which refugees cannot be returned to a country where they face persecution. Their HIV positive status cannot be a reason to deny them refugee status.⁹⁴

The next panel shows the Kargali family living in the refugee camp of the neighbouring country. Papa Kargali's illness has now advanced and he is too tired to go to the market to get food for his children.⁹⁵ Additionally, his son is excluded from football because of the father's illness.⁹⁶ His daughter is propositioned for sex by an older man in return for soap and money.⁹⁷

Village elders and advocates point out how this behaviour is wrong. The next day at the market, the villagers refuse to buy products from Papa Kargali's shop saying he has AIDS and accuse all refugees of taking up their land and spreading AIDS in their country.⁹⁸ Once again, advocates point out how refugees face stigma and discrimination just for being refugees. Additionally, the advocate states, refugees are also often falsely accused of spreading AIDS.

Up to this point in the story, it is unclear whether Papa Kargali actually has HIV/AIDS. It is on their daughter's insistence that Papa Kargali and his wife, Desire, decide to get tested.⁹⁹ The health practitioner

⁸⁵ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.10.

⁸⁶ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.10.

⁸⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.11.

⁸⁸ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.12.

⁸⁹ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.12–13.

⁹⁰ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.14.

⁹¹ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.16.

⁹² UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.4.

⁹³ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.4.

⁹⁴ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.5.

⁹⁵ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.6.

⁹⁶ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.6.

⁹⁷ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.8.

⁹⁸ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.8.

⁹⁹ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.10.

informs them that their results will be kept confidential and not revealed without permission.¹⁰⁰ She also informs them that in case they test positive for HIV, the health centre can provide them with nutritional support, medication and counselling groups.¹⁰¹

Five years later, the story ends with peace returning to the village of the Karagli family, and although Papa Karagli has lost the battle against AIDS, his family, having received their new education in HIV/AIDS, spread the word and bring awareness about the disease as they return to their village¹⁰²

4. Score the Goals (2010)

The final endeavour in this direction is the comic book called *Score the Goals* which is a 2010 publication of the Food and Agriculture Organization of the United Nations (“FAO”), the Stop Tuberculosis Partnership (Stop TB Partnership), UNAIDS, the United Nations Development Programme (“UNDP”), the United Nations Department of Public Information (“DPI”) and the United Nation Office on Sport for Development and Peace (UNOSDP). The story begins when an all-star football ship goes missing at sea. The players find themselves on a desert island and realise that food, water and shelter would be absolutely necessary if they are to survive until help arrives.¹⁰³

Through their survival efforts, the team highlights several millennium development goals like eradication of hunger and poverty; achievement of primary education and gender equality; reduction of child mortality rate; improvement of maternal health; endeavours for environmental sustainability and combating HIV/AIDS (limited to the extent of fighting stigma and discrimination against those affected). The story ends when all the members of the crew learn about these important lessons in how to do one’s bit in achieving them and a rescue team comes and saves the day.

IV. Critical Analysis of the Comic Books

A. Obligations of the Health System

The core obligations on each government system signatory to the ICESCR are highlighted above (Part II A). These obligations are core obligations for the purpose of a right to health, understood generally. In addition, if these obligations have to qualify as the core, in any meaningful way, they have to also form a part of the core of each health issue. The issue in question for the present inquiry is HIV/AIDS and therefore, I will assess how many of these core obligations were mentioned while the UN comics discussed the topic of HIV/AIDS and whether they were discharged in keeping with the QA³ principles. When the core obligation is discussed, I will critically analyse which parts of its contents have been addressed and which were missed so that the future comics may take those misses into account as well. In fleshing out the content of these core obligations, I will rely chiefly on their understanding in General Comment 14 and other international law documents.

1. Core Obligation of Discrimination

(1) Incomplete Discussion of Discrimination The comics tell us that discrimination is “being treated differently ... but in a bad way.”¹⁰⁴ The comics educate about HIV/AIDS¹⁰⁵ and tell us that resources should

¹⁰⁰ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.9.

¹⁰¹ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.10.

¹⁰² UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.11–14.

¹⁰³ UNAIDS, *Score The Goals* (2010), p.3.

¹⁰⁴ WHO, *The Right to Health*, (2002), p.6. See also, WHO, *HIV/AIDS: Stand up for human rights* (2003), p.2. This is an illustrative list.

¹⁰⁵ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.4–5, 16.

be *available* and *accessible*¹⁰⁶ to all regardless of their HIV/AIDS status and no one should be discriminated against: fired/not hired¹⁰⁷; excluded from school¹⁰⁸, sports,¹⁰⁹ peer group,¹¹⁰ village or community life owing to this.¹¹¹ One will practically read the comics' general precept about the availability of health services,¹¹², water, food, housing and healthy living conditions¹¹³ to be applicable to persons living with HIV/AIDS without discrimination. *Still, the availability of health programmes and services for HIV/AIDS (or more generally, health) without discrimination is not mentioned as a core government obligation.*¹¹⁴ Instead, in one comic, a private health practitioner/manager of a health centre¹¹⁵ finds out about an act of discrimination against an HIV/AIDS patient and corrects it.¹¹⁶ Only the 2003 comic mentions that "governments have responsibilities to promote and protect human rights."¹¹⁷ However, this responsibility has not been pegged to health or the core obligation to not discriminate with respect to HIV/AIDS status.

While the comic asks governments to prioritise health in their budgets and exhorts rich countries to help poor countries¹¹⁸, *it does not tell us that non-discrimination with respect to HIV/AIDS status (or more generally, health) is an achievable goal even for resource stripped countries.*¹¹⁹ It can be achieved with minimum resources by adoption/repeal of legislation and dissemination of information.¹²⁰ In 2010, the Secretary General analysed responses from various government bodies, UN bodies, and non-governmental organizations from across the world to assess the responses to the disease. The analysis suggested some ways in which immediate action can be taken without severe monetary implications. Some of these suggestions which were least resource heavy included the repeal of repressive sex-related laws which drive certain sexual behaviour underground and increase vulnerability to the virus, and the ability to seek treatment.¹²¹

Finally, in keeping with the principle of accessibility, at least one of the comics tells us that health services must be "easy to reach"¹²², affordable¹²³ and that we should be heard "because it is what is best for you [us] that counts."¹²⁴

(2) Intersections of Discrimination Not Discussed

The intersections of HIV/AIDS status (or health, generally) with prohibited grounds of discrimination¹²⁵ such as, "the grounds of race¹²⁶, colour, sex¹²⁷,

¹⁰⁶ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.16.

¹⁰⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.8.

¹⁰⁸ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.8.

¹⁰⁹ UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.4.

¹¹⁰ UNAIDS, *Score The Goals* (2010), p.14.

¹¹¹ WHO, *The Right to Health*, (2002), p.7.

¹¹² WHO, *HIV/AIDS: Stand up for human rights* (2003), p.7 which does mention this specifically with respect to HIV positive persons.

¹¹³ WHO, *The Right to Health*, (2002), p.10.

¹¹⁴ See the statement of Mr. Dainius Puras, the Special Rapporteur on Health, made to the General Assembly on 25 October 2016 where he has stressed this point. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20806&LangID=E> [Accessed 1 August 2018].

¹¹⁵ Alisha's father's profession is unclear from the comic. While he bears the tag of supervisor, he is carrying a stethoscope. See WHO, *HIV/AIDS: Stand up for human rights* (2003), p.9–10.

¹¹⁶ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.9.

¹¹⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.9.

¹¹⁸ WHO, *The Right to Health*, (2002), p.13. See also, CESCR, *General Comment No.14*, para.18.

¹¹⁹ WHO, *The Right to Health*, (2002), p.13. See also, CESCR, *General Comment No.14*, para.18.

¹²⁰ WHO, *The Right to Health*, (2002), p.13. See also, CESCR, *General Comment No.14*, para.18.

¹²¹ *The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)* 20 December 2010.

¹²² WHO, *The Right to Health*, (2002), p.11.

¹²³ WHO, *The Right to Health*, (2002), p.13.

¹²⁴ WHO, *The Right to Health*, (2002), p.12.

¹²⁵ See also, CESCR, *General Comment No.14*, para.18.

¹²⁶ For example, WHO, *The Right to Health*, (2002), p.7. See also, WHO, *HIV/AIDS: Stand up for human rights* (2003), p.13 and UNAIDS, *Score The Goals* (2010), p.12. What is needed is a little more than saying that people of different skin colour are equal. A substantive equality lens will require showing how the problem of discrimination is compounded by skin colour.

¹²⁷ For example, WHO, *The Right to Health*, (2002), p.8 and WHO, *HIV/AIDS: Stand up for human rights* (2003), p.12. What is needed is a little more than saying that boys and girls are equal. A substantive equality lens will require showing how the problem of discrimination is compounded by gender and sexual orientation.

language, religion, political or other opinion, national or social origin¹²⁸, property¹²⁹, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status” are not discussed. These grounds may contribute in determining a person’s susceptibility and bargaining power when it comes to this disease.¹³⁰ *HIV/AIDS: Stand Up for Human Rights* shows that Freddy’s mother is infected with the virus but does not show how her socio-economic condition may have made her more susceptible to the virus. Jonathan Mann had identified very early on in the epidemic that socio-cultural factors will play a big role in tackling the issue. He had identified tabooed sexual activities as one of the obstacles that the society will have to deal with if it wants to comprehensively deal with the disease.¹³¹

The comics missed out on an important segment of “vulnerable communities” such as, the gay community, men who have sex with men (“MSM”)¹³², and the youth in the age range of 15–24¹³³ who are vastly regarded as the most sensitive group. While Miriam says that the reason for doing this was that they did not want to send a very complicated message through a pilot comic, Helen agrees that if the comic was written today, it would certainly be more nuanced and would incorporate the gay community.¹³⁴

The Secretary General’s Report of 2010 on HIV/AIDS has noted after studying government responses that MSM, sex workers, drug users, prisoners etc. have an increased vulnerability to the virus but their needs are still ignored in the response to the HIV/AIDS.¹³⁵ He consequently recommended a better assessment of the needs of these populations. It is worth noting that at the time of writing these comics, *General Comment No. 14* had committed to providing health care to people without discrimination on the basis of sexual orientation¹³⁶ but the United Nations had not made concrete commitments to many vulnerable groups. For example the 2001 Declaration of Commitment on HIV/AIDS did not specify key categories like MSM or persons who use drugs; instead adopted the vague broad concept of “vulnerable groups”.¹³⁷ However, the newer comics should certainly address these populations in light of several studies and the Secretary General’s report.

¹²⁸ The 2006 comic talks about a refugee’s right to be treatment without discrimination irrespective of HIV status and also tries to tackle the myth associated with refugees- that they are carriers of HIV/AIDS. See UNHCR, HIV and UNAIDS, *Score The Goals* (2010), WHO, *HIV/AIDS: Stand up for human rights* (2003), CESCR, *General Comment No.14*.

¹²⁹ For example, WHO, *HIV/AIDS: Stand up for human rights* (2003), p.13. What is needed is a little more than saying that rich and poor are equal. A substantive equality lens will require showing how the problem of discrimination is compounded by social class/caste.

¹³⁰ The only place in the comics where an intersectionality is shown is when Fatou Kargali considers exchanging sex for money and soap although “it doesn’t feel right.” See UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.6. Perhaps this panel has been made to talk about the right to basic shelter, sanitation and water but the panel misses the opportunity to spell this out or to place the responsibility of this on governments (core obligation). Instead, when Fatou narrates this story to an older woman, she hears the following: “My dear Fatou, you did well to run away as this is not a solution for you or your family. You must finish your school, there are many other ways to earn a little money to help your family and your friends must learn to say no to a man like that.” See UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.7.

¹³¹ See, Stemple, “Health and Human Rights in Today’s Fight Against HIV/AIDS” 2008, 22 (Suppl 2) AIDS S113, S118.

¹³² In many Sub- Saharan African countries, the MSM form at least 20% of the cases of newly infected people. UNAIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010* 30 (2010). Other Studies suggest that there could be myriad reasons for the lack of work with gay communities: 1. Homophobic stigma, 2. Restrictive foreign aid policies that are not always supportive of gay rights or 3. Lack of skill or scope of many NGOs to articulate gay rights issues when they are intertwined with HIV. Cary Alan Johnson, *Off the Map: How HIV/AIDS Programming is Failing Same Sex Practicing People in Africa* (New York: International Gay and Lesbian Human Rights Commission, 2007), at 3. See also, Hsuan L. Hsu and Martha Lincoln, “Health Media & Global Inequalities” (Spring 2009) *Daedalus* 20, 21.

¹³³ It is believed that youth belonging to this age group account for half the newly infected cases. Open Society Institute, Human Rights and HIV/AIDS: Now More than Ever (July 2009) *Open Society Institute*, https://www.opensocietyfoundations.org/sites/default/files/nmitc_20090923_0.pdf [Accessed on 1 August 2018], p.3.

¹³⁴ See fn. 5 and Nygren-Krug, fn. 49. Helena made this particular point with respect to homosexuality, perhaps this statement could also today be extended to other categories of vulnerable groups.

¹³⁵ *The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)* 20 December 2010, p.14.

¹³⁶ See also, CESCR, *General Comment No.14*.

¹³⁷ See Stemple, “Health and Human Rights in Today’s Fight Against HIV/AIDS” 2008, 22 (Suppl 2) AIDS S113, S116. However, in June 2011, the Human Rights Council adopted the first ever United Nations resolution on the rights of lesbian gay bisexual and transgender (LGBT) people which will result in the first ever United Nations study on the situation of the LGBT people around the world with a view to rectify the challenges they face. See generally, Press Statement by Hillary Rodham Clinton, *United Nations Human Rights Council Resolution on Sexual Orientation and Gender Identity*, (Washington DC, 17 June 2011).

The *HIV/AIDS: Stand Up for Human Rights* (2003) promotes an abstinence model¹³⁸ when it says “we should wait to have sex”¹³⁹ and in the same page, the comic informs us, by showing us a heterosexual couple in bed, that when we do have sex, we must condom-ise.¹⁴⁰ It also shows that the man in the couple is very receptive to the idea of a condom. This depiction of sex, not only misses out on the entire gay community (which in many sub-Saharan African countries account for twenty percent of the new infections¹⁴¹) in its portrayal of the “assumed naturalness”¹⁴² of heterosexuality, but also fails to address the point that women are usually not in a position to negotiate the use of the condom.¹⁴³ It would have been more helpful or at least educational, if the comic had informed of female condoms which would have helped the woman protect herself from sexually transmitted disease and would have proved to be of great help for women in a weaker negotiable position. Additionally, female condoms are said to create a “pleasurable friction”¹⁴⁴; a fact that could have definitely gone a long way to encourage condom use.

This heterosexist bent is repeated when, in the comic *Right to Health*,¹⁴⁵ marriage is presented as a heterosexual privilege and children are presented as benefits within the marriage paradigm.¹⁴⁶ To be sure, there are positive message as regards sexuality too: Page 12 of HIV/AIDS comic¹⁴⁷ shows that women have the right to say no to unsafe sex and page 16 of the same comic asserts the right against discrimination irrespective of “sexual choices”¹⁴⁸, thus keeps the discussion open for incorporating vulnerable communities like MSM communities.

Finally, with respect to the principles of acceptability and quality of care, at least one of the comics do tell us that doctors must *accept* privacy and safeguard against unwarranted disclosure regardless of HIV status (however, this obligation has been mentioned only with respect of the doctor and not *in rem*)¹⁴⁹ but it does not tell us that a key attribute of this acceptance is that the HIV person’s treatment must be respectful and commensurate with their culture. However, the comic does not mention that persons living with HIV and AIDS have a discrimination free *quality of care* claim in the form of trained medical professionals and unexpired medicines.

2. The Core Obligation of Essential Drugs

The comics must make clear that essential drugs are a human right and it is a core obligation¹⁵⁰ for governments to provide essential drugs to its peoples commensurate with the QA³ principles.¹⁵¹ The place to find a list of essential medicines for the purpose of obligations under the ICESCR is the WHO Essential

¹³⁸ Maybe this is because a large part of the HIV/AIDS budget is dependent on donations and United States, which itself supports and promotes or at least did, at the time of writing this comic, promote this approach abroad. See, Stemple, “Health and Human Rights in Today’s Fight Against HIV/AIDS” 2008, 22 (Suppl 2) AIDS S113, S116.

¹³⁹ UNAIDS, *Score The Goals* (2010), p.4.

¹⁴⁰ UNAIDS, *Score The Goals* (2010), p.4.

¹⁴¹ UNAIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010* 30 (2010).

¹⁴² Jeffrey Weeks, “Necessary Fictions: Sexual Identity and the politics of diversity”, in *Inverted Moralities: Sexual Values in an Age of Uncertainty* (Columbia University Press, New York, 1995) at 99.

¹⁴³ However, sometimes women don’t want to use condoms for pleasure purposes. Jenny A. Higgins et al. “Rethinking Gender, Heterosexual Men, and Women’s Vulnerability to HIV/AIDS” (2010) 100 (3) *American Journal of Public Health* 435, 438.

¹⁴⁴ Anne Philpott et al., “Promoting Protection and Pleasure: Amplifying the Effectiveness of Barriers Against Sexually Transmitted Infections and Pregnancy” (2006) 368 (9551) *The Lancet* 2028, 2031.

¹⁴⁵ WHO, *The Right to Health*, (2002).

¹⁴⁶ WHO, *The Right to Health*, (2002), p.9.

¹⁴⁷ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.12.

¹⁴⁸ WHO, *HIV/AIDS: Stand up for human rights* (2003), p.16.

¹⁴⁹ See WHO, *HIV/AIDS: Stand up for human rights* (2003), p.10; WHO, *The Right to Health*, (2002), p.7 See UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.10.

¹⁵⁰ See, CESCR, *General Comment No.14*, para.43. See also, Thomas Pogge, Montreal Statement on the Human Right to Essential Medicines, (2007) 16(1) *Cambridge Quarterly of Healthcare Ethics* at 104–108.

¹⁵¹ Stephen Marks, “Access to Essential Medicines as a Component of the Right to Health”, in *Realizing the Right to Health: Swiss Human Rights Handbook*, Vol.3 p.92. See also, Stephen Marks’ analysis on how the right to and the core obligation to essential medicines must be thought through commensurate with the QA³ principles. He accomplishes this by drawing on the history of the development of the core obligation of water at p.95.

Drug List.¹⁵² The latest version of the list released in 2017 lists the following medicines as essential for HIV/AIDS treatment: Abacavir, Lamivudine, Tenofovir Disoproxil Fumarate +, Zidovudine, Efavirenz, Nevirapine.¹⁵³ There are some other inhibitors mentioned on the list, the use of which countries will have to determine on their own after considering international and national treatment guidelines.

Governments must also update this list in light of the special circumstances of their country. The comics must also mention that this means that the governments must ensure that the production, distribution and pricing of medicines favour the continuous availability and accessibility of essential medicines in each country at affordable prices and within an hour's walk from home.¹⁵⁴ The comics must make very clear that the claims of intellectual property in essential medicines are weaker than the human right of essential medicines¹⁵⁵ and that the state can intervene through trade practices such as parallel importing and compulsory licensing to privilege the core obligation.¹⁵⁶ Finally, the comics must also demonstrate how on the ground access to essential medicines depends on one's social reality.

3. The Core Obligation of Prevention, Treatment and Control of Infectious Diseases

This obligation requires instituting educational programmes on HIV/AIDS and other determinants of good health, such as economic development, gender equity, a safe environment and education. *Score the Goals* deals with this core obligation to some extent when it addresses malaria prevention by using mosquito repellents and mosquito nets, the benefits of moving water over stagnant water, and tuberculosis.¹⁵⁷ *Score the Goals* also busts some myths about the spread of HIV.¹⁵⁸ It tells us that HIV/AIDS does not spread by touching, working alongside an affected person, sharing a meal etc.¹⁵⁹ Once again, this brief mention of prevention and cure of these diseases is done by the star football team but the QA³ principles are not built in.

4. Core Obligations Partially Mentioned

While generally speaking about the right to health, the comics tell us that health depends on *living condition, clean drinking water*¹⁶⁰, *food and housing*,¹⁶¹ but the comics do not tell us that *clean drinking water, food and housing are non-derogable core obligations* of signatories either with respect to the right to health generally or with respect to the HIV issue specifically. Consequentially, there is no discussion about the principles of availability, accessibility, acceptability and quality of care through which these obligations may be borne out.

¹⁵² WHO Model List of Essential Medicines, 20th list (March 2017) at http://www.who.int/medicines/publications/essentialmedicines/20th_EML2017.pdf?ua=1 [Accessed 1 August 2018]

¹⁵³ Committee for Economic, Social and Cultural Rights, *General Comment No.17*, pp.19–21.

¹⁵⁴ WHO Essential Medicines List and the MGD Gap Task Force Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals MGD Gap Task Force Report 2008.

¹⁵⁵ Committee for Economic, Social and Cultural Rights, *General Comment No.17*, 2006.

¹⁵⁶ Montreal Statement on Essential Medicines at Thomas Pogge, "Montreal Statement on the Human Right to Essential Medicines" (2007) 16(1) *Cambridge Quarterly of Healthcare Ethics*, 104.

¹⁵⁷ UNAIDS, *Score The Goals* (2010), p.9, 17.

¹⁵⁸ See also, UNHCR, *HIV and AIDS: Human Rights for Everyone* (2006), p.5.

¹⁵⁹ UNAIDS, *Score The Goals* (2010), p.14–15.

¹⁶⁰ UNAIDS, *Score The Goals* (2010), p.8, 9.

¹⁶¹ WHO, *The Right to Health*, (2002), p.10. See also, UNAIDS, *Score The Goals* (2010), p.2, 3.

5. Core Obligations that are Not Mentioned At All

Some core obligations such as, *equitable distribution, training of health professionals, immunization, maternal and reproductive health*¹⁶² and the requirement of a *national health plan* are completely omitted with respect to the issue of HIV (and health in general).

6. No Information about What a Person May Do in the Scenario of Non-Compliance

None of the comics elaborate what a person can do when the state does not meet its health-related obligations. While one does find a mention of the responsibility of the government to protect and promote human rights in some of the comics,¹⁶³ it is unclear what those words mean and how, if at all, one can ensure that one's government discharges its obligation.

(1) Office of the High Commissioner for Human Rights It is beyond the scope of this article to elaborate on enforcement mechanisms within the UN. However, significantly, as Marks asserts, the concept of sovereignty is "less than ever an insurmountable obstacle"¹⁶⁴ and many monitoring systems have now been put in place to fulfil several UN Charter objectives. Summarily, the Office of the High Commissioner for Human Rights (OHCHR) provides oversight to the monitoring of treaty obligations. The commissioner is the "principal human rights official of the United Nations"¹⁶⁵ and this office works to monitor, provide public reports and to provide technical assistance to countries in the fulfilment of their human rights obligations.¹⁶⁶ It carries out these tasks with the help of the bodies described below, all of which work under the general supervision of the OHCHR.

- i. The Public Procedure or the 1235 procedure¹⁶⁷ (which owing to newer mechanisms has been rendered unnecessary) was used to scrutinise all manner of violations by the appointment of a Special Rapporteur.¹⁶⁸
- ii. The 1503 Procedure¹⁶⁹: this procedure involves a closed door examination of a "consistent pattern of gross and reliably attested violations of human rights."¹⁷⁰ This procedure has now been replaced by a
- iii. confidential complaints procedure to address, "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstance."¹⁷¹

¹⁶² The comic does mention the right of women to choose if and when they want to marry and how many children they want to have. But, it does not discuss the societal pressures that bear upon this choice and consequences for maternal, reproductive and child rights and health. See WHO, *The Right to Health*, (2002), p.9. In *Score the Goals*, at p.13, the lost at sea all-star football team does mention that the health of the pregnant fan was their "top priority" but the comic misses an opportunity to state what else constitutes maternal health. See UNAIDS, *Score The Goals* (2010), p.13.

¹⁶³ See WHO, *HIV/AIDS: Stand up for human rights* (2003), p.14, 16. WHO, *The Right to Health*, (2002), p.13.

¹⁶⁴ Stephen Marks, "The United Nations and Human Rights", in Weston H. Weston and Anna Greal (eds.) *Human Rights in the World Community* (University of Pennsylvania Press: 2016), p.326.

¹⁶⁵ Office of the High Commissioner of Human Rights, <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx> [Accessed 1 August 2018].

¹⁶⁶ Marks, "The United Nations and Human Rights", in Weston and Greal (eds.) *Human Rights in the World Community* (2016), p.319.

¹⁶⁷ Established through the 6 June 1967 Economic and Social Committee Resolution 1235 (XLII) to enable a "study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid, ... and racial discrimination, ... and report, with recommendations thereon, to the Economic and Social Council" sourced from <http://hrlibrary.umn.edu/procedures/1235.html> [Accessed 1 August 2018]. See Marks, "The United Nations and Human Rights", in Weston and Greal (eds.) *Human Rights in the World Community* (2016), p.320.

¹⁶⁸ Marks, "The United Nations and Human Rights", in Weston and Greal (eds.) *Human Rights in the World Community* (2016), p.320.

¹⁶⁹ Called so for Resolution No. 1503 of the Economic and Social Council adopted in 1970. <http://hrlibrary.umn.edu/procedures/1503.html> [Accessed 1 August 2018]

¹⁷⁰ Marks, "The United Nations and Human Rights", in Weston and Greal (eds.) *Human Rights in the World Community* (2016), p.320.

¹⁷¹ See, UNHCR "Human Rights Council Complaints Procedure" (18 June 2007), UNHCR, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> [Accessed 1 August 2018]. For more information, see Marks, "The United Nations and Human Rights", in Weston and Greal (eds.) *Human Rights in the World Community* (2016), p.320.

(2) Special Procedures of Thematic and Country Rapporteurs of the Human Rights Council Since the 1980s, the Commission on Human Rights has been appointing special rapporteurs who are experts on either thematic problems afflicting the world or country-specific human rights problems. These experts monitor situations of human rights abuse according to their mandate. Marks states that as of 2014 there have been 37 thematic rapporteurs on issues such as housing, child prostitution, involuntary disappearances, food, poverty, racism, independence of judges etc.¹⁷²

(3) Universal Periodic Review of the Human Rights Council Since 2007, the Human Rights Council has been empowered to scrutinise the human rights records of all its member states. The council looks at the reports of governments, of rapporteurs, of other UN bodies, non-governmental organizations, academic and research institutes and regional organizations to draw a list of recommendations for each country.¹⁷³ Governments are then held accountable to these recommendations to which they may respond by addressing the issues at hand or by justifying and explaining their position.¹⁷⁴

(4) Committee on Economic, Social and Cultural Rights This committee is the monitoring body for all countries that have ratified the ICESCR. This is a “body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.”¹⁷⁵ The committee hears individual complaints (by those countries signed on to the optional protocol), state on state complaints (this has never been used)¹⁷⁶ and conducts confidential inquiries on human rights abuses on those countries that have recognised the competence of the committee to do so.¹⁷⁷ It also considers shadow reports submitted by non-governmental organizations in addition to State reports and issues a set of recommendations for the state.

V. Conclusion

It would have been worthwhile to see how the comic book experiment fared, despite it lacking focus on the issue of HIV/AIDS from a holistic, socio-political and sexuality angle. However, there has been no formal evaluation of the work, although, Miriam asserts that these comic books have been very successful, chiefly from the number of reprint requests that they received from various schools and Governments.¹⁷⁸ If there is any real progress in fighting the disease through the medium of comic books, one needs to be aware of the exact impact each part of the comic has had, which part needs to be modified, which part needs to be explained in more detail etc: in sum, a robust “evidentiary standard common to social science”¹⁷⁹ needs to be set up to make a fair assessment of strengths and weakness and to recognise areas that need work.

This article makes a beginning at that by analysing the comics through a public health perspective. This critique can serve as a ready reference for the next edition of comic books on HIV/AIDS. However, the important point this article attempts to bring home is that the comic book project cannot ignore the general jurisprudence emerging from UN documents, statements, General Comments and other associated

¹⁷² For more information, see Marks, “The United Nations and Human Rights”, in Weston and Grear (eds.) *Human Rights in the World Community* (2016), p.321.

¹⁷³ Marks, “The United Nations and Human Rights”, in Weston and Grear (eds.) *Human Rights in the World Community* (2016), p.321–322.

¹⁷⁴ Marks, “The United Nations and Human Rights”, in Weston and Grear (eds.) *Human Rights in the World Community* (2016), p.322.

¹⁷⁵ <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> [Accessed 1 August 2018]. (COMMITTEE ON SOCIAL ECONOMIC AND CULTURAL RIGHTS).

¹⁷⁶ Marks, “The United Nations and Human Rights”, in Weston and Grear (eds.) *Human Rights in the World Community* (2016), p.323.

¹⁷⁷ <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm> [Accessed 1 August 2018]. (COMMITTEE ON SOCIAL ECONOMIC AND CULTURAL RIGHTS).

¹⁷⁸ Telephone Interview with Miriam Maluwa, Law and Human Rights Adviser, UNAIDS, (27 October 2011).

¹⁷⁹ Stemple, “Health and Human Rights in Today’s Fight Against HIV/AIDS” 2008, 22 (Suppl 2) AIDS S113, S119.

international law material while making the comics. If it does so, it will inevitably miss out on important areas which require advocacy.

One way to incorporate these suggestions could be that each comic could bring together artists, affected persons (especially the vulnerable sections whose voice is not captured effectively), international law scholars, and in-field human rights defenders to lay out all the issues that need to be discussed with respect to the disease. Then, perhaps, it could be decided that there will be more than one comic on the issue and each comic would pick out one core right to health obligation with respect to HIV/AIDS that it will address, alongside its intersectionalities.

It is also not true that, artistically, it is difficult to show intersectionalities of rights. In a new release called *Night Stars* by *Comics Uniting Nations*, one panel mentions that rural women lack ownership and financing to till their lands.¹⁸⁰ This not only shows that ownership of lands varies by gender, but also that it varies by rural/urban setting. If research has found that access to treatment depends on economic status, then a comic can demonstrate this by drawing two adjacent panels, one in which a HIV/AIDS affected person who is visibly affluent is given treatment, and the other in which a visibly poor person is denied treatment. Similarly, these panels can be adapted to demonstrate difference in access based on other factors that studies may reveal: race, sex, caste, religion, homelessness, gender identity, sexual orientation, imprisonment status so on and so forth.

Most importantly, presently, the comics are not incomprehensible to anyone who cannot read and write. There are big dialogue boxes with a lot of content but the pictures do not tell a story by themselves. Perhaps, the illustrations, if drawn in a more telling way, would be more effective in conveying the message to the intended population.

¹⁸⁰ Timothy P. Lattie and Decheser Media “Global Goals Story” in *Night Stars: Special* (2016).

Your Immigration Status Please

Matthew White*

✉ Banks; Current accounts; Data protection; Discrimination; EU law; Immigration status; Necessary in democratic society; Proportionality; Right to respect for private and family life

Abstract

With the introduction of the Immigration Act 2014, the UK Government has sought to make life difficult for those with an irregular migration status through various means, by denying them access to certain services in what is called the “hostile environment”. The Government’s latest addition to the “hostile environment” is to compel banks and building societies to conduct immigration checks on 70 million current accounts. Given that this involves the processing of personal data, this article, (based on a blog post of the same name) considers the lawfulness of this measure under arts 8 and 14 of the European Convention on Human Rights. This assessment leads to the consideration as to whether this would be yet another obstacle for the UK when they seek a data protection adequacy ruling from the European Union’s European Commission once it has left the EU.

Introduction

With the introduction of the Immigration Act 2014 (IA 2014), the UK Government has sought to make life difficult for those with an irregular migration status through various means, by denying them access to certain services through what is called the “hostile environment”.¹ The Government’s latest addition to the “hostile environment” is to compel banks and building societies to conduct immigration checks on 70 million current accounts.² Given that this involves the processing of personal data, this article, (based on a blog post of the same name)³ considers the lawfulness of this measure under arts 8 and 14 of the European Convention on Human Rights (ECHR or Convention Right). This assessment leads to the consideration as to whether this would be yet another obstacle for the UK when they seek a data protection adequacy ruling from the European Union’s (EU) European Commission (Commission) once it has left the EU.

The Immigration Checks from Banks and Building Societies

The Immigration Act 2016 (IA 2016) updated and amended provisions relating to bank accounts. Schedule 7 of the IA 2016 inserts s.40A into the IA 2014 which creates the legal basis for banks and building societies to conduct immigration checks. This came into force January 2018.⁴ Initially, s.40 of the IA 2014 concerned banks and building societies preventing disqualified persons from opening current accounts. This new insertion of s.40A(1) of the IA 2014 requires banks and building societies to conduct immigration

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¹ C. Yeo, “The hostile environment: what is it and who does it affect?” (29 May 2017), *Free Movement*, <https://www.freemovement.org.uk/hostile-environment-affect/> [Accessed 1 August 2018].

² A. Travis, “UK banks to check 70m bank accounts in search for illegal immigrants” (21 September 2017), *The Guardian*, https://www.theguardian.com/uk-news/2017/sep/21/uk-banks-to-check-70m-bank-accounts-in-search-for-illegal-immigrants?CMP=twt_gu [Accessed 1 August 2018].

³ M. White, “Guest Post: Your Immigration Status, Please!” (9 January 2018), <https://paulbernal.wordpress.com/2018/01/09/guest-post-your-immigration-status-please/> [Accessed 1 August 2018].

⁴ Travis, “UK banks to check 70m bank accounts in search for illegal immigrants” (21 September 2017), *The Guardian*, https://www.theguardian.com/uk-news/2017/sep/21/uk-banks-to-check-70m-bank-accounts-in-search-for-illegal-immigrants?CMP=twt_gu [Accessed 1 August 2018].

checks (specified by regulations) *into each current account* which is not an excluded account. Excluded accounts are those used for the purposes of trade, business or a profession.⁵ Section 40A(2) of the IA 2014 details that immigration checks means checking (based on information held by a specified anti-fraud organisation or data-matching authority) whether an account is operated by a disqualified person. Section 40A(3) of the IA 2014 defines a disqualified person as a person in the UK who does not have, but requires, leave to remain and that the Secretary of State considers an account should not be provided for.

The IA 2014 (Current Accounts) (Compliance &c) Regulations 2016 (the Regulation) is the Regulation responsible for immigration checks. Regulation 2 notes that immigration checks must be carried out during each successive quarter of each year. This means that banks and building societies must conduct immigration checks four times a year, every year. The explanatory memorandum of the Regulation does not make a statement of compatibility with the ECHR, as it is not required.⁶ This necessitates a consideration under the ECHR.

The European Convention on Human Rights

The immigration checks set out in the IA 2014 and the Regulation will be assessed on its compatibility with the ECHR. This assessment considers whether immigration checks are compatible with art.8 in and of itself, and whether it is compatible with art.8 in conjunction with art.14.

Compatibility of immigration checks with art.8 of the European Convention on Human Rights

a. Immigration checks interfere with art.8

Article 8 details that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

For art.8 to apply, it has to be interfered with. The threshold for interfering with art.8 is not a particularly high one,⁷ and the evidence for interferences does not necessarily have to be factual.⁸ Due to the protection of personal data being of fundamental importance to a person's enjoyment of their private and family life,⁹ its mere storage interferes with art.8.¹⁰ Subsequent use is irrelevant to that finding.¹¹ The European Court of Human Right's Grand Chamber has due regard to the way in which records are used and processed and the results that may be obtained.¹² More specific to s.40A(1) of the IA 2014 and the Regulation is that information that is retrieved from banking documents undoubtedly amounts to personal data, irrespective

⁵ Regulation 2 of the IA 2014 (Current Accounts) (Excluded Accounts and Notification Requirements) Regulations 2017 (SI 2016/1252).

⁶ Explanatory Memorandum to the IA 2014 (Current Accounts) (Compliance &c) Regulations 2016 (SI 2016/1073), at [6.1].

⁷ *AG (Eritrea) v Secretary of State* [2007] EWCA Civ 801; [2008] Imm. A.R. 158 at [28].

⁸ I. Roagna, "Protecting the right to respect for private and family life under the European Convention on Human Rights" (2012), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCMContent?documentId=09000016806f1554> [Accessed 1 August 2018] p.35.

⁹ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [103].

¹⁰ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [67].

¹¹ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [67].

¹² *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [67].

of its sensitivity.¹³ Thus, the fact that banks and building societies store personal data with regards to current accounts, and can run immigration checks on the data stored which can subsequently lead to the current accounts being frozen or closed (though this is suspended pending a review)¹⁴ establishes an interference with art.8. Along with the suspension on freezing accounts, current account checks have been temporarily reduced.¹⁵ This, however, does not affect the validity of the arguments that will be made for a variety of reasons. Firstly, s.40A(1) and the Regulation has not been repealed, suspended or revoked, and is thus still the law as it stands, secondly, there is no detail as to how and in what ways current account checks will be reduced (for e.g. will it still be quarterly?), thirdly, due to the reductions being temporary, they are not permanent and there is no clarity as to how long these reductions will last. Fourthly, even if there are temporary reductions, these could be completely bypassed by immigration exemptions in Sch.2, para.4 of the Data Protection Act 2018 (DPA 2018).¹⁶ Finally, given that s.40A(1) and the Regulation is still in force, it is important to remember that “[i]t is the *potential reach of the power* rather than its actual use *by which its legality must be judged*.¹⁷ Every current account that is not an excluded account is potentially subject to this power and insufficient legal restraints does not become legal simply because self-restraint may be exercised.¹⁸ References to the temporary reductions will be highlighted where necessary. Once interference has been established, it is necessary to consider whether current account checks are compatible with art.8 by determining whether it is in “accordance with the law”, pursue a legitimate aim, and is “necessary in a democratic society”.

b. Immigration checks need to be in accordance with the law

The interference of a measure must be “in accordance with the law”, requiring some basis in domestic law.¹⁹ The issue that arises with reducing current account checks is that its basis would still be based upon s.40A(1) and the Regulation and if not, this would violate art.8 for not having a legal basis.²⁰ This highlights another reason why both s.40A(1) and the Regulation would still have to be considered under the ECHR. The domestic law has to satisfy what is referred to as the “quality of the law” meaning it has to be compatible with the rule of law,²¹ accessible to the person concerned and foreseeable as to its effects.²²

Publication of the law (as is the case on legislation.gov.uk) makes it likely that s.40A(1) of the IA 2014 and the Regulation comply with accessibility.²³ However, given that current account checks have been temporarily reduced, the details of those reductions have not been made available to the public.²⁴ This, therefore, does not “set out in a form accessible to the public any indication”²⁵ as to how and in what ways current account checks will be reduced, thus not making the policy open to public knowledge or scrutiny.²⁶ A law that is not accessible is not “in accordance with the law” for the purposes of art.8 and violates it.²⁷

¹³ *M.N. and Others v San Marino* (2016) 62 E.H.R.R. 19 at [51].

¹⁴ *The Guardian*, “Sajid Javid says government’s hostile environment will be reviewed – video” (3 June 2018), *The Guardian*, <https://www.theguardian.com/global/video/2018/jun/03/sajid-javid-says-governments-hostile-environment-will-be-reviewed-video> [Accessed 1 August 2018]; B. Staton, “Home Office suspends bank account closures over Windrush fears” (16 May 2018), *Sky News*, <https://news.sky.com/story/home-office-suspends-bank-account-closures-over-windrush-fears-11374690> [Accessed 1 August 2018].

¹⁵ J. Grierson, “Home Office suspends immigration checks on UK bank accounts” (17 May 2018), *The Guardian*, <https://www.theguardian.com/uk-news/2018/may/17/home-office-suspends-immigration-checks-on-uk-bank-accounts> [Accessed 1 August 2018].

¹⁶ M. White, “Immigration Exemption and the European Convention on Human Rights” (2018) *European Data Protection Law Review* (forthcoming).

¹⁷ *Beghal v DPP* [2015] UKSC 49, [102].

¹⁸ *Beghal v DPP* [2015] UKSC 49, [102].

¹⁹ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [95].

²⁰ *Radu v The Republic of Moldova* (App No.50073/07) judgment of 14 April 2004 at [27-32].

²¹ *Stafford v UK* (46295/99) (2002) 35 E.H.R.R. 32 at [63].

²² *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [95].

²³ *Leander v Sweden* (A/116) (1987) 9 E.H.R.R. 433 at [52]–[53].

²⁴ *Liberty v UK* (58243/00) (2009) 48 E.H.R.R. 1 at [66].

²⁵ *Liberty v UK* (2009) 48 E.H.R.R. 1 at [69].

²⁶ *Liberty v UK* (2009) 48 E.H.R.R. 1 at [67]; *Shimovolos v Russia* (30194/09) (2014) 58 E.H.R.R. 26 at [69].

²⁷ *Liberty v UK* (2009) 48 E.H.R.R. 1 at [69].

With regards to foreseeability, a law is foreseeable if it is formulated with sufficient precision to enable any individual, if need be with appropriate advice, to regulate their conduct.²⁸ This requirement ensures that there is an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any such measures²⁹ i.e. current account checks. This allows individuals to avoid exposure to unwelcome intrusions by the State.³⁰ After all:

“[I]t would be contrary to the rule of law for the discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. *Consequently*, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference ...”³¹

Domestic law must afford appropriate safeguards to prevent any such use of personal data that is inconsistent with art.8.³² Section 40A(1) in combination with the Regulation permits banks and building societies to conduct immigrations checks on *all* current accounts, *four times a year, every year*. It could be argued that s.40A(1) and the Regulation satisfies this requirement because the law is clear as to *when* current accounts will be checked (quarterly). Due to the checks occurring quarterly, it could also be argued that such measures are not arbitrary in that they can only occur *during* a said quarter.

However, these arguments are unconvincing for reasons that will now be highlighted. Section 40A(1) and the Regulation provides no scope of any such discretion because 70 million accounts will be checked on a continuous basis. The quarterly indication is not adequate in that it guarantees art.8 interference is inevitable. If the temporary reduction in current account checks are taken into account, would they still occur on a quarterly basis? If not, what is the frequency of said checks? This makes the position unclear. There is no indication as to, or under, what circumstances (e.g. when there are reasons to suspect³³ that a current account belongs to a disqualified person) an immigration check may ensue, thus making the measure arbitrary because the vast majority of accounts will be screened for the sole purpose that they exist. It also does not take into account that individuals may have leave to remain, outstanding applications and appeals pending.³⁴ A temporary reduction in current account checks does not alter the fact that the criteria for them occurring is still unclear. There is also the fact that in 9.5% of cases, “disqualified persons” were not in the UK (by the IA 2014’s own definition, they would *not* be a disqualified person as they are not present in the UK) but were still screened.³⁵ This will be exacerbated by s.40A(1) and the Regulation and temporary reduction of its use would not rectify this. Moreover, current accounts will be continuously checked even if an individual’s current account has been ruled out as not belonging to a disqualified person on first inspection, treating every current account with *de facto* suspicion.³⁶ Moreover, this is all the more striking when 70 million current accounts will be routinely checked for the aim of catching 6000 over-stayers, and 900 every proceeding year,³⁷ which highlights the arbitrary and virtually unfettered³⁸ nature of the powers. It does not give individuals adequate indications as to when the law will apply to

²⁸ *Amann v Switzerland* (27798/95) (2000) 30 E.H.R.R. 843 at [56].

²⁹ *Uzun v Germany* (35623/05) (2011) 53 E.H.R.R. 24 at [61].

³⁰ Privacy International, “Memorandum of Laws Concerning the Legality of Data Retention with regard to the Rights Guaranteed by the European Convention on Human Rights” (10 October 2003), www.statewatch.org/news/2003/oct/Data_Retention_Memo.pdf [Accessed 1 August 2018], p3.

³¹ *Szabo and Visy v Hungary* (37138/14) (2016) 63 E.H.R.R. 3 at [230]–[231].

³² *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [103].

³³ *Roman Zakharov v Russia* (47143/06) (2016) 63 E.H.R.R. 17 at [260].

³⁴ D. Bolt, “An inspection of the ‘hostile environment’ measures relating to driving licences and bank accounts” (October 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf [Accessed 1 August 2018], at [6.29].

³⁵ Bolt, “An inspection of the ‘hostile environment’ measures relating to driving licences and bank accounts” (October 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf [Accessed 1 August 2018], at [6.46]–[6.47].

³⁶ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [122].

³⁷ Travis, “UK banks to check 70m bank accounts in search for illegal immigrants” (21 September 2017), *The Guardian*, https://www.theguardian.com/uk-news/2017/sep/21/uk-banks-to-check-70m-bank-accounts-in-search-for-illegal-immigrants?CMP=rwt_gu [Accessed 1 August 2018].

³⁸ *Liberty v UK* (58243/00) (2009) 48 E.H.R.R. 1 at [64].

them, so they can regulate their conduct to avoid any unwelcome intrusions, because interference with art.8 occurs *irrespective* of conduct.³⁹ The temporary reduction in current checks exemplifies the arbitrary and unfettered nature of s.40A(1) and the Regulation, because there is no indication that a reduction was possible. Additionally, there are no clear or binding⁴⁰ detailed rules on what information will be screened during an immigration check, thus it cannot be ruled out that sensitive personal data will also be checked.

It has been argued that for the purposes of art.8, immigration checks as envisaged in s.40A(1) and the Regulation, even with the temporary reductions are very unlikely to pass the test of foreseeability and would therefore not “in accordance with the law” and thus amount to a violation.⁴¹ Finding a measure not to be in “accordance with the law” usually obviates the need to consider whether the measure is “necessary in a democratic society”,⁴² but it is possible for the European Court of Human Rights to consider this regardless.⁴³

c. Do immigration checks pursue a legitimate aim?

A legitimate aim is an exemption⁴⁴ found with art.8(2), such as national security and public safety. These exemptions are exhaustive and restrictive, and to attain compatibility with art.8, the interference must pursue an aim “that can be linked to one of those listed in that provision”.⁴⁵ Such link must be reasonable and genuine to be considered legitimate.⁴⁶

The Home Office have argued on a general point that the European Court of Human Rights regards the deportation of foreign criminals and immigration controls as legitimate aims under art.8(2).⁴⁷ The Home Office continued that the UK’s Supreme Court⁴⁸ and Court of Appeal⁴⁹ agree that immigration control falls within protecting the economic well-being of a country. One could even refer to the European Court of Human Right’s position in *Saadi v UK* where the Grand Chamber noted that subject to their obligations under the Convention, States enjoy an “undeniable sovereign right to control aliens” entry into and residence in their territory.⁵⁰

This position, however, can be critiqued. The Home Office refers to the European Court of Human Rights on the issue of deportation being a legitimate aim, when s.40A(1) and the Regulation do not actually deal with deportation. This can be evidenced by the fact that the Home Office does not acknowledge that art.8 is even engaged,⁵¹ for current account checks. Thus, no legitimate aim to justify interference has been advocated. Furthermore, the reference to *Saadi* concerned the control of migrants’ entry and residence, whereas s.40A(1) and the Regulation concerns the rights of migrants *and* citizens.

In playing devil’s advocate, it must be noted that Judge Wildhaber’s *et al* concurring opinion in *Rotaru* noted that the more or less indiscriminate processing of personal data (in that instance, storage) in pursuit of a legitimate aim is “evidently problematic”.⁵² This highlights that the more or less indiscriminate

³⁹ M. White, “The new Opinion on Data Retention: Does it protect the right to privacy?” (27 July 2016), <https://eulawanalysis.blogspot.be/2016/07/the-new-opinion-on-data-retention-does.html> [Accessed 1 August 2018].

⁴⁰ *Valenzuela Contreras v Spain* (1999) 28 E.H.R.R. 483 at [60].

⁴¹ *Hasan and Chaush v Bulgaria* (30985/96) (2002) 34 E.H.R.R. 55 at [86] and [89].

⁴² *Uzun v Germany* (35623/05) (2011) 53 E.H.R.R. 24 at [63].

⁴³ *Kurić and others v Slovenia* (26828/06) (2013) 56 E.H.R.R. 20 at [350].

⁴⁴ *Biržietis v Lithuania* (App No.49304/09) judgment of 14 June 2016 at [53].

⁴⁵ *Biržietis v Lithuania* (App No.49304/09) judgment of 14 June 2016 at [53].

⁴⁶ *Rotaru v Romania* (App No.28341/95), judgment of 4 May 2000, Concurring Opinions of Judge Wildhaber’s et al.

⁴⁷ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], para.8.

⁴⁸ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 A.C. 166, at [18].

⁴⁹ *Treebhown v Secretary of State for the Home Department* [2012] EWCA Civ 1054; [2013] Imm. A.R. 15, at [76].

⁵⁰ *Saadi v UK* (13229/03) (2008) 47 E.H.R.R. 17 at [64].

⁵¹ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at [14].

⁵² *Rotaru v Romania* (App No.28341/95), judgment of 4 May 2000.

processing of personal data through current account checks is evidently problematic in the pursuit of a legitimate aim.

The Home Office uses economic well-being to justify most of the provisions of the IA 2016 but does not do so with regard to current account checks due to the first problem highlighted above, that is, it is acting on the assumption that art.8 is not engaged. On the matter of current account checks the Home Office relies upon the general (or public) interest ground under art.1 Protocol 1.⁵³ However, a public or general interest is not a legitimate aim that can justify interference under art.8(2). Korff gives the example of art.9 (freedom of religion, thought and conscious) not having national security as a permissible justification for interference noting that “[s]tates may therefore not interfere with that right on that ground”.⁵⁴ Even if one were to consider a simplistic definition of economic well-being, that being, preventing monetary loss through the activities of disqualified persons, the impact assessment of current account checks acknowledges that this will lead to a net loss of £0.8 million over ten years,⁵⁵ whereas the “Do Nothing” results in no net loss, but somehow does not meet the Government’s objective.⁵⁶ The Government’s impact assessment continues—that the primary benefit is to not allow disqualified persons access to banking products and services to reduce the attractiveness of the UK as a place to stay for law breakers,⁵⁷ moving away from an economic well-being position.

However, Gerards notes that, in practice, a legitimate aim does not seem to be of real importance to the European Court of Human Rights. Gerards continues that the European Court of Human Rights usually solves the problem of legitimate aims by accepting very general and abstract aims, such as the “protection of national security or respecting the rights and freedoms of others, as the basis for its examination of the justifiability of interferences with fundamental rights”.⁵⁸ For Gerards, this easy acceptance of very broad meaningless terms adds very little to the reasoning of the European Court of Human Rights.⁵⁹

In summary, although it is relatively straightforward and easy for a legitimate aim to be satisfied regarding current account checks, problems still persist. For instance, it can be argued that there has not been a legitimate aim that can be identified to justify the interference with art.8 because the Government does not believe art.8 to be engaged. Even if there was a legitimate aim, the justification used (public/general interest) does not fall within the list of exemptions in art.8(2). Moreover, the proportionality test would be difficult to apply on the basis of broads aims, such as the “general interest”.⁶⁰ Even if one were to consider economic well-being as a justification, the impact assessment’s own figures suggest that s.40A(1) and the Regulation will have the opposite effect of safeguarding it. Thus, if the argument that the indiscriminate screening of 70 million current accounts serves no legitimate aim, this would amount to a violation.⁶¹

⁵³ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at [72].

⁵⁴ D. Korff, “The Standard Approach Under Articles 8-11 ECHR and Article 2 ECHR” (2009), https://www.pravo.unizg.hr/_download/repository/KORFF_-_STANDARD_APPROACH_ARTS_8-11_ART2_-_Aug08%5B2%5D.pdf [Accessed 1 August 2018], p3; Guide to Article 9 (2015), https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf [Both accessed 1 August 2018], para.31; see also *Nolan and K v Russia* (2512/04) (2011) 53 E.H.R.R. 29 at [73].

⁵⁵ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [53].

⁵⁶ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018].

⁵⁷ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [51].

⁵⁸ J. Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, 479.

⁵⁹ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, 480.

⁶⁰ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, 480.

⁶¹ *Erméyi v Hungary* (App No.22254/14), judgment of 22 November 2016 at [37]–[40]; *Khuzhin and Others v Russia* (App No.13470/02), judgment of 23 October 2008) at [117]–[118].

d. Are immigration checks necessary in a democratic society?

For a measure to be “necessary in a democratic society,” interfering with those rights must correspond to “pressing social need,” it must be “proportionate to the legitimate aim pursued,” and the reasons given by the national authorities to justify it must be “relevant and sufficient.”⁶²

Is there a pressing social need for immigration checks?

The European Court of Human Rights has stressed that “necessary” in a democratic society is not synonymous with “indispensable” but at the same time this did not mean it encompassed expressions such as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.⁶³ This applies to the measure applying the law, *and the law itself*⁶⁴ and thus demonstrates further why a temporary reduction cannot be considered in isolation to s.40A(1) and the Regulation. To justify a pressing social need “[t]here must be a sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect”.⁶⁵ It is the duty of the State to demonstrate there is a pressing social need,⁶⁶ with the onus being significantly high.⁶⁷ The EU’s Article 29 Data Protection Working Party (29WP) considers that a pressing social need asks:

- a. Is the measure seeking to address an issue which, if left unaddressed, may result in harm to or have some detrimental effect on society or a section of society?
- b. Is there any evidence that the measure may mitigate such harm?
- c. What are the broader views (societal, historic or political etc) of society on the issue in question?
- d. Have any specific views/opposition to a measure or issue expressed by society been sufficiently taken into account?⁶⁸

These questions will be used to assess the need for current account checks. According to the Government’s impact assessment, the need for this measure derives from the fact that, previously, it was not possible to restrict current accounts for disqualified persons before the IA 2014 and for those who had *become* a disqualified person.⁶⁹ The Government continued that it intends to ensure that banks are required to check for current accounts held by known disqualified persons.⁷⁰ This position does not reflect the wording of s.40A(1) and the Regulation, as checks are not based upon checking current accounts of known disqualified persons, but checking *every* current account, four times a year, every year on a precautionary basis. Such a position is later acknowledged in the impact assessment.⁷¹ The Government does not address in what ways not having this provision would be detrimental to society or sections of it. The Government’s focus

⁶² *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [101].

⁶³ *Handyside v United Kingdom* (A/24) (1979–80) 1 E.H.R.R. 737 at [48].

⁶⁴ *Handyside v United Kingdom* (1979–80) 1 E.H.R.R. 737 at [49].

⁶⁵ Joint Committee on Human Rights, *First Report* (2000–01), HL 42/HC 296.

⁶⁶ *Piechowicz v Poland* (2007/07) (2015) 60 E.H.R.R. 24 at [212].

⁶⁷ *Pullen & Ors -v- Dublin City Council* [2008] IEHC 379 at [12(c)].

⁶⁸ Article 29 Working Party, “Opinion 01/2014 on the application of necessity and proportionality concepts and data protection within the law enforcement sector” (27 February 2014), www.dataprotection.ro/servlet/ViewDocument?id=1081 [Accessed 1 August 2018], at [3.19].

⁶⁹ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018].

⁷⁰ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018].

⁷¹ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [20].

is simply on making life harder for disqualified persons. The impact assessment even *admits* that doing nothing has “*no costs associated with it*”⁷² and is therefore not detrimental to society.

With regards to evidence that s.40A(1) and the Regulation might mitigate the occurrence of over stayers, the evidence is lacking (see more below). As the Independent Chief Inspector of Borders and Immigration noted:

“[J]ustification for extending the ‘hostile environment’ measures is based on the conviction that they are ‘right’ in principle, and enjoy broad public support, rather than on any evidence that the measures already introduced are working or need to be strengthened, since no targets were set for the original measures and little has been done to evaluate them.”⁷³

The Home Affairs Committee heavily criticised the Government and found it unacceptable that it had “not yet made any assessment of the effectiveness of the”⁷⁴ “hostile environment” and urgently called on them to do so.

With regards to broader views, the impact assessment makes *no* assessment on the human rights implications. The concerns lie with the effects on the banking industry.⁷⁵ The Home Office’s ECHR memorandum acknowledges that immigration checks engage art.6 (fair trial) and art.1 Protocol 1 (right to property), but *not* art.8.⁷⁶ Therefore, consideration for the protection of personal data does not even factor.

Additionally, the impact assessment does not entertain the possibility of only checking current accounts where there are reasonable and objective grounds to believe it belongs to a disqualified person. Moreover, the impact assessment acknowledges that after the first year, roughly 900 matches will be made⁷⁷ despite 70 million current accounts subject to checks on a continuous basis. Immigration current account checks do not prevent those who seek to circumvent this provision from setting up overseas accounts,⁷⁸ and in any event, are conducted “haphazardly, irregularly or without due and proper consideration”.⁷⁹ On a fundamental level, the link between current accounts and UK residency is never established, and thus raises more concerns about the necessity of the measure. There might be a pressing social need to remove over stayers by checking current accounts that are linked to them (which in and of itself would have to be demonstrated), but there can be no pressing social need that subjects every current account to checks with the aim of furthering the “hostile environment”.⁸⁰ A failure to establish a pressing social need also results in a violation.⁸¹

⁷² HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [6].

⁷³ Bolt, “An inspection of the ‘hostile environment’ measures relating to driving licences and bank accounts” (October 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf [Accessed 1 August 2018], at [7.23].

⁷⁴ Home Affairs Committee, *Home Office delivery of Brexit: immigration (third report)* (2017-19, HC 421), at [120].

⁷⁵ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [19].

⁷⁶ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at [68–76].

⁷⁷ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [20].

⁷⁸ PBC (HC Bill 074) 2015–16, written evidence submitted by ILPA (IB 14B).

⁷⁹ *Roman Zakharov v Russia* (47143/06) (2016) 63 E.H.R.R. 17 at [257].

⁸⁰ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [68].

⁸¹ *Faber v Hungary* (App No.40721/08), judgment of 24 July 2012 at [59].

Relevant and sufficient reasons

This part of the “necessary in a democratic society” requirement⁸² concerns the effectiveness of a measure.⁸³ In difficult cases, the European Court of Human Rights relies upon “factual, statistical, or empirical information as to the effectiveness of a certain measure”.⁸⁴ If the margin of appreciation (discretion)⁸⁵ of a State is narrowed, then the demands of the effectiveness of a measure needs to be higher, which has to be demonstrated and justified with evidence for the European Court of Human Rights to assess.⁸⁶ The European Court of Human Rights have noted that States usually have a wide margin of appreciation when assessing “the existence of a problem of public concern warranting specific measures and in implementing social and economic policies”.⁸⁷ However, as Gerards notes, if on the basis of empirical data, the European Court of Human Rights finds:

“[T]hat the means chosen were inadequate or unnecessary, there would be no need for it to investigate whether, in the end, the legislature or the administration found a reasonable balance.”⁸⁸

As noted above, the Home Affairs Committee and the Independent Chief Inspector of Borders and Immigration have highlighted the fact that there is no evidence to back up the measures employed, whether it be the “hostile environment” in general or current account checks. To remedy this, the Government intends to conduct an informal review of current account checks 12 months after implementation.⁸⁹ It is problematic that the said review will be conducted by HM Treasury and the Home Office, essentially assessing its own effectiveness. Such a task would be more appropriate for the Independent Chief Inspector of Borders and Immigration which:

“[M]onitor and reports on the efficiency and effectiveness of the immigration, asylum, nationality and customs functions carried out by the Home Secretary and by officials and others on her behalf.”⁹⁰

Importantly, the Independent Chief Inspector of Borders and Immigration is *independent* of the Government⁹¹ unlike HM Treasury and the Home Office. There is no indication as to what an “informal review” entails. There is no guarantee that such an informal review will occur due to it not being mandated by the IA 2014 or 2016. Section 45 of the IA 2016 does provide that the Secretary of State must review the operation of s.40A and provide a report for Parliament within five years. This, again, should be a task for Independent Chief Inspector of Borders and Immigration whose reports are laid before Parliament.⁹² Having the Home Office, HM Treasury and the Secretary of State conduct informal or formal reviews of their own effectiveness does not guarantee effective and adequate safeguards against abuse⁹³ as the independence of those reviews can be questioned.

⁸² *Smith and Grady v UK* (33985/96) (2000) 29 E.H.R.R. 493 at [87–88].

⁸³ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, 473.

⁸⁴ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, 473.

⁸⁵ A. Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp 2002), p1; H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, 1996), p15; M. Saul, “The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments” (2015) *Human Rights Law Review* 15 745, 746.

⁸⁶ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, at 476, 478, and 481.

⁸⁷ *Kopecký v Slovakia* (2005) 41 E.H.R.R. 43 at [37]; *Fábíán v Hungary* (2018) 66 E.H.R.R. 26 at [115].

⁸⁸ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, at 472.

⁸⁹ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [24].

⁹⁰ Independent Chief Inspector of Borders and Immigration, “About us” <https://www.gov.uk/government/organisations/independent-chief-inspector-of-borders-and-immigration/about> [Accessed 1 August 2018].

⁹¹ Independent Chief Inspector of Borders and Immigration, “About us” <https://www.gov.uk/government/organisations/independent-chief-inspector-of-borders-and-immigration/about> [Accessed 1 August 2018].

⁹² Independent Chief Inspector of Borders and Immigration, “About us” <https://www.gov.uk/government/organisations/independent-chief-inspector-of-borders-and-immigration/about> [Accessed 1 August 2018].

⁹³ *Z v Finland* (22009/93) (1998) 25 E.H.R.R. 371 at [103].

On the issue of relevancy and sufficiency, the European Court of Human Rights noted that it is not sufficient that interference belongs to that *class of the exceptions* i.e. economic well-being, nor is it sufficient that the interference was imposed *because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms*.⁹⁴ The European Court of Human Rights continued that they had to be satisfied an interference was necessary with regards to the facts and circumstances of the specified case before it.⁹⁵ This demonstrates that *even if* economic well-being was a justifiable legitimate aim for current account checks, that in and of itself is not a sufficient justification for interfering with art.8. It also highlights that it is also not sufficient that current accounts are checked by virtue of their existence because they are caught by a rule that permits the screening of *all* of them. Lastly, it demonstrates that it is the facts and circumstances of specified cases that are relevant which would become problematic for the UK Government if millions (or just one) current account holders argue that their current accounts are being unnecessarily checked four times a year, every year, simply because they have one.

Considering there is not sufficient evidence to demonstrate the need for s.40A(1) and the Regulation, the review of its effectiveness is tainted by a lack of independence, the current checks would fall under a particular exception and/or a rule in general or absolute terms, it is argued that the Government has not given sufficient reasons to justify this measure, even if there is a wide margin of appreciation in this particular area. This would also violate art.8.⁹⁶

Proportionality

Proportionally, though having many forms⁹⁷ is often described “striking a fair balance”⁹⁸ between the interests (or right of the individual)⁹⁹ at stake. There are several factors¹⁰⁰ to consider when dealing with proportionality, but for the purposes of this article, only two aspects will be considered, that is, whether there was a least restrictive measure to achieve the objective, and whether a fair balance had been struck given all the circumstances.

Brems and Lavrysen perfectly describe the least restrictive measure, a general principle of the ECHR¹⁰¹ as using a nutcracker, instead of a sledgehammer, to crack a nut.¹⁰² For a measure to be proportionate and necessary, the possibility of an alternative that is less damaging to fundamental rights which fulfils the same aim *must* be ruled out.¹⁰³ This was demonstrated in *Ürper and Others v Turkey* which concerned the complete prohibition on newspapers which published articles in support of the PKK, a Kurdish independence movement.¹⁰⁴ The European Court of Human Rights ruled that “that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles”.¹⁰⁵ Gerards notes the European Court of Human Right’s judgment was based on the “concrete and demonstrable existence of alternatives, which would have been less onerous yet equally effective”.¹⁰⁶ Given that all current accounts are checked irrespective of whether there are

⁹⁴ *Sunday Times v UK* (A/30) (1979–80) 2 E.H.R.R. 245 at [65].

⁹⁵ *Sunday Times v UK* (1979–80) 2 E.H.R.R. 245 at [65].

⁹⁶ *Sunday Times v UK* (1979–80) 2 E.H.R.R. 245 at [63] and [67].

⁹⁷ T. Hickman, “Proportionality: Comparative Law Lessons” (2007) *Judicial Review* 12(1) 31.

⁹⁸ *Hatton v UK* (3602/97) (2003) 37 E.H.R.R. 28 at [123].

⁹⁹ *Reiner v Bulgaria* (App No.46343/99), judgment of 23 May 2006 at [141].

¹⁰⁰ N. Taylor, “Policing, privacy and proportionality” (2003) *European Human Rights Law Review Supp (Special issue: privacy)* 86, 88.

¹⁰¹ *Glor v Switzerland* (App No.13444/04), judgment of 30 April 2009 at [94].

¹⁰² E. Brems and L. Lavrysen, “Don’t Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights” (2015) H.R.L.R. 15(1) 139, 140.

¹⁰³ *Nada v Switzerland* (10593/08) (2013) 56 E.H.R.R. 18 at [183].

¹⁰⁴ *Ürper and Others v Turkey* (App Nos.14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), judgment of 20 October 2009.

¹⁰⁵ *Ürper and Others v Turkey* (App Nos.14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07), judgment of 20 October 2009 at [43].

¹⁰⁶ Gerards, “How to improve the necessity test of the European Court of Human Rights” (2013) I•CON 11(2) 466, at 483.

objective reasons for suspecting the account belonged to a disqualified person, it is contended that a sledgehammer has indeed been swung. The clear alternative is to run a check on current accounts where there are objective reasons for suspecting it belongs to a disqualified person. Having a temporary reduction does not change this position because it is unclear what criteria (such as reasonable objective suspicion) is used to reduce current account checks and in any event does not alter the fabric of s.40A(1) and the Regulation.

The fair balance principle assesses the proportionality of the State's conduct¹⁰⁷ which can lead to the consideration of other factors.¹⁰⁸ A person may become disqualified due to a minor mistake in an application or by a missed deadline, or being unable to apply for further leave due to their documents being seized due to exploitation.¹⁰⁹ As noted above, checks occur whether one has leave to remain, is making an appeal, or is not even an immigrant at all. Given that the Government anticipates 900 matches to disqualified persons a year, against 70 million current accounts, the "rewards of the procedure appear disproportionately small compared to the effort involved".¹¹⁰

The Independent Chief Inspector of Borders and Immigration noted that there was a 10% error rate for the classification of disqualified persons.¹¹¹ The Home Affairs Committee detailed the example of an error with the case of Dr Mohsen Danaie, who was incorrectly identified as a disqualified person, and was subsequently told by the Home Office to leave immediately, or face six months in prison, be removed by force and receive a ten-year ban on returning.¹¹² The Independent Chief Inspector of Borders and Immigration told the Home Affairs Committee that it recommended that the Home Office check the accuracy of its data before it is used for enforcement purposes, but the Home Office refused.¹¹³ This 10% error rate will only increase the amount of wrongly identified disqualified persons as the amount of current checks increase exponentially.

The Home Office's guidance for banks and building societies notes that if there is evidence that contradicts data held by a specified anti-fraud organisation or the Home Office which can demonstrate that individuals are not a disqualified person, only in exceptional circumstances should (though they are not required to) they contact the Home Office, and the default is to refuse the application.¹¹⁴ This creates a presumption of being a disqualified person and is manifestly unfair.

The European Court of Human Rights have already found indiscriminate measures to be incompatible with art. 8 for lack of proportionality.¹¹⁵ This disproportionality intensifies considering that current account checks occur four times a year indefinitely without differentiation or distinction. The unfairness contributes to the disproportionality, in that the Home Office refuses to check the accuracy of their own data which will lead to greater errors; advises banks and building societies to presume (despite evidence to the contrary) that an individual is a disqualified person; and the perceived benefit of 900 matches a year is outweighed by the nearly 70 million current accounts which customers will have their art.8 rights unnecessarily interfered with. For the reasons set out in this subsection, it is argued that current account checks constitute a disproportionate interference with art.8 and would thus amount to a violation.¹¹⁶

¹⁰⁷ A. Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights" (2010) *Human Rights Law Review* 10(2) 289, 290.

¹⁰⁸ A. Mowbray, above fn.98, 312.

¹⁰⁹ PBC (HC Bill 074) 2015–16, written evidence submitted by ILPA (IB 14B).

¹¹⁰ PBC (HC Bill 074) 2015–16, written evidence submitted by ILPA (IB 14B).

¹¹¹ Bolt, "An inspection of the 'hostile environment' measures relating to driving licences and bank accounts" (October 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf [Accessed 1 August 2018], at [6.29].

¹¹² Home Affairs Committee, Home Office delivery of Brexit: immigration (third report) (2017–19, HC 421), at [125].

¹¹³ Home Affairs Committee, Home Office delivery of Brexit: immigration (third report) (2017–19, HC 421), at [125].

¹¹⁴ Home Office, "Guidance for banks and building societies on carrying out immigration status checks on current account applicants" (October, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/654410/Guidance_for_banks_and_building_societies_on_carrying_out_immigration_status_checks_on_current_account_applicants.pdf [Accessed 1 August 2018].

¹¹⁵ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [125].

¹¹⁶ *S and Marper v UK* (2009) 48 E.H.R.R. 50 at [125].

Compatibility of immigration checks with Article 14 of the European Convention on Human Rights

Article 14 details that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 14 is not freestanding¹¹⁷ and has no independent existence,¹¹⁸ and therefore relies upon a Convention Right, in this case art.8, to be applicable. When art.14 is considered to have a fundamental aspect to a case, the European Court of Human Rights will consider it,¹¹⁹ even when the substantive right has not been violated.¹²⁰ Article 14 requires there to be a difference in treatment of persons in analogous, or relevantly similar, situation, the situation does not need to be identical.¹²¹

The Home Office’s ECHR Memorandum acknowledges the applicability of art.14 but only in relation to illegal working, driver’s licences and residential tenancies.¹²² The Home Office incorrectly ascribes nationality as a difference in treatment based on an “other status”¹²³ when art.14 specifically refers to national origin. The Home Office then states when the issue is a difference in treatment based on immigration status, which involves an element of choice and is a socio-economic issue, the European Court of Human Rights have stated that the margin of appreciation will be relatively wide.¹²⁴ However, the European Court of Human Rights have stated that very weighty reasons have to justify the difference in treatment based exclusively on nationality.¹²⁵ This argument does not need to be pursued because current account checks are not dependent on nationality, which raises an altogether different art.14 issue.

Relevantly, *Thlimmenos*-type discrimination occurs when:

“States without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different.*”¹²⁶

To be justified, this type of discrimination also requires the measure to pursue a legitimate aim, and if it does, whether there is a reasonable relationship of proportionality between means employed and the aim sought to be realised.¹²⁷

Given that current account checks apply to anyone with a current account, whether they are a disqualified person or not, this fails to treat differently those who are in a significantly different situation. There is no objective justification for these measures because there is no evidence to justify them. They are not reasonable because they apply irrespective of situations and the legitimate aim is questionable (see above) given the minuscule number of current accounts that may belong to disqualified persons.

My blog post on this asked several questions which highlight the lack of the reasonable relationship of proportionality of s.40A(1) and the Regulation, which can be summarised as followed:

¹¹⁷ *Airey v Ireland* (A/32) (1979–80) 2 E.H.R.R. 305 at [30].

¹¹⁸ *Chassagnou v France* (25088/94) (2000) 29 E.H.R.R. 615 at [89]; *Oršuš and Others v Croatia* (15766/03) (2011) 52 E.H.R.R. 7 at [144].

¹¹⁹ *Chassagnou v France* (25088/94) (2000) 29 E.H.R.R. 615 at [89]; *Oršuš and Others v Croatia* (2011) 52 E.H.R.R. 7 at [144].

¹²⁰ *Sommerfield v Germany* (App No. 31871/96), judgment of 8 July 2003 at [84].

¹²¹ *Clift v UK* (App No.7205/07) judgment of 13 July 2010 at [66].

¹²² Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at paras 10 and 13.

¹²³ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at para.10.

¹²⁴ Home Office, “Immigration Bill: European Convention on Human Rights Memorandum” (17 September 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [Accessed 1 August 2018], at para.10.

¹²⁵ *Biao v Denmark* (38590/10) (2017) 64 E.H.R.R. 1 at [93].

¹²⁶ *Thlimmenos v Greece* (34369/97) (2001) 31 E.H.R.R. 15 at [44].

¹²⁷ *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15 at [46].

- If there is no reason to suspect that someone is a disqualified person, then why is an immigration check being conducted?
- What is the objective reasonable justification for this?
- If the aim is to match 6000 current accounts in the first year and 900 thereon after, and if a person was never a disqualified person, why are the checks still occurring four times a year, every year?¹²⁸

If these questions cannot be adequately answered, and if one considers the previous subsection on proportionality, then it cannot be argued that there is a reasonable relationship of proportionality between these checks and immigration control, and thus would amount to a violation of art.14 in conjunction with art.8.¹²⁹

Another art.14 issue arises when, although the Home Office did not acknowledge that art.14 may be engaged with regards to banking, the impact assessment accepted that such measures may “impact on the appetite of firms to offer banking services to legal migrants who do not have permanent leave to remain” due to them being risk averse.¹³⁰ This therefore creates a *prima facie* art.14 issue. As the Immigration Law Practitioners Association have noted:

“[W]ill have a disproportionate impact on certain racial groups, with severe consequences for individuals whose bank accounts are wrongly closed or frozen mistakenly creating many other associated problems such as homelessness and adverse impact on children. Such measures could contribute to a climate of misunderstanding and ethnic profiling.”¹³¹

This is a relevant observation given that Blackstone Solicitors are taking high street banks to court regarding concerns of racially discriminating against Iranian nationals with regards to closures of their accounts.¹³² Therefore, this argument simply highlights that discrimination beyond a *Thlimmenos*-type discrimination is possible.

Post-Brexit Data Protection Adequacy

On 24 June 2016 the UK voted in a referendum to leave the EU. Although leaving the EU has no legal implications for the relationship between the UK and the ECHR (although the UK Government seeks to honour a mutual commitment with the EU that it will remain party to the ECHR post-Brexit),¹³³ the ECHR will have implications for the UK and EU post-Brexit. Using the discussion above on current account checks illustrates this. When the UK actually leaves as intended on 29 March 2019 it will become a third country for the purposes of data protection. Chapter V of the General Data Protection Regulation (GDPR)¹³⁴ governs the transfer of personal data to third countries. Article 45(1) highlights that such transfers are only permissible if the Commission decides that the third country in question has an adequate level of data protection. The Court of Justice of the European Union (CJEU) have ruled that third countries have

¹²⁸ White, “Guest Post: Your Immigration Status, Please!” (9 January 2018), <https://paulbernal.wordpress.com/2018/01/09/guest-post-your-immigration-status-please/> [Accessed 1 August 2018].

¹²⁹ *Thlimmenos v Greece* (34369/97) (2001) 31 E.H.R.R. 15 at [55].

¹³⁰ HM Treasury, “Immigration Bill: tackling existing current accounts held by illegal immigrants” (3 August 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462233/Immigration_Bill_bank_accounts_impact_assessment.pdf [Accessed 1 August 2018], at [63]-[64].

¹³¹ PBC (HC Bill 074) 2015–16, written evidence submitted by ILPA (IB 14B).

¹³² S. K. Dehghan, “UK bank accounts of Iranian customers still being closed, says law firm” (21 April 2017), *The Guardian*, <https://www.theguardian.com/money/iran-blog/2017/apr/21/law-firm-reports-surge-in-iranians-uk-bank-accounts-being-closed-sanctions-iran-nuclear-deal-trump> [Accessed 1 August 2018].

¹³³ HM Government, *The Future Relationship Between the United Kingdom and the European Union* (White Paper, Cm 9593 2018), para 19.

¹³⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ/L119.

to have “a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order”.¹³⁵ The European Council draft negotiating guidelines holds the same position.¹³⁶

The UK Government seeks to ensure that data flows between the UK and third countries “with existing EU adequacy decisions can continue on the same basis after the UK’s withdrawal, given such transfers could conceivably include EU data”.¹³⁷ The UK Government boasts about it being a “safe destination for personal data with some of the strongest domestic data protection standards in the world”. It does “not see any reason for existing data flows from third countries to the UK to be interrupted”¹³⁸ because of its “exceptionally high standards of data protection”.¹³⁹ This, however, overlooks the Commission’s finding of several deficiencies within the current UK data protection framework.¹⁴⁰

The Home Affairs Committee highlighted several obstacles for the UK in its pursuit of being found adequate, namely:

- In the process of making an adequacy decision, the EU may examine the UK’s data protection regime relating to national security legislation, including controversial powers conferred by the Investigatory Powers Act 2016;
- It is not clear that the Government has sufficiently incorporated the EU Charter of Fundamental Rights into UK law, most importantly in relation to data protection;
- The Data Protection Bill, which the Government claims incorporates the Charter’s data protection elements, contains provisions that may cause problems when seeking an adequacy decision;
- The UK’s onward transfer of EU data to “Five Eyes” countries, including the USA, is likely to come under scrutiny by the EU; and
- The Government’s red line on the future direct jurisdiction of the CJEU may also cause problems for UK negotiators.¹⁴¹

Since these observations, the UK has decided not to incorporate the Charter of Fundamental Rights into domestic law post-Brexit by virtue of s.5(4) of the EU (Withdrawal) Act 2018. It has also incorporated an immigration exemption in the DPA 2018 which creates another adequacy obstacle.¹⁴² In addition to this, Murray argues that reliance on art.8 may not be sufficient to obtain adequacy.¹⁴³ Be that as it may, the purpose of this article is to demonstrate that the UK does not even comply with art.8, and therefore, in and of itself creates adequacy obstacles. Pounder suggests that any divergence from the European Court of Human Rights in relation to data protection would make the UK inadequate.¹⁴⁴ When the Commission is making an adequacy decision, art.45(2) of the GDPR stipulates that they should take into account the following elements:

¹³⁵ *Schrems v Data Protection Commissioner* (C-362/14) [2015] E.C.R. I-650 at [96].

¹³⁶ European Council (Art.50) (23 March 2018)—Draft guidelines, para.11.

¹³⁷ HM Government, “The exchange and protection of personal data: a future partnership paper” (27 August 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf [Accessed 1 August 2018], at [31].

¹³⁸ HM Government, “The exchange and protection of personal data: a future partnership paper” (27 August 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf [Accessed 1 August 2018], at [31].

¹³⁹ T. May, “Prime Minister Theresa May’s speech at the 2018 Munich Security Conference” (17 February 2018), <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018> [Accessed 1 August 2018].

¹⁴⁰ Letter to Dr Chris Pounder from the Ministry of Justice, (5 May 2011), amberhawk.typepad.com/files/uk-deficiency-details_may-2011.pdf [Accessed 1 August 2018]; C. Pounder, “Question answered: ‘Why does the European Commission think the UK’s Data Protection Act is a deficient implementation of Directive 95/46/EC?’” (6 February 2013), amberhawk.typepad.com/amberhawk/2013/02/question-answered-why-does-the-european-commission-think-the-uks-data-protection-act-is-a-deficient-implementation-of.html [Accessed 1 August 2018].

¹⁴¹ Home Affairs Committee, *UK-EU security cooperation after Brexit* (fourth report) (2017-19 HC 635), at [94].

¹⁴² White, “Immigration Exemption and the European Convention on Human Rights” (2018) *European Data Protection Law Review* (forthcoming).

¹⁴³ A. Murray, “Data transfers between the EU and UK post Brexit?” (2017) *International Data Privacy Law* 7(3) 149, 151.

¹⁴⁴ C. Pounder, “Why the UK is unlikely to get an adequacy determination post Brexit” (9 January 2017), amberhawk.typepad.com/amberhawk/2017/01/why-the-uk-is-unlikely-to-get-an-adequacy-determination-post-brexit.html [Accessed 19 June 2018].

- a) the rule of law;
- b) respect for fundamental rights and freedoms;
- c) relevant legislation, general and sectoral;
- d) existence of effective independent supervisory authorities;
- e) commitments to legally binding conventions.

With regards to a), this article has argued that current account checks pursuant to s.40A(1) of the IA 2014 and the Regulation are very unlikely to be compatible with the rule of law, because it is not in accordance with the law. In relation to b), given that current account checks are argued to not be in accordance with the law, whose legitimate aim is questionable, not be necessary in a democratic society and are discriminatory, it is argued that fundamental rights and freedoms are not respected. In relation to c), this applies insofar as it relates to a specific law, namely s.40A(1) of the IA 2014 and the Regulation. Regarding d), although the UK does have an independent regulator for data protection, the Information Commissioner, in which the Commission already has concerns,¹⁴⁵ in the specific context of current account checks, it is the Government that will assess the effectiveness of the measure, which would raise concerns regarding the independence of any findings. With regards to e), the UK is a Council of Europe Member State and is subject to ECHR and the jurisdiction of the European Court of Human Rights, and by demonstrating that current account checks violate art.8 and art.8 in conjunction with art.14, it shows that the UK is not committing to its legally binding conventions. For these reasons, it is argued that s.40A(1) of the IA 2014 and the Regulation creates yet another obstacle for the UK in pursuit of a post-Brexit adequacy finding.

Conclusions

This article has considered powers within s.40A(1) of the IA 2014 and the accompanying Regulation which compels banks and building societies to run immigration checks on current accounts four times a year, every year and its compatibility with art.8. In doing so, this article argues that the powers that compel current account checks (even if temporarily reduced) is very unlikely to, or does not satisfy, many of the requirements of art.8(2) in that a measure has to be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society. This article further argues that current account checks also violate art.14 in conjunction with art.8 in that it fails to demonstrate a reasonable relationship of proportionality, it fails treat those in a significantly different situation differently and there is the real potential for direct discrimination. Failing to comply with obligations under the ECHR will create obstacles for a finding that the UK has adequate data protection laws as the Commission has to consider whether the third country adheres to the rule of law, respects human rights and is committed to their legally binding international obligations. It has been argued that the UK, with this specific set of laws, do not.

¹⁴⁵ Letter to Dr Chris Pounder from the Ministry of Justice, (5 May 2011), amberhawk.typepad.com/files/uk-deficiency-details_may-2011.pdf [Accessed 19 June 2018]; C. Pounder, "Question answered: "Why does the European Commission think the UK's Data Protection Act is a deficient implementation of Directive 95/46/EC?"" (6 February 2013), amberhawk.typepad.com/amberhawk/2013/02/question-answered-why-does-the-european-commission-think-the-uks-data-protection-act-is-a-deficient-implementation-of.html [Accessed 19 June 2018].

Bermuda's Domestic Partnership Act 2018: From "Living Tree" to Broken Branches?

Marc Johnson*

✉ Bermuda; Constitutionality; Equal treatment; Human rights; Marriage; Rule of law; Same sex partners

Abstract

It is often thought that affording rights is a progressive movement; rights are given to natural legal persons; the rights are normalised in societal expectations and they form part of a body of enforceable rights against the state. On 7 February 2018, Bermuda became the first state in modern history to withdraw the right of same-sex couples to marry, bucking the trend of progressively affording rights. In a recent judgment, the Bermudian Supreme Court has ruled that taking away the right of same-sex couples to marry is unconstitutional. This article will briefly consider the development of the right of same-sex couples to marry in Bermuda, the connection between Bermudian human rights law and the European Convention on Human Rights and ask whether rights afforded under a constitutional arrangement can be taken away.

Introduction

On 7 February 2018, Bermuda's Governor approved the Domestic Partnership Act 2018 which withdraws the right for same-sex couples to marry in Bermuda with effect from 1 June 2018. The Domestic Partnership purports to offer the same legal standing as marriage¹ though there is a degree of scepticism around whether this will be the case. There is a substantial body of writing² in the UK on whether the Civil Partnership established under the Civil Partnership Act 2004 was in fact equal to marriage, or whether creating a second form of legal partnership also created a subordinate form of legal partnership.³ Furthermore, the recent decision of the UK Supreme Court⁴ declaring⁵ that the provisions of the Civil Partnership Act 2004 which restrict civil partnerships to same-sex couples only, are incompatible with arts 14 and 8⁶ of the Convention, is a telling sign of the direction of progress in the UK law on partnership.⁷ Both these ideas

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¹ This article is solely concerned with legal marriage and not with religious marriage.

² For example, some perceptions are that the previous reservation of marriage for opposite-sex couples creates a hierarchy of legal partnership. Professor Howard NeJaime said in *R. Ferguson v AG & OutBermuda et al v AG* [2018] SC (Bda) 45 Civ at [19], that internationally speaking, partnerships are not perceived to attract the same respect as marriage. See H. Fenwick and A. Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] 6 E.H.R.L.R. 544; H. Fenwick, "Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority Via Consensus Analysis?" [2016] 3 E.H.R.L.R. 248; R. Leckey, "Must Equal Mean Identical? Same-Sex Couples and Marriage" (2014) 10(1) *International Journal of Law in Context* 5; F. Hamilton, "Why the Margin of Appreciation is Not the Answer to the Gay Marriage Debate" [2013] 1 E.H.R.L.R. 47; R. Gaffney-Rhys, "Same-sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 be Extended to Opposite Sex Couples?" (2014) 26(2) *Child and Family Law Quarterly* 173; R. Sandberg, "The Right to Discriminate" (2011) 13(2) *Ecclesiastical Law Journal* 157.

³ R. Wintemute, "Unequal Same-sex Survivor Pensions: The EWCA Refuses to Apply CJEU Precedents or Refer" (2016) 45(1) *Industrial Law Journal* 89; N. Barker and D. Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge, 2015).

⁴ *R. (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32.

⁵ Under the powers conferred on them by the Human Rights Act 1998 s.4.

⁶ Human Rights Act 1998 Sch.1.

⁷ This will be discussed later in this article.

will be explored later in this article. This may not, however, be the end of the story.⁸ On 20 February 2018, a Bermudian lawyer filed a motion asking for the Supreme Court of Bermuda to consider whether the Domestic Partnership Act 2017 (DPA) is consistent with the Bermudian Human Rights Act 1981 (HRA) and the Bermudian Constitution. In a judgment handed down on 7 June 2018,⁹ the Supreme Court agreed that legislating against same-sex marriage was not permitted by the constitution and so the specific provision of the DPA was declared inoperative. More recently, on 6 July 2018 the Bermudian government stated that it is to appeal the decision of the Supreme Court of Bermuda in *Ferguson*.¹⁰ This matter is fast-paced and the role of the Judicial Committee of the Privy Council should be considered tentatively in light of any appeal beyond the Court of Appeal.

This article will aim to consider novel constitutional and human rights perspectives on same-sex marriage in Bermuda. It will consider whether the Bermudian Constitution is capable of growing using the living tree doctrine, established for the Canadian constitution. It will seek to draw a link between human rights in Bermuda, the UK and the European Convention on Human Rights (ECHR). A number of theoretical principles from the UK and Europe will be drawn in to expand on the constitutional matters around same-sex marriage in Bermuda. Principles such as equality and the rule of law, majority rule and identity thinking will all be included to foster discussion in this area. Throughout this article, the concept of the living tree and its associated doctrine will be revisited; it is therefore prudent to first consider the living tree doctrine.

Gifting a constitutional tree

It has long been established that legislative and common law inconsistencies arise across the Commonwealth, and that the result of these inconsistencies can lead to questions before the Judicial Committee of the Privy Council (JCPC).¹¹ This has happened across the jurisdictions of Commonwealth and often leads to innovative doctrines being established. A salient example of this is a seminal case concerning the Canadian Constitution, decided before the JCPC in the early twentieth century. The case of *Edwards*¹² is a point of interest as it established a constitutional theory known as the “living tree” doctrine. Simply put, this doctrine asserts that the Canadian Constitution is a living or organic entity that must develop and evolve as the society it represents evolves. This case came about when a challenge was brought to the ban on women becoming senators in Canada. In handing down their judgment, the Canadian Supreme Court felt that women should continue not to be eligible for two reasons: first, that women under the Canadian common law were not permitted to hold office; secondly, women were not “persons” using a narrow reading of the word “persons” found in the relevant Act,¹³ and the male emphasis in s.24.¹⁴ Using both the Common Law principle and the intrinsic aid above, the Canadian Supreme Court maintained the prohibition on women becoming Canadian senators. However, on appeal to the JCPC, the prevailing authority that had persuaded the Canadian Supreme Court came under the direct scrutiny of the JCPC; in handing down its judgment, the Court said:

⁸ E. Farge, “Bermudian lawyer goes to court to challenge gay marriage reversal” (20 February 2018), *Reuters World News*, <https://www.reuters.com/article/us-bermuda-gaymarriage/bermudian-lawyer-goes-to-court-to-challenge-gay-marriage-reversal-idUSKCN1G401N?il=0> [Accessed 1 August 2018].

⁹ *Ferguson* [2018] SC (Bda) 45 Civ.

¹⁰ J. Bell, “Government appeals same-sex ruling” (6 July 2018) *The Royal Gazette*, <http://www.royalgazette.com/news/article/20180705/government-appeals-same-sex-ruling> [Accessed 1 August 2018].

¹¹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] A.C. 250, Lord Neuberger at [45].

¹² *Edwards v Canada* [1930] A.C. 124, 1929 UKPC 86.

¹³ British North America Act 1867.

¹⁴ British North America Act 1867.

"their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development."¹⁵

This is a departure from the reserved approach taken by the domestic courts in Canada and the adoption of, arguably, a judicial activist¹⁶ approach to ensuring that the laws of Canada reflect common and popular morality. It is also possible to argue that the JCPC introduced—or at least considered—equality before the law¹⁷ when giving its opinion. Equality before the law will be addressed later in the article.

The judgment refers to "[planting] in Canada a living tree capable of growth and expansion within its natural limits".¹⁸ This idea of a gift by the UK legislature, of a growing and evolving constitution in Canada, is a particularly relevant point when considering the current above-mentioned issue in Bermuda. If the gift of a constitution by the UK to a Commonwealth country is an evolving gift which is everything but stagnant, then it follows to reason that the Bermuda Constitution Act 1967 and the Bermuda Constitution Order 1968 have also gifted a living organic constitution to reflect the society that it serves. If the Constitution is living, then the rights contained within it can be expanded upon in the same way that the Canadian constitutional rights were expanded to include women senators. Two questions arise here: first, is the Bermudian HRA sufficient in its authority to expand upon constitutional rights. Secondly, can the Constitution in its living nature contract as well as expand; can it allow for the removal of rights which have lawfully been given? In considering whether the Constitution can contract, will UK common law on removing rights that have been given influence any potential appeal to the JCPC in the withdrawal of same-sex marriage in Bermuda? The case of *Blackburn*¹⁹ is often cited when the discussion moves towards removal of rights. In *Blackburn*, Lord Denning exclaimed that "[f]reedom once given cannot be taken away. Legal theory must give way to practical politics". Though this article does not assert Lord Denning's words as some form of authority, it does invite discussion on the merit of such a proposition. In relation to Bermuda, there are some fundamental questions to answer including whether allowing same-sex couples to marry would amount to giving a right to those in a same-sex relationship. In any event, should the matter come before the JCPC, would the Privy Council see it as its role to apply the logic found in the aforementioned statement in *Blackburn* literally? Whatever approach is taken, should the JCPC become involved in this matter there is a warning of caution to sound, given that the Progressive Labour Party, which is currently in government in Bermuda, has always been vocal about its desire for independence.²⁰ Any tension between the JCPC and the domestic courts in Bermuda may give weight to the Progressive Labour Party's agenda.

Development of same-sex marriage in Bermuda

On the question of allowing same-sex couples to marry, this is not as straightforward as it may first seem. The right of same-sex couples to marry came about following a ruling of the Supreme Court of Bermuda in *W. Godwin et al.*²¹ which found that the Marriage Act 1944 was discriminatory in not allowing same-sex couples to marry. The Supreme Court of Bermuda issued a mandatory order requiring the registrar to

¹⁵ *Edwards v Canada* [1930] A.C. 124, 1929 UKPC 86.

¹⁶ B. Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" [1988] Public Law 370.

¹⁷ Equality before the law has a long and diverse history in the UK and has been codified in many written constitutions. It has been argued that it forms part of the Rule of Law by notable theorists such as Dicey and Dworkin amongst others (see J.W.F. Allison (ed.), A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford University Press, 2013, first published 1885) and R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978)). There are many opinions on equality before the law and the connection with formal and substantive views of the Rule of Law makes for a lengthy discussion. For more information, see P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467.

¹⁸ *Edwards v Canada* [1930] A.C. 124, 1929 UKPC 86.

¹⁹ *Blackburn v Attorney General* [1971] EWCA Civ 7; 1 W.L.R 1037.

²⁰ Progressive Labour Party, "1972–1985" (2018) *History*, <http://www.plp.bm/history> [Accessed 1 August 2018].

²¹ *W. Godwin et al v Registrar General* [2017] SC (Bda) 36 Civ.

publish banns of marriage for those same-sex couples that apply, and as such the right to marry became extant both domestically and onboard approved ships registered in Bermuda. This latter point is noteworthy, given that many large cruise lines have ships that are registered in Bermuda and so can offer same-sex marriage onboard their vessels.²² Since the judgment of the Supreme Court of Bermuda in May 2017, the Governor of Bermuda has given Royal Assent to the DPA which withdraws the ability of same-sex couples to marry²³ and the DPA took effect from 1 June 2018. Additionally, a number of legal challenges were brought in the case of *Ferguson*²⁴; this will be considered below. Although the right was arguably created by the Bermudian common law, it is relevant here to apply some distinctly European (and more-so British) legal reasoning to this issue, given that Bermuda is a British Overseas Territory and has very close reciprocal links with both the UK and Europe.

Looking at this matter from a rather Dworkinian perspective, it is reasonable to argue that *Godwin* could be an example of a Dworkinian “hard case”.²⁵ The Supreme Court in Bermuda drew on equitable principles (considering equality in the prescription of rights) and, in turn, espoused a new rule.²⁶ The rule previously did not exist, and so in creating a rule the Court is imputing its inherent morality onto the statute book. Though this article does not have the scope to enter into jurisprudential arguments on judicial activism and ethics in hard cases, it is nonetheless a relevant (if not subtle) point to note. In taking away these rights, there is arguably an assault on the concept of justice and equality before the law. The Supreme Court of Bermuda decided the case in the way that it did, as the Marriage Act 1944 was perceived to be incompatible with the provisions of Bermuda’s HRA. The HRA states that a person is discriminated against if they are treated less favourably than another because of, *inter alia*, that person’s sexual orientation.²⁷ Though reasonable lawyers and lay people alike will disagree on the fundamental matter of same-sex marriage, the judgment of the Supreme Court in *W. Godwin* is logical and coherent. It is also worth drawing attention to a connected point—Bermuda recognises the ECHR²⁸ and the HRA specifies that these rights apply in Bermuda. This was previously recognised, as the UK had extended the ECHR to “virtually the whole dependent empire” in 1953,²⁹ following the UK’s ratification of the 1950 Convention.³⁰ Therefore, the provisions contained within the Convention are not novel in the Bermudian courts or to the Bermudian legislature. Notwithstanding, Bermuda, as with most British Overseas Territories, has a very complex relationship with the ECHR and with Strasbourg’s jurisprudence.³¹ Despite this, there is some inconsistency within Bermudian law regarding the protections from discrimination that are afforded. According to the Schedule to the Constitution of Bermuda: Forms of Oaths and Affirmations, “no law shall make any provision which is discriminatory either of itself or in its effect”.³² Although this seems to be clear in its assertion, s.12(4)(c) of the same Schedule states that the protection from discrimination

²² Carnival Corporation, “Carnival Corporation Statement Regarding Bermuda’s Domestic Partnership Act” (2018) *News Release*, <http://www.carnivalcorp.com/phoenix.zhtml%3Fc%3D200767%26p%3Dirol-newsArticle%26ID%3D2340880> [Accessed 1 August 2018].

²³ Government of Bermuda, “Governor signs Domestic Partnership Act” (7 February 2018) *News*, <https://www.gov.bm/articles/governor-signs-domestic-partnership-act#>, [Accessed 1 August 2018].

²⁴ *Ferguson* [2018] SC (Bda) 45 Civ.

²⁵ R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), p.81; Alan C. Hutchinson and John N. Wakefield, “A Hard Look at ‘Hard Cases’: The Nightmare of a Noble Dreamer” (1982) 2 *Oxford Journal of Legal Studies* 86, 88.

²⁶ Dworkin does not actually define what a hard case is other than to say that a hard case is where “both in politics and law, … reasonable lawyers … disagree about rights” and where “no established rule can be found”. See Dworkin, *Taking Rights Seriously* (1978). See also T. Etherton, “Liberty, the Archetype and Diversity: A Philosophy of Judging” [2010] *Public Law* 727.

²⁷ Human Rights Act 1981 s.2(2)(a)(ii).

²⁸ According to the preamble to the Bermudian Human Rights Act 1981 and prior to this art.63 of the ECHR allowed the UK to extend the Convention to its Overseas Territories.

²⁹ *Treaty Series 71* (1953), UK Command Paper 8969.

³⁰ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001).

³¹ N. Barker, “‘I Wouldn’t Get Unduly Excited About It’: The Impact of the European Convention on Human Rights on the British Overseas Territories. A Case Study on LGBT Rights in Bermuda” [2016] *Public Law* 595.

³² Bermuda Constitution Order 1968, “The Schedule to the Constitution of Bermuda: Forms of Oaths and Affirmations”.

does not apply to marriage, and other personal law applicable to the relevant persons.³³ It is positive that the Supreme Court of Bermuda has recently departed from its reliance on s.12(4)(c); in *Ferguson* the Court disagreed with the argument that discriminatory practices in relation to marriage are protected by s.12(4)(c), the Court feeling that the remit of this section was to support the expansion of beliefs and "[r]ather than permitting the State to prefer some beliefs over others, section 12(4)(c) is designed to facilitate diversity in beliefs".³⁴ The Court goes on to say that "[t]he Jewish Marriage Act 1946, the Baha'i Marriage Act 1970, and the Muslim Marriage Act 1984, are examples of legislation which is facilitated by s.12(4)(c) of the Constitution".³⁵ The status of the HRA is an important factor in determining how far an Act succeeding the Constitution can expand on constitutional protections and constitutional theory.

The HRA does not specifically state that it is a constitutional instrument in and of itself, though s.28 does state that the provisions of the HRA are in addition to the Constitution. It is commonly accepted that human rights are generally thought of as being constitutional in nature, as they enshrine natural rights which are accepted internationally. However, it is prudent to consider the status of the HRA in an attempt to establish how constitutional it is in terms of Bermudian law. The Bermudian HRA does have a status which is over and above that of ordinary laws, as it allows the Supreme Court of Bermuda to declare an Act "inoperative" if it conflicts with the provisions of the HRA. A good recent example of this occurred in *A and B*.³⁶ In 2010, the JCPC has previously gone as far as to call the Bermudian HRA a quasi-constitutional document,³⁷ and in *Bermuda Bred Co* the Supreme Court of Bermuda compared the authority it receives from the HRA to declare an Act inoperative with the power to strike down laws that conflict with the Bermudian Constitution.³⁸ In *Bermuda Bred Co* the Court states that although:

"the rights protected by the HRA do not enjoy quite as elevated a status as the fundamental rights and freedoms provisions of the Constitution, Parliament has clearly conferred on this statute quasi-constitutional status."

However, in both *Bermuda Bred Co* and in *A and B* the courts took a "generous and purposive approach" to applying the HRA, and followed the higher standard of rights that were allocated under the HRA as opposed to the constitutional rights which precluded express protections for same-sex couples. Using this as a guide, it would seem to indicate that the HRA has given the courts the ability to liberally interpret the Constitution in light of the protections that are available under the HRA and thus expanding upon the rights already afforded under the Constitution. If this is in fact the case, it is another example of a constitution evolving to keep abreast of not just national, but international, changes in attitudes to rights. It is another demonstration of a living tree growing to reflect society. In support of the assertion that the convention grows positively to protect rights opposed to contracting to curtail rights, the recent case of *Lendore*³⁹ cited the earlier European Court of Human Rights case of *Tyler*,⁴⁰ where the European Court of Human Rights described the European Convention on Human Rights as:

"a living instrument which ... must be interpreted in the light of present day conditions ... the court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe."⁴¹

³³ For more on the interaction between territorial law and personal law, see H. Tagari, "Personal Family Law Systems—A Comparative and International Human Rights Analysis" (2012) 8(2) *International Journal of Law in Context* 231.

³⁴ *Ferguson* [2018] SC (Bda) 45 Civ at [104].

³⁵ *Ferguson* [2018] SC (Bda) 45 Civ at [104].

³⁶ *A and B v Director of Child and Family Services and Attorney-General* [2015] SC (Bda) 11 Civ.

³⁷ *Marshall v Deputy Governor* [2010] UKPC 9; [2010] W.L.R. (D) 133.

³⁸ *Bermuda Bred Co v Minister of Home Affairs* [2015] SC (Bda) 82 Civ.

³⁹ *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 W.L.R. 3369.

⁴⁰ *Tyler v United Kingdom* (1978) 2 E.H.R.R. 1 at [31].

⁴¹ *Tyler* (1978) 2 E.H.R.R. 1 at [31].

Ferguson

The judgment of the Supreme Court contains a great deal of narrative of the case management and progression, and in terms of understanding the atmosphere that surrounds the proceedings this is very helpful. There were a large number of points raised in the judgment and this article could not feasibly consider them all with equal respect. As such, a small number of points have been selected to foster the public law and human rights discussions around this topic.

The first of such matters is the Court's summary dismissal of the argument that the judgment in *W. Godwin* amounted to "legislating from the bench".⁴² This is an interesting point, though not particularly well thought out. The Supreme Court appropriately identified that Parliamentary Sovereignty in Bermuda is a qualified concept—one that states that the legislature is entitled to legislate "for the peace, order and good government of Bermuda"⁴³ according to the Constitution. This limitation must, by its inclusion in the Constitution, have an adjudicative venue to resolve disputes. The Bermudian Supreme Court is therefore a constitutional court, given that it possesses the power to resolve and decide matters of a constitutional nature. There will undoubtedly be some envy from the UK Supreme Court, whose status as a constitutional court is a matter of much debate.⁴⁴ The Court in *Ferguson* also cited a recent discussion on this matter of *Robinson*,⁴⁵ where Nazerath JA stated that the Colonial Laws Validity Act 1865 makes any law which is incompatible with the Bermudian Constitution void. Kawaley CJ summarised to that effect that:

"the Legislative branch of Government has not for 50 years had more than qualified Parliamentary sovereignty in Bermuda. The Judiciary has been tasked by Chapter I of the Bermuda Constitution with ensuring that both executive action and legislative provisions do not contravene the fundamental rights of freedoms of the citizens and residents of Bermuda."⁴⁶

This poses some interesting conceptual questions, one being that the separation of powers in British Overseas Territories are subject to caveats, viz that the judiciary retains the right to curtail the parliament's sovereignty if the judiciary feels that the parliament is legislating contrary to the constitution. In Bermuda, is it more appropriate to talk of constitutional supremacy supported by judicial superiority, and the subjugation to some extent of the legislature?

Although this last statement is intentionally evocative, there are some connected points to make on it from the *Ferguson* judgment which will be transposed in the opposite direction on current affairs in the UK. A statement from the affidavit of an intervener in the case, cited a quote which raises some further relevant points. The statement reads:

"In any event, even if a majority of Bermudians were in favour of depriving a minority group of its human rights ... it would be wholly inappropriate for Government to legislate on that basis ... In civilised societies, the majority does not get to pick and choose which of a minority's human rights should and should not be protected. In fact, in a great many instances the oppressive views of the majority are exactly what minorities most need their human rights to be protected against."

This statement directly conflicts with the prevailing concept of majority rule. However, this is not novel—criticisms of law-making based on popular policy are long-standing.⁴⁷ It is not unreasonable to conclude that human rights matters should be beyond the influence of majority rule in order that they are

⁴² *Tyler* (1978) 2 E.H.R.R. 1 at [39].

⁴³ Bermuda Constitution Order 1968.

⁴⁴ Lord Neuberger, "The UK Constitutional Settlement and the UK Supreme Court" (10 October 2014) speech at the Legal Wales Conference 2014, <https://www.supremecourt.uk/docs/speech-141010.pdf> [Accessed 1 August 2018].

⁴⁵ *Robinson v R* [2009] Bda LR 40.

⁴⁶ *Ferguson* [2018] SC (Bda) 45 Civ at [43].

⁴⁷ W. Sadurski, "Legitimacy, Political Equality, and Majority Rule" (2008) 21(1) *Ratio Juris* 39; J. Jaconelli, "Majority Rule and Special Majorities" [1989] *Public Law* 587.

not impacted upon by popularist and often transient changes in public policy. For example, in *SAS*⁴⁸ the European Court of Human Rights considered France's ban on full-face covering in public in an attempt to incite cohesion and a sense of community. In terms of whether this is feasible, attention needs to be turned to the concept of "identity thinking" and its relevance in human rights matters.⁴⁹ In brief, identity thinking asserts that every person is "commensurable and identical" through an exchanging of unequal ideas known as "barter".⁵⁰ As Adorno put it, "identity becomes the authority for the doctrine of adjustment"⁵¹ and this concept fundamentally underpins human rights theory. According to Nicholson, equality before the law and universal rights are predicated on the standard for equality, being the concept of the community. The community decides who is a member of it and so who is entitled to human rights and protections.⁵² This, arguably over-simplistic explanation, does however fit with the idea of majority rule, but poses a legal problem connected to majority rule. Society inevitably adapts and changes at different rates in different countries. The geo-political influence cannot be downplayed, and this can be seen in anecdotal statements in the media asserting that the majority of people in Bermuda are against same-sex marriage. The question then becomes, does majority rule legitimise discrimination? When a community decides not to include an individual, as that individual does not accord with the community's inherent identity, where does that leave the individual? To draw these points together, if the majority of Bermudian people oppose same-sex marriage and that formed the basis for political policy-making, then those same-sex couples are ostensibly ostracised from the marriage community. It is the role of the courts in Bermuda, in pursuance of their constitutional nature, to uphold the egalitarian nature of the Constitution and rule against the will of the majority to impose equality. Each reader will of course come to their own conclusion on whether this is acceptable or not. However, given the very brief mention made of identity-thinking and human rights, and without affording further consideration to the impact and influence of European legal theory in the Caribbean,⁵³ it is still possible to conclude that the court in *Ferguson* was right to be influenced by the assertion that the "majority" are against same-sex marriage. By putting too much weight on this, the Court would have reinforced the concept of majority rule to the detriment of equality before the law. There are some comments in the *Ferguson* judgment that seem to indicate that the legislature had given weight to representative pressure groups when attempting to ban same-sex marriage. It is rather obvious to suggest that government is invariably interested in the opinion of the general public given that the government has its democratic mandate because of the public. In the earlier mentioned *SAS* case, the French state banned all full-face coverings and this, in turn, is the state as a community ostracising those who chose to wear the niqab, for example. The community is stating that there is an identity which is incompatible with the community and so must either change or suffer exclusion. Yet, in Bermuda this is not the case; the judiciary exercised its authority over the government, and in turn the legislature, to set aside the will of the majority in favour of inclusion. The community is, by virtue of the judgment, forced to include same-sex couples; this could hopefully lead to the normalisation of same-sex marriage within the community. It could alternatively lead to hostility or resentment either towards same-sex couples or the Bermudian Supreme Court itself. Baroness Hale's statement in *Ghainan*⁵⁴ is also cited in the *Ferguson* case, when the court is referring to the case of *Re P*,⁵⁵ where Baroness Hale said, "democracy values everyone equally even if the majority does not".

⁴⁸ *SAS v France* (2015) 60 E.H.R.R. 11.

⁴⁹ An excellent discussion of this is available in M. Nicholson, "Majority Rule and Human Rights: Identity and Non-Identity in S.A.S. v France" (2016) 67(2) *Northern Ireland Legal Quarterly* 115.

⁵⁰ T.W. Adorno, *Negative Dialectics* (London: Routledge, 2004).

⁵¹ Adorno, *Negative Dialectics* (2004).

⁵² Nicholson, "Majority Rule and Human Rights: Identity and Non-Identity in S.A.S. v France" (2016) 67(2) *Northern Ireland Legal Quarterly* 115.

⁵³ Bermuda is an associate member of the Caribbean Community and the term Caribbean is used in that sense, not the geographical sense.

⁵⁴ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at [132].

⁵⁵ *Re P* [2009] 1 A.C. 179.

A final matter which will be considered from the judgment is the Court's very extensive dealings with the allegation that the Bermudian legislature had created the DPA under religious influence and persuasion.⁵⁶ The question that the Court sought to answer was whether “the revocation provisions of the DPA [are] invalid because they were enacted for a religious purpose?”⁵⁷ The Court spent some time on this matter and the nexus of the Court’s discussion on these points was whether the Constitution is a secular one, or whether it permitted a religious inclination. If the latter were true, then there would also be scope to argue that a religiously charged law is permissible under the Constitution. The Court discussed this at length and in its judgment included statements from the Supreme Courts of Bermuda,⁵⁸ Canada⁵⁹ and the UK all stressing that their respective constitutions are secular. However, the Court then goes on to find that the DPA has a religious motive in part, but that this is not sufficient enough to draw its validity into question. It is proposed that another aspect has been neglected somewhat and only mentioned in passing during the judgment. In *McFarlane*,⁶⁰ Laws LJ clarified that art.9 of the ECHR is absolute in its protection of rights to hold or not hold a religion. The right to manifest a religious belief is subject to limitation; these have been discussed extensively in both UK domestic courts⁶¹ and at the European Court of Human Rights.⁶² Whether the Constitution is secular only satisfies half of the argument, even if the Constitution was not secular (which it is⁶³). Whether the HRA would permit the government to put forward a bill which manifests its religious belief in a discriminatory way is another matter entirely. In this case the relationship between the Constitution and the HRA is significant on several levels—if the HRA expands on the Constitution then the Constitution would be “in harmony” with the HRA and its principles, including those emanating from European human rights jurisprudence, given the HRA’s recognition statement. The impact of the HRA on the Constitution and whether it has any material impact on the Constitution needs to be considered further.

Living tree or broken branches

The case of *Ferguson* has raised some issues which are relatively infrequently addressed in Bermudian domestic courts. Having rights, provided under the common law which are consistent with the HRA as a quasi-constitutional statute, taken away by an ordinary law is inconsistent with most UK jurisprudence and legal theory,⁶⁴ though there seems to be limited Bermudian case-law to refer to in this area. Given that the UK jurisprudence may inevitably filter into the argument if the matter is appealed beyond the Bermudian Court of Appeal⁶⁵ to the JCPC, some UK points will be considered to add flesh to the bones of the argument.

Earlier, reference was made to *Blackburn* and specifically to Lord Denning’s point that “[f]reedom once given cannot be taken away”. It could be argued that a legislature could legislate to remove rights—the UK Parliament could repeal the Human Rights Act 1998 and withdraw from the ECHR and all proceeding domestic laws on rights and civil liberties, and therefore remove rights from the individual. However, this is an abstract argument given that doing so would invariably result in a considerable, politically charged discourse. There is also a common law presumption in the UK that Parliament does not legislate contrary to the common law unless it does so explicitly.⁶⁶ Although the DPA seems express and certain in both its wording and its intention, there is a slightly confusing *caveat* that has been included in s.53 which was a

⁵⁶ *Ferguson* [2018] SC (Bda) 45 Civ, summarised at [67]–[70].

⁵⁷ *Ferguson* [2018] SC (Bda) 45 Civ, summarised at [67]–[70].

⁵⁸ *Centre for Justice v Attorney-General and Minister for Legal Affairs* [2016] Bda LR 140.

⁵⁹ *R v Big M Drug Mart* (1985) 1 SCR 295.

⁶⁰ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

⁶¹ *R. (Begum) v Head Teacher and Governors of Denbeigh High School* [2006] 2 All E.R. 487.

⁶² *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8.

⁶³ According to Kawaley CJ in *Centre for Justice v Attorney-General and Minister for Legal Affairs* [2016] Bda LR 140.

⁶⁴ M. Johnson, “The Models of Parliamentary Sovereignty” (2017) University of Bristol Law School Blog, https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/#_fn6 [Accessed 1 August 2018].

⁶⁵ At the time of writing, permission to appeal to the Court of Appeal in Bermuda had not been granted.

⁶⁶ *Leach v R* [1912] A.C. 403, (1912) 7 Cr. App. R. 157.

disputed section in the *Ferguson* case. The first phrase states “[n]otwithstanding anything in the Human Rights Act 1981...”. Given that the HRA specifically precludes less-favourable treatment on the basis of sexual orientation, it is difficult to reconcile s.53 of the DPA with s.2(2)(a)(ii) of the HRA, specifically. Whether this is the government’s attempt to legitimise the revocation of same-sex marriage by including a reference to the HRA, and to attempt to persuade the public that due consideration has been given to the HRA, is unclear. The Bermudian government states that the DPA gives a statutory right to all couples to enter into a legally recognised partnership, but the result of that is simply that same-sex couples could no longer get married. This does directly discriminate against same-sex couples as (using the standard set out in s.2 of the HRA) same-sex couples cannot enter into a legal marriage and so are treated less favourably, thus making out the grounds for discrimination under the Bermudian HRA. There are material differences between the domestic partnership and marriage, though the one difference that seemed to hold weight with the court in *Ferguson* was the international recognition of partnerships as sub-standard to marriage, according to Professor Howard NeJaime.⁶⁷ Given that the DPA does in fact discriminate against same-sex couples, the Supreme Court of Bermuda is correct in declaring that the DPA is inoperable, as the HRA carries the quasi-constitutional status mentioned earlier. The point which is due discussion is whether the quasi-constitutional HRA is “in harmony” with the Bermudian Constitution, and if it is adequate consideration needs to be given to the impact of matters such as the art.9 limitations on manifestation of beliefs and the making of religiously charged laws.

As mentioned, the Bermudian Constitution includes a clause exempting marriage⁶⁸ from discriminatory protection, whereas the HRA does not and so the discriminatory protections contained in the HRA do apply to marriage.⁶⁹ Here, a somewhat theoretical approach needs to be taken to answering the question. In the Bermudian case of *A v Attorney General*,⁷⁰ the Supreme Court grapples with a post-constitution statute (the Companies Act 1981), which seems inconsistent with the constitution. The Court affirmed that it is the duty of a court to construe an Act “subject to the presumption of constitutionality” if it precedes the Bermuda Constitution Order 1968. Where this is not possible, it must declare that the later Act is repugnant in accordance with the Colonial Laws Validity Act 1865. The presumption of constitutionality asserts that an Act passed is constitutional unless a subject can prove that it is not.⁷¹ Given that the HRA has not yet been declared repugnant to the Constitution, it is possible that the former option, viz the HRA, is being read compatibly with the Constitution and so affording rights in addition to the Constitution is true. This is, however, a weak assumption as it is based on the lack of evidence to the contrary in terms of the common law and logical reasoning. Notwithstanding, assuming that the HRA is compatible with the Constitution, the constitutional rights have, therefore, been extended under the HRA to include discrimination protections for same-sex couples, and these are not exclusive of marriage as was originally the case.

There is an alternative argument which should be considered—does the HRA provide protection against discrimination based on sexual orientation, save for the marriage exception which is found in para.12(4)(c) of the Constitution? In order to make this argument fit, a number of Commonwealth principles need to be ignored including (but not limited to), the living tree doctrine established in the Canadian constitutional case and the logic invoked by Lord Denning in *Blackburn* above. The statement of the Supreme Court of Bermuda in *A v Attorney General* would also need to be reviewed; it would no longer be sufficient to read an Act compatibly with the presumption of constitutionality, the Act would need to be construed as to apply subject to any exceptions which can be found in the Constitution. This seems like a considerable

⁶⁷ *Ferguson* [2018] SC (Bda) 45 Civ at [19].

⁶⁸ It also exempts personal law, though this article does not consider this matter further as it warrants its own independent piece.

⁶⁹ *Godwin and DeRoche v The Registrar General and others* [2017] SC (Bda) 36 Civ.

⁷⁰ *A v Attorney General* [2017] SC (Bda) 90 Civ.

⁷¹ E. Carolan, “Leaving behind the Commonwealth model of rights review: Ireland as an example of collaborative constitutionalism” and C. Kelly, “A tale of two rights-based reviews or how the European Convention on Human Rights Act 2003 has impacted on the Irish model of review” in J. Bell and M. Luce (eds), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Cheltenham: Edward Elgar, 2016).

step from the current path trodden by the Supreme Court of Bermuda in terms of logical reasoning and from the judgment in *Ferguson*. From this, it is possible to argue the judgment in *Ferguson* is a strong one, even if the reasoning in this article differs from that in the judgment. In addition, over the past two decades the move in Commonwealth countries from all corners of the world has been to expand their constitutional rights to include same-sex marriage; jurisdictions such as Canada,⁷² Australia,⁷³ Malta,⁷⁴ South Africa,⁷⁵ Saint Helena, Ascension and Tristan da Cunha⁷⁶ have either allowed, or are due to allow, same-sex marriage. Even the remote islands of South Georgia and the South Sandwich Islands allow same-sex marriage.⁷⁷ As the Bermudian legislature has chosen to appeal the decision in *Ferguson*, it is “bucking the trend” considerably in the progression of rights across the Commonwealth. Bermuda’s recent enactment of the DPA plots a substantially different course to that of Commonwealth countries mentioned above, and it is right to question if such an attempted divergence in rights is consistent with the objectives of the Commonwealth. Though Bermuda is itself not a member of the Commonwealth of Nations, it is a British Overseas Territory and the Commonwealth of Nations sees the people who live in “associated and overseas territories” as “part of the Commonwealth family”.⁷⁸ It is therefore not necessary to draw a distinction between Bermuda and Commonwealth countries given that the perception of the Commonwealth of Nations is that a link exists between it and overseas territories of full members.

As the UK is a Member of the Commonwealth of Nations, it is incumbent upon the UK to lead its territories towards compliance with the Charter’s aims. Although it is recognised that other Commonwealth nations do discriminate against LGBT+ people, this should not justify the UK’s acquiescence towards the Charter’s aims. The Charter of the Commonwealth is a set of values that each Commonwealth state signs to uphold and embody. Within the values can be found two statements: the first, “We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively”,⁷⁹ and secondly, “We emphasise the need to promote tolerance, respect, understanding … and recall that respect for the dignity of all human beings is critical to promoting peace and prosperity”.⁸⁰ Although the Charter does not protect LGBT+ rights by specifically stating them, the phrases “rights cannot be implemented selectively” and “respect for the dignity of all human beings” fit well with the earlier mentioned notion of equality before the law as a fundamental constitutional right. It is acknowledged that the author is attempting to draw specifics from a vague statement and that this poses several inherent challenges, however statements written in vague terms can have longevity as they can apply to the ever-changing shape of society. Therefore, it is not problematic to attempt to apply these vague statements to modern society, though it is problematic to close one’s ears to potential criticisms of that exercise. LGBT+ rights in the Commonwealth are a matter attracting much media coverage⁸¹ and so a jurisdiction moving against the grain on this matter would inevitably come under the spotlight of public scrutiny. Notwithstanding these points, and drawing back to the purely legal question of the inoperability of the DPA, given the strength of feeling that the Bermudian government seem to have demonstrated in favour of the DPA, it is possible that the matter will eventually end up before the JCPC. If that does happen, it will offer the JCPC the opportunity to mend the broken branches and treat the constitutional tree. However, should the

⁷² Civil Marriage Act 2005.

⁷³ D. McKeown, “Chronology of same-sex marriage bills introduced into the federal parliament: a quick guide” (*Research Papers 2017/18*, Parliament of Australia, 2018), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/SSMarriageBills [Accessed 1 August 2018].

⁷⁴ Marriage Act 2017.

⁷⁵ Civil Union Act 2006.

⁷⁶ Marriage Ordinance 2017.

⁷⁷ By virtue of its legal relationship with the UK.

⁷⁸ Commonwealth of Nations, “Associated and Overseas Territories” (2018) *Commonwealth Membership*, <http://www.commonwealthofnations.org/commonwealth/commonwealth-membership/associated-and-overseas-territories/> [Accessed 1 August 2018].

⁷⁹ Relating to the application of the Universal Declaration of Human Rights and found in the Charter of the Commonwealth 2013, II.

⁸⁰ Charter of the Commonwealth 2013, IV.

⁸¹ B. Dittrich, “Commonwealth Nations Must Decriminalize Gay Sex” (2018) *The Advocate*, <https://www.advocate.com/commentary/2018/4/16/commonwealth-nations-must-decriminalize-gay-sex> [Accessed 1 August 2018].

JCPC choose not to engage "actively"⁸² in a similar way to their predecessors in *Edwards* (possibly in deference to the PLP government and concerns that doing so would strengthen the call for independence), then the JCPC runs the risk of condoning the pruning of the constitutional tree by the Bermudian government. In deciding which approach to take, it may be prudent for the JCPC to recall, should the matter come before them, that twisting the branch will incline the tree.⁸³

Separation of powers

The point made here refers to the earlier mentioned case of *Lendore*⁸⁴ and a statement made by Lord Hughes JSC at [16], where His Lordship considers whether the separation of powers is relevant and persuasive when the executive has the right to grant clemency when the courts have sentenced to death. His Lordship considered whether one branch of the state can lawfully interfere with the execution of another's role. His Lordship was not satisfied by the argument in *Lendore*, referring to the earlier case of *Boyce v The Queen*,⁸⁵ in which Lord Hoffman stated that arguing a constitution was "based upon the principle of the separation of powers" as "pithy". Lord Hoffman felt that constitutions create their own version of the separation of powers and transcribe that into domestic law—the role of the court is to then uphold that constitutional view of the separation of powers. The difficulty here lies in a vague description of the separation of powers laid down in the Constitution. In the absence of a specific model of separation, how does the judiciary and legislature establish their remit without testing the limits of their power?

In *Godwin* and *Ferguson* there is currently no indication that the decisions of the Court were ultra vires; however, the author acknowledges the pending appeal of the government against the *Ferguson* decision. Notwithstanding, the curious approach was taken to legislate to stop the decision in *Godwin* applying going forward, without affecting the authority of the decision between the time the judgment was handed down and the time the DPA provisions commenced. This is distinctly different from the *Lendore* and *Boyce* examples listed above, in that the question is whether an action which is inconsistent with the separation of powers in Bermuda is unconstitutional. The Bermuda Constitution Order 1968 mentions an "independent court" several times, and yet it is questioned whether the court is truly independent if the legislature can legislate to confine a ruling of a court without preceding through an appeal in pursuance of natural justice.⁸⁶ Little comment was made in *Ferguson* about the legislature's apparent indifference towards the independence of the judiciary and the separation of powers, so this matter continues to be unresolved.

The Supreme Court of Bermuda itself has recently stated in the case of *Centre for Justice*⁸⁷ that the Constitution has created an "independent judiciary based on the separation of powers".⁸⁸ In *Centre for Justice* the claimants were seeking judicial review of, inter alia, the decision of the executive to designate six churches as polling stations in a referendum on same-sex relationships, which were actively supporting Preserve Marriage Ltd, an organisation established to resist same-sex marriage. In addition, the Court was asked to consider the constitutionality of calling a referendum on same-sex marriage, and the Court made comments generally on the use of referendums to make policy on human rights matters. The Court seems to indicate that the convention of not using referendums to drive policy reforms in areas of human rights was not as absolute as previously considered. This raises the potential of government tabling legislation

⁸² In terms of Judicial Activism.

⁸³ A. Pope, *Epistles to Several Persons: Moral Essays* (London: Methuen, 1961, first published 1732), Epistle to Cobham, "Just as the Twig is bent, the Tree's inclin'd".

⁸⁴ *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 W.L.R. 3369.

⁸⁵ *Boyce v The Queen* [2004] UKPC 32; [2005] 1 A.C. 400.

⁸⁶ Section 53 of the DPA states "[n]otwithstanding anything in the Human Rights Act 1981, any other provision of law or the judgment of the Supreme Court in *Godwin and DeRoche v The Registrar General and others* delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female".

⁸⁷ *Centre for Justice* [2016] SC (Bda) 64 Civ.

⁸⁸ *Centre for Justice* [2016] SC (Bda) 64 Civ at [3].

to reduce rights and citing a referendum as the driving force or justification for such a reduction—a matter not too distant from some discussions in the UK regarding the referendum on exiting the EU. The Court also felt that it had jurisdiction to oversee the legality of a referendum, but that the Bermudian government was able to convene a referendum that proposed to limit or extinguish rights that were enjoyed under the HRA. The Court also stated that “fundamental rights could not be diluted or negotiated by the electorate”.⁸⁹ There seems to be some disconnect between these statements. Furthermore, these statements do not seem to rest easy with the living tree analogy used earlier, or the UK and EU perspective that rights grow as society grows.⁹⁰ It can, however, be married with the statement made by the European Court of Human rights, viz the development of rights must be “in the light of present day conditions”⁹¹ Therefore, if the opinion of the Bermudian people has changed and is now more hostile towards same-sex marriage rights, the government could argue that it is simply responding to this change. However, if the majority of a referendum are not in favour of same-sex marriage, should rights be interpreted in light of domestic Bermudian communities, British Overseas communities, UK, Commonwealth or international communities? Each one would potentially lead to a different outcome. In June 2016 the same-sex relationships referendum was held in Bermuda, and 69% of the votes cast were against same-sex marriage. Despite these figures, the turnout was only 46.89% of eligible voters, which is below the 50% required for the referendum result to be valid.⁹² It may be hard to justify using the referendum as support for removing same-sex marriage, as it is not a valid referendum due to poor turnout. If there seems to be at best an indifference amongst the communities of Bermuda as to same-sex marriage (given the low turnout despite campaigning by both sides), how does this translate into the interpretation of rights in light of the community that they serve? This conundrum does demonstrate the tension between the courts, which are seeking to assert legal certainty, and the government which may be more inclined to make policy based on the view of 14,192,⁹³ or 21.70% of Bermuda’s population.⁹⁴ The weight of international jurisprudence in Bermuda will certainly be under the spotlight if the government seeks to appeal the decision to the Bermudian Court of Appeal or seeks the involvement of the JCPC. A connected issue has recently been decided in the UK Supreme Court—equal access to civil partnerships has been debated for a number of years and this is a salient point which can be discussed in brief in relation to Bermudian same-sex marriage.

Equal access to civil partnerships

Brief consideration will be given here to the recent decision of the UK Supreme Court in the case of *Steinfeld and Keidan*,⁹⁵ and the insight that it may give the government of Bermuda should they seek to refer the matter to the JCPC. After all, the JCPC may de jure be a different chamber of adjudication, and the relationship it has with overseas and Commonwealth territories is unique and subject to political and legal sensitivities. However, given that the same justices decide cases in the JCPC as do in the UK’s Supreme Court it would be prudent to acknowledge the decisions of one, when it deals with a relevant subject, even if it does not bind the other.⁹⁶ On 27 June 2018 the UK Supreme Court handed down its judgment in the above-mentioned case of *Steinfeld and Keidan*, issuing a declaration of incompatibility stating that the provisions of ss.1 and 3 of the Civil Partnership Act 2004 (CPA) were incompatible with

⁸⁹ *DeRoche v The Registrar General* [2016] SC (Bda) 64 Civ at [8].

⁹⁰ *Edwards v Canada* [1930] A.C. 124; 1929 UKPC 86.

⁹¹ *Tyler v United Kingdom* (1978) 2 E.H.R.R. 1 at [31].

⁹² S. Jones, “Voters roundly reject same-sex marriage” (24 June 2016) *Royal Gazette*, <http://www.royalgazette.com/news/article/20160624/voters-roundly-reject-same-sex-marriage> [Accessed 1 August 2018].

⁹³ Jones, “Voters roundly reject same-sex marriage” (24 June 2016) *Royal Gazette*.

⁹⁴ According to World Bank, “Data: Bermuda” (2016), <https://data.worldbank.org/country/bermuda?view=chart> [Accessed 1 August 2018].

⁹⁵ *R. (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32.

⁹⁶ For a justice’s opinion on the role of the JCPC and UK Supreme Court, see Lord Neuberger of Abbotsbury, “The Judicial Committee of the Privy Council in the 21st Century” (2014) 3(1) *Cambridge Journal of International and Comparative Law* 30.

art.14 in conjunction with art.8 of Sch.1 to the Human Rights Act 1998. This is because the CPA only permitted same-sex couples to form civil partnerships and not different-sex couples. It is noteworthy that this decision has come about following the UK's creation of same-sex marriage, and one might ask what could have been the logical reason for allowing same-sex couples to form civil partnerships, civil marriages and religious marriages while not allowing different-sex couples the same rights. This has been discussed at length by authors such as Gaffney-Rhys, who argues that the CPA should be extended to heterosexual couples on the grounds of equality, privacy, dignity and autonomy and argues that denying mixed-sex couples the right to form a civil partnership contravenes arts 8 and 14 of the ECHR.⁹⁷ This is the same logical reasoning that the judiciary has adopted in the case of *Steinfeld and Keidan* and this leads to two points—first what impact would this have should the Bermudian DPA and decision in *Ferguson* be challenged before the JCPC, and secondly what does this say about the notion of equality that is adopted by the UK Supreme Court? This latter point will be addressed under the next heading.

In reference to the impact of this decision on any potential referral to the JCPC by the Bermudian government, it should not fill the Bermudian government with much confidence if it continues with the arguments used in *Ferguson*. One difference here is that the DPA does extend to same-sex and opposite-sex couples and so the question is not analogous, rather the logic in the decision of the UK Supreme Court is key. If the CPA is incompatible with art.14 taken with art.8 because it discriminates against different-sex couples, then the Bermudian Marriage Act 1944 would also be incompatible with art.14 and art.8 if it does not permit same-sex couples to marry; this of course is similar to the decision in *Godwin*.⁹⁸ The second matter needs a greater look at the meaning of equality and its role in legal theory on the Rule of Law.

Equality before the law

Exigencies of space preclude a full consideration of the historical development of, and the later codification of, equality before the law in constitutional terms. However, some key and salient points can be made in the short space allowed to explore the nuances of same-sex marriage in Bermuda and the approach to equality taken by the court in *Steinfeld and Keidan*. The Diceyan concept of the Rule of Law includes reference to the law applying equally to all, but makes no judgment on the quality or content of the law itself.⁹⁹ This is often termed the "equal subjection of all classes to a common rule".¹⁰⁰ At the opposite end of the spectrum lies the substantive approach, which often cites that the Rule of Law draws its authority from notions of equality, liberty and fundamental freedoms.¹⁰¹ This distinction is necessary before considering equality before the law clause in Bermuda. Each person will have a favoured perspective on whether equality as a term simply denotes the "equal subjugation", or whether it goes further in referring to a common set of fundamental rights everyone can enjoy. Depending on a person's semantic preference, a formalist would say that the law can be legitimately discriminatory,¹⁰² whilst a substantivist would say that the authority of law is reliant on the content of law being compatible with a normative set of rights. Applying this to same-sex marriage in Bermuda, the very beginning of the Bermudian Constitution states that "every person is entitled to the fundamental rights and freedoms of the individual".¹⁰³ This statement

⁹⁷ R. Gaffney-Rhys, "Same-sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 be Extended to Opposite Sex Couples?" (2014) 26(2) *Child and Family Law Quarterly* 173.

⁹⁸ *Godwin* [2017] SC (Bda) 36 Civ.

⁹⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Oxford: Oxford University Press, 2013, first published 1885); G. Marshall, *Constitutional Theory* (Clarendon Law Series, Oxford University Press, 1980).

¹⁰⁰ P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467.

¹⁰¹ T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, Oxford University Press, 1994).

¹⁰² In the formal conception as the content of law is irrelevant, see J. Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195.

¹⁰³ Bermuda Constitution Order 1968, The Schedule to the Constitution of Bermuda Chapter 1(1).

has a distinctly substantive approach to the formulation of the words in that it refers to an inherent set of freedoms all enjoy.

The first paragraph of the Constitution specifically refers to rights and their universality. This poses a question: if the Constitution sets out certain rights and characteristics which are protected, is *eiusdem generis*¹⁰⁴ permitted to expand the list in the constitution? *Ferguson* would seem to imply that the list is not finite and that the HRA, along with the common law, can expand on the specific rights and characteristics protected in the Constitution. Here, one criticism of the substantive conception rings true, viz against who's moral or ethical standard is the list of rights benchmarked? It has already been stated in this article that the collective opinion of the people is not a sufficient benchmark against which to set fundamental rights. Doing so will marginalise minority groups, which are arguably in greater need of protection from discrimination. It is therefore the responsibility of a few people in positions of authority—such as legislatures and the judiciary—to decide which characteristics are protected from discrimination and how wide universal rights extend. The issue that arises when a small number of people decide such an important factor is that severe change can occur when a post-holder changes to one with a different moral compass or conception on the rule of law. A judge with a purely formal conception on the rule of law might hold that even oppressive laws are neither arbitrary nor contrary to equality.¹⁰⁵ This leads on to a discussion documented by Fairgrieve¹⁰⁶ and is beyond the scope of this article. In brief, however, when one considers the role of equality before the law as an argument to expand discrimination protections, it is right to ask to what extent should they be expanded upon and to reflect on the opinions of those imbued with the power to adjudicate on such matters. It would have been difficult for the Court to assert that discrimination on the grounds of sexual orientation was prohibited by the HRA, and that same-sex marriage discrimination was not prohibited, on the basis that one begets the other. The Court's view in *Ferguson*, that the Constitution protects every individual's right to hold a belief is perfectly acceptable,¹⁰⁷ and the use of that logic to dismiss the proposition that the constitutional right to believe only in opposite-sex marriage precludes same-sex marriage is utilitarian. It does address equality before the law in a roundabout way, in that it asserts a view that everyone has the right to a belief save in the instance that it impacts on others. How far that impact is measured, and what substantive view on equality before the law is being adopted to reach that conclusion, are questions that cannot yet be answered pending either an appeal or further case-law from Bermuda.

In terms of the UK Supreme Courts demonstrable view, however, *Steinfeld and Keidan* seems to be drawing on both the substantive conception of equality having a relation to the fairness of the law to all. This draws on three of Lord Bingham's key principles in his theory on the Rule of Law. First, that the law applies equally to all, this in itself is formalist as it passes no comment on the content of law and so laws could be discriminatory.¹⁰⁸ Secondly, however, that the courts must protect fundamental human rights, and thirdly, that the courts must act fairly when deciding cases. The courts have already demonstrated, not least in *Steinfeld and Keidan*, that forming a legal relationship is a matter which is relevant to the right to a private and family life protected under art.8. It has also demonstrated that treating people differently on the basis of their sexual orientation is discriminatory and contrary to both art.8 and art.14. Coupling this together, the UK Supreme Court seems to have decided matters relatively consistently with the Bermudian Supreme Court, even if the reasoning behind the eventual decision was different. The courts are clearly utilising that distinctly substantive idea of fairness when looking at who should be entitled to marry and form civil partnerships and adopting a broad understanding of equality. Differences in reasoning

¹⁰⁴ *Halsbury's Laws of England*, Statutes and Legislative Process (Vol.96, 2012), para.1199.

¹⁰⁵ M. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 *Yale Law Journal* 561; U. Mattei and L. Nader, *Plunder: When the Rule of Law is Illegal* (Oxford: Blackwell, 2008); D. Fairgrieve, "Etat de droit and Rule of Law: Comparing Concepts—A Tribute to Roger Errera" [2015] *Public Law* 40.

¹⁰⁶ Fairgrieve, "Etat de droit and Rule of Law: Comparing Concepts—A Tribute to Roger Errera" [2015] *Public Law* 40.

¹⁰⁷ *Ferguson* [2018] SC (Bda) 45 Civ at [103]–[105].

¹⁰⁸ T. Bingham, *The Rule of Law* (London: Penguin UK, 2011).

demonstrate that Bermuda has its distinct jurisprudence, the fact that both the UK Supreme Court and the Supreme Court of Bermuda came to similar conclusions in relation to marriage in Bermuda and civil partnership in the UK demonstrates that, despite those differences in jurisprudence, there is a common acknowledgement of equality and fairness that permeates the jurisdictional divide.

Conclusion

The strong statement of intent included in the DPA does lead one to wonder whether the Act has been a knee-jerk reaction to a move by the Supreme Court of Bermuda to apply the HRA in a liberal fashion. Whether this matter warrants a knee-jerk legislative response will partly depend on whether one sees merit in the arguments for or against same-sex marriage. Notwithstanding this point, legislating on equality and enshrining in legislation a form of discrimination seems, *prima facie*, contrary to the ethos of the Bermudian Constitution and its HRA. Permitting an Act to treat people less favourably as a result of their sexuality is intrinsically discriminatory. Sexual orientation and same-sex marriage are fundamentally linked by their definition.¹⁰⁹ Therefore, to argue that discrimination should be sanctioned against same-sex couples wanting to marry and not sanctioned against a person's sexual orientation is illogical, as same-sex marriage is by definition reliant on those parties of the same sex wishing to marry. It is concluded that there is a strong argument for declaring that same-sex marriage should persist in Bermuda by drawing the inference that the DPA is inconsistent with the objectives of the Bermudian HRA insofar as it aims to treat same-sex couples less favourably than opposite-sex couples. A further argument is that the HRA's quasi-constitutional status gives rights which cannot easily be taken away by ordinary law in support of both the living tree doctrine and the statement mentioned above in *Blackburn*.

What will be the approach taken by the Bermudian Court of Appeal should it grant permission to appeal, considering tensions between the opinions of a proportion of their residents and the UK's approach? The UK supports same-sex marriage, the European Court of Human Rights has considered same-sex marriage extensively,¹¹⁰ and whether either of these would trickle into the judgment of the Bermudian Court of Appeal is a matter to be seen. It is not limited to impact from the UK and European jurisprudence, the case of *Jones*¹¹¹ (the very recent case in Trinidad and Tobago) saw the Court declare that criminalising same-sex sexual activity was unconstitutional. Although Trinidad and Tobago may not yet be at the point of discussing same-sex marriage, it is nonetheless a positive move in terms of LGBT+ rights in the Caribbean.

If the Bermudian Court of Appeal grants permission to appeal then the role of the JCPC may be of interest, and the latter arguments in this article may warrant further discussion. Would the JCPC apply the living tree doctrine, which will advance Bermudian rights and, if so, how much will UK and Strasbourg jurisprudence influence the JCPC? If the JCPC did decide to assert rights as it has done more recently in the case of *Steinfeld and Keidan*, can it be of assistance with harmonising the inconsistencies more widely seen across the Commonwealth? There are approximately¹¹² 36 Commonwealth countries which criminalise homosexuality or the LGBT+ community in some way, and the JCPC could be a source of authority to encourage equality and tolerance across the Commonwealth. This is hypothetical at this point—the next

¹⁰⁹ *Lee v McArthur* [2016] N.I.C.A. 39; [2016] H.R.L.R. 22.

¹¹⁰ European Court of Human Rights, "Factsheet—Sexual orientation issues" (February 2018), https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf [Accessed 1 August 2018].

¹¹¹ Case name and citation not available, full judgment due in July. S. Chaudhry, "Trinidad and Tobago court says laws barring gay sex are unconstitutional" (13 April 2018) *Reuters*, <https://www.reuters.com/article/us-trinidadtobago-judiciary-lgbt/trinidad-and-tobago-court-says-laws-barring-gay-sex-are-unconstitutional-idUSKBN1HK2I1> [Accessed 1 August 2018].

¹¹² Varying figures quoted on this, see Royal Commonwealth Society, "A Commonwealth Approach to LGBT Equality" (LGBT Rights, date unknown), <http://thercs.org/our-work/campaigns/lgbt-rights/> [Accessed 1 August 2018]; cf. B. Dittrich, "Commonwealth Should Address LGBT Rights: Two Thirds of Member States Criminalize Consensual Same-Sex Acts" (2018) *The Advocate*, <https://www.advocate.com/commentary/2018/4/16/commonwealth-nations-must-decriminalize-gay-sex> [Accessed 1 August 2018].

few months will be very important in terms of Bermudian constitutionalism and, potentially, of interest across the Commonwealth also.

Given that the matter is pending an appeal by the Bermudian government, the domestic courts in Bermuda should not lose sight of the separation of powers and the substantive notion of equality before the law motioned above. The court's decisions are handed down in pursuance of upholding the constitution as the supreme law, and (using the living tree doctrine) expanding the rights contained in the constitution to reflect society as a whole. In doing so the court should consider the impact and shortcomings of majority rule and identity thinking; the opinions of the population of Bermuda are anecdotally relevant but should not be used as authority for a contraction of rights or the living tree. Minority groups inevitably form a smaller share of the population and so their voices can be drowned out by the masses. It is the role of the Bermudian courts to resist the marginalisation of minority groups to achieve the aims in the first paragraph of the Bermudian Constitution. The courts cannot do this if it submits to the will of the legislature or of some public opinion.

The living tree doctrine was planted nearly a century ago in a society and situation very different from the one that is currently being discussed, however, the author is reminded that trees are planted "for the benefit of another generation".¹¹³

¹¹³ Cicero, *Cato Maior de Senectute* (Cambridge, Massachusetts: Loeb Classical Library, 1923).

Case Analysis

Coman: Vindicating the Residence Rights of Same-Sex “Spouses” in the EU

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EU law; Family reunification; Free movement of persons; Same sex partners; Spouses; Third country nationals

Abstract

In its recent landmark judgment—Coman¹—the Grand Chamber of the European Court of Justice held that the concept of a “spouse” under art.2(2)(a) of Directive 2004/38 (“Citizenship Directive”) embraces non-European Union (“EU”) citizens who have lawfully married an EU national of the same sex in a member state in which that citizen was genuinely resident. In a decision, which may transform free movement for same-sex couples across the Union,² the ECJ concluded that non-EU citizens, whether they are travelling with their EU spouse to another Member State or returning to the spouse’s home jurisdiction, can derive a right of residence for more than three months.

Facts³

The case centred on Adrian Coman, a Romanian national, and Claibourn Hamilton, an American citizen, who married in Belgium in 2010.⁴ The couple had previously lived together for a number of years in the United States, although they did not cohabit in Brussels where Mr Coman was working at the European Parliament. Subsequently, in 2013, the couple considered relocating to Romania. They requested information about the conditions under which Mr Hamilton would be able to reside in that jurisdiction for more than three months. The Romanian authorities responded that no such entitlement existed because domestic law did not acknowledge the couple’s Belgian same-sex marriage. Mr Hamilton could not, therefore, obtain residence rights through family reunification.

The couple challenged this refusal before the national courts, arguing that the failure to recognise, in the context of residence, their Belgian marriage contravened various provisions of the Romanian constitution. When the case transferred to the Constitutional Court (which was called upon to adjudicate the constitutional complaint) that court stayed proceedings and issued a number of questions to the European Court of Justice (“ECJ”).⁵ In particular, the Constitutional Court asked whether: (a) the term “spouse” in art.2(2)(a) of Directive 2004/38, read in the light of arts 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union (“EU Charter”), includes a non-EU same-sex spouse who an EU citizen

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¹ *Relu Adrian Coman, Robert Clabourn Hamilton, Asociatia Accept v Inspectoratul General pentru Imigrari, Ministerul Afacerilor Interne* (C-673/16), 5 June 2018 (“Coman”)

² See: Niko Bacic Selanec and Chloe Bell, “Who is a ‘spouse’ under the Citizens’ Rights Directive? The prospect of mutual recognition of same-sex marriages in the EU” (2016) 41(5) E.L.R. 655.

³ *Coman* (C-673/16) at [9]–[17].

⁴ For more background to the case, see: Accept and ILGA-Europe, *Freedom of movement and same-sex couples in Romania The Coman case—a briefing note* (2018)https://www.ilga-europe.org/sites/default/files/briefing_note_romania_final_accept_ie_-final.pdf [Accessed 1 August 2018].

⁵ *Coman* (C-673/16) at [17].

has lawfully married in another Member State; and (b) if the definition of “spouse” is so inclusive, whether host Member States must extend residence rights to that non-EU citizen for longer than three months.

Judgment

In its judgment, the Grand Chamber began by acknowledging that Directive 2004/38 only applies to situations in which an EU citizen attempts to enter and reside (possibly with intimates) in a Member State of which he or she is not a national. Therefore, as Mr Hamilton was seeking to derive extended residence entitlements in Romania—an EU jurisdiction of which his spouse is a citizen—the Citizenship Directive was not strictly applicable.⁶

However, the Court also observed that in prior jurisprudence it had confirmed that non-EU citizens, such as Mr Hamilton, who do not enjoy residence benefits under Directive 2004/38 because their family member is a national of the EU jurisdiction in which they intend to live can derive such benefits from art.21(1) of the Treaty on the Functioning of the European Union (“TFEU”).⁷ Preventing EU citizens, such as Mr Coman, from continuing family life in their home country, which those citizens has commenced and developed while genuinely resident in another Member State is likely to discourage individuals from leaving their home jurisdiction and exercising freedom of movement.⁸ In determining the conditions under which an EU citizen’s family can obtain residence rights in the home member state national authorities cannot impose requirements which are “stricter than those laid down by Directive 2004/38.”⁹

The question that arose in *Coman* was whether Mr Hamilton—a non-EU same-sex spouse who had married an EU citizen in a Member State in which that citizen was genuinely resident—qualified as a “family” member with whom Mr Coman, having exercised his freedom of movement in Belgium, had a right to maintain family life when he returned to Romania. To this question, the Grand Chamber answered in the affirmative.

Applying Directive 2004/38 by analogy, the Luxembourg judges acknowledged that under art.2(2)(a) family members specifically include an EU citizen’s spouse. The term “spouse” used in that provision refers to a person joined to another person by the bonds of marriage. It is a gender-neutral concept (not requiring that a marital union be heterosexual) and is capable of embracing individuals in a same-sex marriage.¹⁰

While art.2(2)(b) of the Citizenship Directive (which, as discussed below, creates residence rights for same-sex registered partners) only applies where the host Member State also validates same-sex civil partnerships, art.2(2)(a) confers rights upon non-EU spouses without reference to internal legal recognition.¹¹ As such, jurisdictions, including Romania, cannot rely upon their national framework to withhold residence entitlements (guaranteed by EU law) from an individual in Mr Hamilton’s position.¹² To conclude otherwise would create a situation whereby: (a) the rights of EU citizens, who have already exercised freedom of movement and who want to maintain family ties created during that movement, would fluctuate according to national law; and (b) the provisions of Directive 2004/38, applicable by analogy, would be deprived of their effectiveness.¹³

Withholding spousal residence entitlements from Mr Hamilton—whom Mr Coman had lawfully married while genuinely resident in Belgium—interfered with the latter’s freedom of movement. It could only be permissible if it was “based on objective public-interest considerations” and was “proportionate to a

⁶ *Coman* (C-673/16) at [18]–[21].

⁷ *Coman* (C-673/16) at [22]–[23].

⁸ *Coman* (C-673/16) at [24].

⁹ *Coman* (C-673/16) at [25].

¹⁰ *Coman* (C-673/16) at [34]–[35].

¹¹ *Coman* (C-673/16) at [36].

¹² *Coman* (C-673/16) at [36].

¹³ *Coman* (C-673/16) at [39].

legitimate objective pursued by national law.”¹⁴ In their observations to the Court, a number of governments suggested that refusing spousal residence entitlements to same-sex couples met this threshold because it was necessary to maintain the fundamental, opposite-gender nature of marriage.¹⁵ However, the Grand Chamber—having confirmed that derogations from fundamental rights must be interpreted strictly¹⁶—rejected the proposition that withholding residence benefits from persons, such as Mr Hamilton, was justified by public policy.

Extending the definition of “spouse” to same-sex couples would not require Member States to amend their general definition of marriage.¹⁷ The ECJ had affirmed on numerous previous occasions that there is no rule of EU law which requires Member States to permit same-sex marriage. Bringing Mr Hamilton within the definition of spouse under directive 2004/38 would result in Romania, for the limited purposes of EU residence rules, acknowledging the validity of a marriage lawfully concluded in Belgium. However, it would place no further obligation upon the Romanian state to embrace Mr Coman and Mr Hamilton as spouses under domestic law (e.g. favourable tax calculations, next-of-kin rights, etc.).¹⁸ As such, the partial recognition on offer would not “undermine the national identity or pose a threat to the public policy of the Member State concerned.”¹⁹

The ECJ also stressed that, in order to be permissible, a derogation from freedom of movement must be consistent with fundamental rights as protected under the EU Charter.²⁰ However, in this case, by refusing to allow Mr Coman to maintain his shared marital life with Mr Hamilton, Romania was acting in a manner which breached the right to family life both as set out in art.7 of the EU Charter and as interpreted in recent case law of the European Court of Human Rights.²¹

The Grand Chamber concluded that, as the non-EU same-sex spouse of a Romanian citizen who had entered a marriage while genuinely resident in Belgium, Mr Hamilton was entitled to reside with Mr Coman in Romania for longer than three months. The conditions which Mr Coman and Mr Hamilton would have to satisfy in order to exercise that derived residence right could not be any stricter than the residence conditions imposed under Directive 2004/38.

Comment

The decision of the Grand Chamber in *Coman* is a welcome affirmation of sexual orientation rights and is likely to have a significant practical impact for gay, lesbian and bisexual persons who (with their non-EU spouse) either move or return to Member States which currently lack same-sex relationship frameworks.²²

Reinforcing existing same-sex free movement rights

The judgment creates a robust structure through which same-sex married couples (where one spouse lacks EU citizenship), who move throughout the 28 Member States, can be confident of maintaining their family life. The Grand Chamber’s reasoning builds upon, and extends, the existing residence protections which same-sex couples already enjoy under the Citizenship Directive. As noted a novel feature of that legislation applied by analogy in *Coman* is the inclusion—within the concept of family members who enjoy derived rights of residence for more than three months—of “partner[s] with whom the Union citizen has contracted

¹⁴ *Coman* (C-673/16) at [41].

¹⁵ *Coman* (C-673/16) at [42].

¹⁶ *Coman* (C-673/16) at [44].

¹⁷ *Coman* (C-673/16) at [45].

¹⁸ *Coman* (C-673/16) at [45].

¹⁹ *Coman* (C-673/16) at [46].

²⁰ *Coman* (C-673/16) at [47].

²¹ *Coman* (C-673/16) at [48]–[50].

²² Alina Tryfonidou, “EU free movement law and the legal recognition of same-sex relationships: the case for mutual recognition” (2015) 21(1) *Columbia Journal of European Law* 195.

a registered partnership” [art.2(2)(b)]. When first introduced, art.2(2)(b) constituted in many respects a radical development for EU law conferring residence guarantees upon a class of relationships which, in 2004, a majority of the current Member States did not even acknowledge.

Yet, the scope of this new “registered partnership” category is limited by the fact that host Member States only incur an obligation to extend residence benefits where domestic law also provides for same-sex partnership. Thus, while jurisdictions such as Greece and Italy, which recently introduced LGB partnership frameworks²³, are required to grant residence beyond three months to non-EU same-sex partners no such obligation would arise in countries, such as Latvia and Romania, which continue to permit only opposite-sex marriage.²⁴

Article 2(2)(b) of the Citizenship Directive mirrors the ECJ’s case law regarding relationship-based employment benefits arising from the Qualification Directive. While decisions such as *Maruko*²⁵, *Romer*²⁶ and *Hay*²⁷ confirm that Member States cannot discriminate against same-sex registered partners who are comparably-situated to opposite-sex spouses, the Court’s reasoning requires the existence of some baseline legislation.²⁸ Reticent EU jurisdictions can avoid adverse judgments simply by withholding any relationship recognition. In a similar vein, under art.2(2)(b), Member States who oppose residence entitlements for same-sex partners can avoid EU law obligations by refusing to create any partnership structure within their domestic law.

The judgment in *Coman*, however, circumvents member state inaction by confirming that where an EU citizen enters into a same-sex marriage with a non-EU individual host Member States must acknowledge the same-sex spouse as “family” for the purposes of residence entitlements, irrespective of whether domestic law prohibits (even constitutionally) the formal recognition of LGB relationships.²⁹ The same is also true (as *Coman* illustrates) when EU citizens return to home jurisdictions having married a non-EU citizen of the same sex while genuinely resident in another EU country. In both cases—while it need not embrace same-sex marriage generally—the Member State must recognise the validity of the foreign marriage for the purposes of EU residence entitlements.

Building upon ECHR Jurisprudence

A particularly welcome aspect of *Coman* is the extent to which the ECJ builds upon existing European Court of Human Rights jurisprudence: (a) acknowledging the residence entitlements of same-sex couples; and (b) challenging speculative public policy arguments raised in opposition to sexual orientation rights.

In recent years, the European Court of Human Rights has applied increasingly robust review where Contracting Parties exclude same-sex couples from family reunification.³⁰ In *Pajic v Croatia*,³¹ a Bosnian individual had no right to join her female Croatian partner even though if the couple had different sexes residence benefits would have been available. Observing the unjustified difference of treatment between heterosexual and LGB unmarried couples the Strasbourg judges found a violation of art.14 of the European Convention of Human Rights (“ECHR”) read in conjunction with art.8 ECHR. The Court reached the

²³ Aengus Carroll and Lucas Ramon Mendoza, *State-Sponsored Homophobia* (ILGA-World 2017), p. 71.

²⁴ Aengus Carroll and Lucas Ramon Mendoza, *State-Sponsored Homophobia* (ILGA-World 2017), pp. 71–72.

²⁵ *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (C-267/06), 1 April 2008.

²⁶ *Jürgen Römer v Freie und Hansestadt Hamburg* (C-147/08), 10 May 2011.

²⁷ *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (C-267/12), 12 December 2013.

²⁸ Alina Tryfonidou, “Discrimination on the Grounds of Sexual Orientation and Gender Identity” in Stefan Vogenauer and Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017), pp.378–383.

²⁹ *Coman* (C-673/16) at [39].

³⁰ Zsolt Bobis, “European Court Buttresses Binational Same-Sex Couples’ Right to Family Reunification” (25 February 2016), *Strasbourg Observers*, <https://strasbourgobservers.com/category/cases/pajic-v-croatia/> [Accessed 1 August 2018]; Nelleke Koffeman, “Taddeucci and McCall v. Italy: welcome novelty in the ECtHR’s case-law on equal treatment of same-sex couples” (27 July 2016), *Strasbourg Observers*, <https://strasbourgobservers.com/2016/07/27/taddeucci-and-mccall-v-italy-welcome-novelty-in-the-ecthrs-case-law-on-equal-treatment-of-same-sex-couples/> [Accessed 1 August 2018].

³¹ *Pajic v Croatia* (App. No.68453/13), judgment of 23 February 2016.

same conclusion in *Taddeucci and McCall v Italy*,³² where a New Zealand citizen could not join his Italian spouse because residence guarantees were limited to different-sex married couples. Although Taddeucci and McCall were treated similarly to unmarried heterosexual couples, the European Court of Human Rights held that such treatment was inappropriate because same-sex couples could not formalise their relationship and Italian law took no account of Mr McCall's individual circumstances.

The decision in *Coman*—although obviously grounded in the specific frameworks of Directive 2004/38 and art. 21(1) TFEU—builds upon the reasoning and sentiments expressed in the Strasbourg case law, particularly the rejection of internal legal structures as sufficient to exclude same-sex family reunification. While neither the ECJ nor the European Court of Human Rights have (yet) imposed general marriage equality obligations,³³ both courts exhibit a growing willingness to protect same-sex family life across European borders.

The *Coman* decision also mirrors recent European Court of Human Rights scepticism regarding the public policy arguments which Contracting Parties raise against lesbian, gay, bisexual and trans rights. As noted in *Coman* a number of Member States had cited the fundamental, opposite-sex nature of marriage as supporting a limited definition of “spouse” under art.2(2)(a) of the Citizenship Directive. However, the Grand Chamber pointed out that where expanding the definition of spouse to embrace Mr Hamilton and Mr Coman has no appreciable impact on national definitions of marriage the preservation of those definitions could not justify restricting Mr Coman's freedom of movement.³⁴

Such readiness to substantively interrogate member state policy rationales is also evident in European Court of Human Rights jurisprudence. While, in *Karner v Austria*,³⁵ the Austrian government had suggested that withholding survivor tenancy rights from same-sex couples was necessary to protect the traditional institution of marriage the Court could identify no way in which an individual acceding to his or her deceased same-sex partner's tenancy would undermine heterosexual marriage.³⁶ Similarly, in *Vallianatos v Greece*³⁷ the Court noted that, while Greece had defended the exclusively heterosexual character of civil partnership laws as necessary to protect children and marriage, access to such partnerships was open to different-sex couples irrespective of their parental status.³⁸

Charter of Fundamental Rights of the European Union

One notable aspect of the Grand Chamber's judgment—which has drawn critique³⁹—is the absence (whether intentionally or otherwise) of fundamental rights analysis. In its reasoning the Court clearly locates the present dispute within freedom of movement principles and derives Mr Hamilton's extended residence entitlements from Mr Coman's rights under art.21(1) TFEU. While the Romanian Constitutional Court requested an interpretation of art.2(2)(a) of the Citizenship Directive, read in the light of arts 7, 9, 21 and 45 of the EU Charter, the Grand Chamber restricts itself to acknowledging that Romania's interference with Mr Coman's freedom of movement was incompatible with guarantees of “family life” (art.7 of the EU Charter).

On the one hand, the ECJ's concentration on freedom of movement is strategically appealing. Even though *Coman* does not impose broader same-sex marriage obligations the litigation still touches upon

³² *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016.

³³ *Coman* (C-673/16) at [37]; *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010.

³⁴ *Coman* (C-673/16) at [45]–[46].

³⁵ *Karner v Austria* (App. No.40016/98), judgment of 24 October 2003 (“Karner”).

³⁶ *Karner* (App. No.40016/98) at [41]–[42].

³⁷ *Vallianatos v Greece* (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013 (“Vallianatos”).

³⁸ *Vallianatos* (App. Nos 29381/09 and 32684/09) at [82]–[88].

³⁹ Michael Rhimes, “The “gay marriage” case that never was: Three thoughts on Coman, Part 2” (6 June 2018), *UK Human Rights Blog*, <https://ukhumanrightsblog.com/2018/06/06/the-gay-marriage-case-that-never-was-three-thoughts-on-coman-part-2-michael-rhimes/> [Accessed 1 August 2018]; Daron Ran, “Adrian Coman v. Romania: A Small Victory with Wasted Potential” (19 June 2018), *Oxford Human Rights Hub Blog*, <http://ohrh.law.ox.ac.uk/adrian-coman-v-romania-a-small-victory-with-wasted-potential/> [Accessed 1 August 2018].

an issue of deep political sensitivity (particularly among Eastern Member States). Grounding its judgment in art.21(1) TFEU rather than the EU Charter, the Grand Chamber was still able to vindicate Mr Coman and Mr Hamilton's EU entitlements, but did not have to raise more controversial (and contested) questions of sexual orientation equality (art.21 of the EU Charter).⁴⁰ In addition while AG Wathelet did, in his opinion, more substantively address fundamental rights it is not clear that his conclusions on the topic are more convincing (or add to) the ECJ's brief discussion of art.7.⁴¹

On the other hand, there is also a compelling argument that—at least symbolically—the Grand Chamber's refusal to engage with fundamental rights constitutes a missed opportunity. The idea that “spouse” under art.2(2)(a) of Directive 2004/38 excludes lawfully married couples simply because they are gay or lesbian has obvious implications for sexual orientation non-discrimination. The fact that the Court failed to tackle those implications may serve to increase perceptions, encouraged by recent judgments such as *Leger*,⁴² that the ECJ is not yet willing to meaningfully apply fundamental rights to Europe's LGBT populations.⁴³

Future Questions

Moving forward, the Grand Chamber's judgment in *Coman* invites us to consider three, indirectly-related issues.

First, for observers in the United Kingdom *Coman* is a timely illustration of the important role which EU law, and particularly the ECJ, has historically played in advancing LGBT rights across the member states. As the United Kingdom prepares to leave the Union the Grand Chamber's judgment serves to remind UK LGBT populations that they will no longer benefit from future (possible transformative) innovations in this sphere.⁴⁴

This future reality was brought into sharp relief just four weeks after the *Coman* judgment when, in *MB*, the ECJ held that the United Kingdom's refusal before the Marriage (Same-Sex Couples) Act 2013 to permit married trans individuals to access retirement pension benefits according to their preferred gender (there was a requirement to annul an existing marriage) constituted unlawful sex discrimination.⁴⁵ Post-Brexit and the removal of the jurisdiction of the Luxembourg Court LGBT persons in the UK will become detached from a key institutional ally in the development and enforcement of their rights. While the recent case of *R. (on the application of Steinfeld) v Secretary of State for International Development*⁴⁶—where the UK Supreme Court condemned discrimination on the basis of sexual orientation in accessing civil partnership—offers some consolation that LGBT populations will still enjoy the protection of the European Court of Human Rights, one must remember that, in *Hamalainen v Finland*,⁴⁷ the European Court of Human Rights actually upheld the validity of divorce as a pre-condition for legal gender recognition.

Second, what influence will the decision have upon advancing movements for marriage equality across the European Union? While the ECJ is clear that expanding the definition of “spouse” in art.2(2)(a) of the Citizenship Directive leaves intact Member State competence to determine the national definition of marriage some commentators have suggested that it would be “anomalous” for a jurisdiction, such as Romania, to allow non-EU same-sex partners to reside in their territory on the basis of a marriage which

⁴⁰ Michael Rhimes, “The “gay marriage” case that never was: Three thoughts on Coman, Part 2” (6 June 2018) UK Human Rights Blog, <https://ukhumanrightsblog.com/2018/06/06/the-gay-marriage-case-that-never-was-three-thoughts-on-coman-part-2-michael-rhimes/> [Accessed 1 August 2018].

⁴¹ *Coman* (C-673/16) (Opinion of AG Wathelet) at [59]–[67].

⁴² *Leger* (C-528/13), 29 April 2015.

⁴³ Alina Tryfonidou, “The Leger ruling as another example of the ECJ's disappointingly reticent approach to the protection of the rights of LGB persons under EU law” (2016) 41(1) *European Law Review* 91; Uladzislau Belavusau, “Towards EU sexual risk regulation: restrictions on blood donation as infringement of active citizenship” (2016) 7(4) *European Journal of Risk Regulation* 801.

⁴⁴ For a full discussion of the potential impact of Brexit on LGBTQI rights in the United Kingdom, see: Jonathan Cooper OBE, Peter Dunne, Anya Palmer and Keina Yoshida, Brexit, The LGBT Impact Assessment (*Gay Star News*, 2018).

⁴⁵ *MB* (C-451/16), 26 June 2018.

⁴⁶ *R. (on the application of Steinfeld) v Secretary of State for International Development* [2018] UKSC 32.

⁴⁷ *Hamalainen v Finland* (App. No.37359/09), judgment of 16 July 2014.

the state authorities then ignore for all other domestic purposes.⁴⁸ By requiring reticent Member States to accept same-sex “spouses” in one context (immigration) *Coman* must inevitably normalize same-sex marriage rights across the national framework. Of course, as the judgment *imposes* marital recognition obligations upon EU jurisdictions, national authorities may not consider it so anomalous to limit the impact of *Coman*. However, at a time when the European Court of Human Rights continues to disavow same-sex marriage rights under arts 8, 12 and 14 ECHR there is undeniable significance in the Grand Chamber embracing same-sex couples within the Citizenship Directive definition of “spouse”.⁴⁹

Finally, how should one view *Coman* in light of recent, high-profile cases on the provision of services? In *Masterpiece Bakeshop Ltd v Colorado Human Rights Commission*⁵⁰ and *Lee v Ashers Bakers Company*,⁵¹ both the United States and United Kingdom Supreme Courts have been asked to consider the legitimacy of withholding publicly-available services on the basis of a religious objection to same-sex marriage. The applicability of EU law to scenarios such as *Masterpiece* and *Asher* is limited because Directive 2000/78 does not extend to services and public accommodations. Directive 2000/78 is currently the only EU-wide legislation prohibiting discrimination on the basis of sexual orientation and the EU Charter would also not apply.⁵² However, what these cases do caution is that even if *Coman* were to encourage more general same-sex marriage entitlements across the 28 Member States, accessing marriage may not guarantee that same-sex couples enjoy all marriage-related benefits on an equality footing with their different-sex peers.

⁴⁸ Alina Tryfonidou, “Free Movement of Same-Sex Spouses within the EU: The ECJ’s Coman Judgment” (19 June 2018) *European Law Blog*, <https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/> [Accessed 1 August 2018].

⁴⁹ Paul Johnson, “The choice of wording must be regarded as deliberate”: same-sex marriage and Article 12 of the European Convention on Human Rights” (2015) 40(2) *European Law Review* 207.

⁵⁰ *Masterpiece Bakeshop Ltd v Colorado Human Rights Commission* 584 U.S. (2018).

⁵¹ *Lee v Ashers Bakers Company* [2016] NICA 55.

⁵² *Jürgen Römer v Freie und Hansestadt Hamburg* (C-147/08), 10 May 2011.

Case and Comment

Selected decisions from the European Court of Human Rights for March and April 2018

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Revision request for Ireland v UK (1978)

Torture—inhuman and degrading treatment—five techniques—inter-state application—new evidence—revision

☞ Dissenting judgments; Emergency powers; Fresh evidence; Inhuman or degrading treatment or punishment; Interrogation; Northern Ireland; Torture

Ireland v UK (Application No.5310/71)

European Court of Human Rights (Third Section): Judgment of 20 March 2018

Facts

The present case concerns a request by Ireland for the European Court of Human Rights (the Court) to revise its previous judgment on *Ireland v UK* of 18 January 1978 (the original judgment), owing to new evidence becoming available which Ireland felt would have or could have affected the outcome of that judgment. The original judgment concerned a claim by the Irish Government against the UK, arguing that the latter breached art.3 of the Convention by torturing suspected members of the Irish Republican Army (IRA). Owing to a sustained campaign of bombings, both in England and Northern Ireland, the UK instituted a series of emergency powers which granted the authorities extra-judicial powers of arrest, detainment, internment and interrogation with the so-called “five techniques”—wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and water. The Court took the view in the original judgment that these techniques were not capable of causing a level of suffering which would allow them to be classed as acts of torture.

The first ground of revision concerned the criterion of severity for torture. The Irish Government contended that a newly available medical report produced by Dr L, which the UK Government had in its possession at the time of the original judgment, demonstrated that the effects of the “five techniques” could be “substantial, severe and long-lasting”. Despite this report, Dr L gave evidence in the proceedings relating to the original judgment, submitting that the effects of the “five techniques” were minor and short term. The applicant Government contended that if the Court had been made aware of the true gravity of the “five techniques” in the original judgment, it would have or could have found them to constitute acts of torture.

A second ground of revision advanced by the Irish Government was that the newly available material revealed the extent to which the UK Government had actively adopted a policy of withholding information from the Commission and the Court in the original judgment, including that the use of the “five techniques” had been authorised at a ministerial level. The Irish Government submitted that if the Court in the original judgment had been aware of this they would have scrutinised the evidence presented by the UK Government more carefully, possibly arriving at a different outcome. The Irish Government also argued that the failure to co-operate with the Court in the original judgment was, on its own, a ground of revision.

Held

- (1) The request for revision was dismissed (six votes to one).

The Court first dealt with the UK’s submission that Ireland had not been within the six-month time limit as Ireland had received a number of documents, including the medical report by Dr L, and had become aware of research into the newly released documents as early as 2013. The Court noted that the majority of the case-law relied upon by both parties in this regard dealt with whether the fact upon which revision was requested could have been known to the parties before the delivery of the original judgment and not whether, as in the present case, the fact could only become known long after the original judgment was handed down. Despite this the Court found that there were good reasons to allow Rule 80(1) to apply to situation where the new fact becomes known after the original judgment is handed down. In dealing with whether the Irish Government was within the six-month time limit the Court found that the request for revision was not dependent upon the receipt of one particular piece of evidence but rather a significant number of documents which, when taken as a whole, led the Irish Government to believe there were grounds for revision. In light of this, the Court found the Irish Government to be within the six-month time limit as it was only upon receiving knowledge of the vast array of documents on 4 June 2014 that the Irish Government could be said to have acquired the knowledge required to request a revision. Crucial to the Court’s reasoning in this regard was that the Irish Government had not been idle when it received Dr L’s report in March 2014 and had submitted it to the Irish Attorney General for review, subsequently concluding that the document on its own was not sufficient to request a review.

The Court then turned to whether the newly discovered fact may have had a decisive influence upon the original judgment. In order to address this issue, the Court first dealt with whether the newly released evidence provided any new facts at all. In doing so, the Court outlined the procedure for determining whether the newly released documents could be said to contain new facts. First, the new documents would have to show sufficient *prima facie* evidence that the Irish Government’s version of events were correct. In dealing with this the Court noted that the documents submitted in support of the first ground of revision concerned matters of compensation relating to the domestic proceedings brought before the UK Courts and only one contained the express medical opinion of Dr L, which was itself published

after the Commission in the original judgment had heard evidence. Another document, which comprised of advice from a counsel to the UK Government, referenced Dr L's medical opinions and notably recorded that Dr L had observed long-term health effects in one of the men who was subjected to the “five techniques”. However, none of these opinions related to the illustrative cases brought before the Commission in the original judgment. The above considerations led the Court to express doubts as to whether the newly released documents provided sufficient *prima facie* evidence that Dr L misled the Commission in the original proceedings.

Assuming that the newly released documents did provide sufficient *prima facie* evidence that Dr L did mislead the Commission in the original proceedings, the Court opined that it could not be said that knowledge of the newly released documents would have altered the findings of the original judgment. The Court reached this view on the understanding that Dr L was not the only professional to suggest the “five techniques” resulted in only short-term consequences. Also, the Court gave great weight to the fact that the Court in the original proceedings did not consider the issue of possible long-term effects when ascribing the “five techniques” with the status of inhuman and degrading treatment but rather the fact that the “five techniques” lacked the required severity to be considered as torture. The Court noted that the perceived severity of the “five techniques” does not depend on whether the consequences of their usage are long term or short term.

In dealing with the second ground of revision, namely that the UK Government had actively misled the Commission, the Court went on to examine the facts which the newly released documents provided. In doing so, the Court found that the documents provided no facts which were not known the Commission at the time of the original proceedings. The Court commented that while they shed light upon the UK Government’s general attitude of delaying the original proceedings and that, as part of its general litigation strategy, it had conceded that the “five techniques” constituted torture in the original proceedings so as to prevent their witnesses from being cross-examined on the point, the documents did not provide any facts not already known. Indeed, the Commission in the original proceedings commented on the UK Government’s habit of delaying proceedings and that the UK Government had expressly announced at the start of the original proceedings that it had instructed all witnesses not to answer any questions in relation to the “five techniques”.

Cases considered

- Bugajny and Others v Poland*, (revision) (App. No.22531/05), judgment of 15 December 2009
- Cernescu and Manolache v Romania* (revision) (App. No.28607/04), judgment of 30 November 2010
- Gäfgen v Germany* Gäfgen v Germany (2010) 52 E.H.R.R. 1
- Grossi and Others v Italy* (revision) (App. No.18791/03), judgment of 30 October 2012
- Hertzog and Others v Romania* (revision) (App. No.34011/02), judgment of 14 April 2009
- Ireland v the United Kingdom* (1978) 2 E.H.H.R 25
- McGinley and Egan* (revision) (App. No.23414/94), judgment of 28 January 2000
- Naumoski v the former Yugoslav Republic of Macedonia* (revision) (App. No.25248/05), judgment of 5 December 2013
- Selmouni v France* (2000) 29 E.H.R 403

Comment

The present case is helpful in that it clarifies the procedure for revising previous judgments and provides that evidence which could not have been known at the time of the original judgment can still be relied upon to make an application for revision. The case also clarified that the Court will not retrospectively re-interpret the facts which were known at the time of the original judgment but rather will solely rely upon how the new facts may have been interpreted had they been known. Also, of interest is the tactic recognition by the Court that the “five techniques” need not be explicitly recognised as torturous practices, as suggested by the Government of Ireland, owing to the more recent case of *Selmouni v France* in which reliance upon the original judgment was prevented owing to the ever-evolving classification of torture. This is significant as it is arguable that in formulating its judgment in this way the Court missed an opportunity to finally end suggestions that measures similar to the “five techniques” should not be classified as torture owing to a selective reading of the Court’s jurisprudence and the reasoning of the original judgment.

Judge O’Leary’s dissenting opinion also merits consideration. Although Judge O’Leary disagreed with the majority on many points the most notable is her suggestion that the majority adopted an unnecessarily narrow view of how the Court reached its decision in the original judgment. Primarily Judge O’Leary opined that the majority were wrong to view the revision request as though it were seeking to change the legal definition of torture, or the stigma attached to it, as it existed in 1978. Rather, in Judge O’Leary’s view, the revision request was seeking to establish how the Court would have applied that same definition in 1978, had it been in possession of all of the facts which were withheld from it at the time. In this sense, it was opined that had the original Court had access to the now available documents, it would have been “very difficult, if not impossible, to displace” the Commission’s unanimous finding of torture in the original proceedings. A final point of interest to note from the dissenting opinion is her suggestion that the reason the original Court found that the “five techniques” did not constitute acts of torture may have been because the Court was unwilling to find the UK, a founding state of the European Convention, responsible for a violation of art.3 owing to the special stigma that it recognised was attached to such violations.

Although the outcome might be particularly disappointing for the victims, the decision of the Court is not surprising. It is difficult to contest that had the Court examined the ‘five techniques’ today and in light of its evolving case-law and interrogation techniques, it would have concluded that they amounted to torture. It is also not difficult to accept that had the judges accepted to revise a case that was decided 40 years ago in light of limited new evidence, the Court would have been unrealistic. However, as the request for the referral of the current judgment to the Grand Chamber is still pending, it is worth waiting to see how both Ireland and the Grand Chamber shall react to another opportunity to review the case.

The right to defend oneself in person in criminal proceedings

Self-representation—criminal proceedings—Human Rights Committee—right to a fair trial—art.6

☞ International law; Litigants in person; Margin of appreciation; Portugal; Right to conduct own defence; Right to fair trial

Correia de Matos v Portugal (Application No.56402/12)

European Court of Human Rights (Grand Chamber): Judgment of 4 April 2018

Facts

The applicant, Mr Carlos Correia de Matos, was previously a lawyer, but was suspended by the Bar Council in 1993 due to his concurrent practice as an auditor. Although the applicant was no longer practising as an auditor from 2016, he remained suspended from the Bar due to a disciplinary sanction imposed for practising as a lawyer while not authorised.

The applicant was charged with the criminal offence of insulting a judge arising from civil proceedings in 2008 in which the applicant had been acting as a lawyer. As part of the criminal investigation, a defence counsel was appointed, but the applicant made a request that the criminal proceedings were made adversarial and sought leave to replace the appointed defence counsel and represent himself. The Court agreed to open the investigation to an adversarial proceeding but held that the applicant could not represent himself without the assistance of defence counsel, as this would prevent the realisation of his constitutional right to be represented by independent counsel.

The Portuguese Court of Appeal dismissed the applicant's appeal, on the basis that criminal procedure rules required the separate status of the defendant and their counsel, arguing that this reflected the emotional burden on the defendant, and was to safeguard the proper and effective defence of the accused. The applicant then appealed to the Constitutional Court, but they refused to examine it without the endorsement of the applicant's state-appointed defence counsel. The criminal proceedings continued, concluding with a fine and an order for costs, including for counsel as the applicant had not requested legal aid. The cost order was discontinued as the applicant was unable to pay and lacked seizable assets. A further appeal was sought by the applicant for the criminal conviction but was found inadmissible as the applicant sought to self-represent with the Court of Appeal reiterating its previous finding that the right to counsel could not be waived.

The applicant complained before the European Court of Human Rights (the Court) that his art.6 right had been violated because the domestic courts refused him leave to represent himself as defendant in the criminal proceedings.

Held

(1) The application was declared admissible (unanimous).

(2) There had been no violation of art.6(1) and art.6(3)(c) (nine votes to eight).

The Court considered the applicant's complaint to essentially be the question of the scope of the right of defendants with legal training to defend themselves in person but noted that the applicant was suspended from the Portuguese Bar Council's roll and therefore could not do so. The Court highlighted that a margin of appreciation is offered to states with reference to the right to defend oneself under art.6 and sought to assess the mandatory representation of defendants in criminal proceedings under Portuguese law with reference to this.

Recognising from previous case-law that requiring compulsory representation by a registered lawyer is a measure taken in the interest of defendants, even if against their wishes, the Court considered that this must be balanced against the defendant's freedom to choose their legal representation and must only be overruled where necessary in the interests of justice, and to ensure the fairness of proceedings as a whole.

The Court noted that art.6(3)(c) grants the right to defend oneself in person *or* through legal assistance and considered a margin of appreciation is left to states in determining how these alternatives are offered. This was justified as recognising both of these rights as absolute would be excessive, and there is no consensus amongst states on how this choice of means is offered.

Taking into account the reasoning of the Portuguese domestic courts, the Court held that the state had not exceeded this margin of appreciation in preventing defendants like the applicant from representing themselves, as they were not prevented from some choice in their means of defence, and they did not consider that the fairness of proceedings was adversely affected by these rules. They also noted that although the applicant chose not to participate in the criminal proceedings, he did not complain of lack of confidence in the expertise of his counsel, and therefore did not point to any unfairness in his proceedings, but in principle against the requirement of mandatory representation.

Cases considered

- Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21
- Brualla Gómez de la Torre v Spain* (2001) 33 E.H.R.R. 57
- Centre for Legal Resources on behalf of Valentin Cămpeanu v Romania* (App. No.47848/08), judgment of 17 July 2014
- Correia de Matos v Portugal* (App. No. 48188/99), judgment of 15 November 2001
- Croissant v Germany* (1993) 16 E.H.R.R. 135
- Dvorski v Croatia* (App. No. 25703/11), judgment of 28 November 2013
- Fogarty v United Kingdom* (2001) 34 E.H.R.R. 302
- Hatton and Others v United Kingdom* (2003) 37 E.H.R.R. 611
- Ibrahim and Others v United Kingdom* (2015) 61 E.H.R.R. 9
- Karpetas v Greece* (App. No.6086/10), judgment of 30 October 2012
- Kyprianou v Cyprus* (2007) 44 E.H.R.R. 27
- Mamatkulov and Askarov v Turkey* (2005) 41 E.H.R.R. 25
- Mayzit v Russia* (2006) 43 E.H.R.R. 38
- Meftah and Others v France* (App. No.32991/96), judgment of 26 July 2002
- Quaranta v Switzerland* (App. No.12744/87), judgment of 24 May 1991
- S.H. and Others v Austria* (App. No.57813/00), judgment of 3 November 2011
- Sejdovic v Italy* (2004) 42 E.H.R.R. 360
- Simeonovi v Bulgaria* (App. No.21980/04), judgment of 20 October 2015
- Weber v Switzerland* (1990) 12 E.H.R.R. 508
- X. v Norway* (App. No.5923/72), judgment of 30 May 1975
- X v Finland* (App. No.34806/04), judgment of 3 July 2012

Commentary

The majority judgment of the Court in favour of the state was met by a number of dissenting judgments, expressing disagreement with the finding of the majority that the Portuguese law preventing defendants from representing themselves was within the margin of appreciation offered to states by art.6(1) and (3). The dissenting opinions of Judges Tsotsoria, Motoc and Mits, and of Judge Pinto del Aburquerque joined by Judge Sajo criticise the majority's holding with respect to the margin of appreciation, noting in particular that the comparative legal analysis of the right to defend oneself failed to note the extremity of Portugal's absolute ban on self-representation. While the dissenting opinions noted that the right to self-represent could not be absolute, they considered that the comparative strictness of Portugal's rule was a compelling reason that it should have been held that Portugal had exceeded the margin of appreciation.

Further to this three of the dissenting opinions note the inconsistency of this decision with the interpretation of the International Covenant on Civil and Political Rights (ICCPR) on this matter. In a 2006 Communication regarding the same applicant, the Human Rights Committee (HRC) had held that

the applicant's right to defend himself in person under the ICCPR had been violated. The dissenting opinion of Judge Bošnjak notes that while the European Court is not bound by the HRC's interpretation, the inconsistency of these judgments represents a fragmentation of international human rights law, which is damaging to its coherence.

The dissenting judgments also consider in some depth the analysis of the overall fairness in proceedings, which the majority had held was not affected as the assignment of a competent lawyer to represent the applicant ensured a good defence. However, the joint opinion of Judges Pejchal and Wojtyczek noted that the proceedings treated the accused as an object of procedure, rather than allowing him to actively participate, which could not be fair. The opinion summarises that the Portuguese rule on mandatory representation is paternalistic, a sentiment that is strongly reiterated by Judge Pinto del Albuquerque, who characterises the majority judgment as "a return to the biases of the tormented black past of Europe, those biases that categorised defendants as objects in the hands of the almighty State, which could always dictate what was in their interests, even against their own will".

The decision of the majority to allow a wide margin of appreciation to Portugal in light of the lack of agreement on the matter across the Council of Europe state is not surprising. However, it is both regrettable and worrying that the Court chose to not align itself with the HRC's interpretation of the right to a fair trial under art.14 ICCPR allowing for further fragmentation of international human rights law.

Residency rights of stateless persons

Status of aliens—state dissolution—permanent residency—statelessness—citizenship—right to respect for private and family life—art.8—discrimination—art.14—art.1 Protocol No.12

☞ Croatia; Discrimination; Right to respect for private and family life; Rights of entry and residence; Statelessness

Hoti v Croatia (Application No.63311/14)

European Court of Human Rights (First Section): Judgment of 26 April 2018

Facts

The applicant, Mr Bedri Hoti, has lived in Novska, Croatia since 1979. The applicant's parents, both Albanian nationals, were granted refugee status in the Former Socialist Federal Republic of Yugoslavia (SFRY) on political grounds and resided in Kosovo where the applicant was born. Mr Hoti applied for a permanent residence permit in Croatia in 1987 and was granted a temporary residence permit pending the final decision. In February 1989, the Ministry of the Interior informed the local authorities that the applicant's request was to be declined in line with a policy dictating that Albanian refugees be instructed to apply for SFRY citizenship. The applicant declined to apply for SFRY citizenship.

The applicant was granted further temporary residency in the SFRY by the authorities in Kosovo valid until 1991 whereupon Croatia declared independence from the SFRY. The applicant was called up to serve the local authorities in compulsory civilian service following the outbreak of war and was issued a permit for this purpose. In the intervening period Mr Hoti submitted an application for Croatian citizenship, citing his residence in Novska since 1979, his employment and, subsequently, indicating that he was prepared to renounce his Albanian citizenship. Despite assurances given to the Novska police and the applicant by the National Intelligence Agency and the Ministry of the Interior that there was nothing preventing the applicant from acquiring Croatian citizenship if he provided evidence of his willingness

to renounce Albanian citizenship within two years his application was dismissed in August 1995. A report by the Novska police alleged that the applicant had been absent from his place of residence during the war and the authorities considered that he had thereby failed to evidence five continuous years of residence in line with domestic legal requirements. The applicant's appeal lodged before the Administrative Court was dismissed on the same grounds.

In November 2001 the applicant reapplied for permanent residency in Croatia, citing *inter alia*, his inability to obtain travel documents or a certificate of renunciation of citizenship from the Albanian authorities. This request was similarly denied by the Ministry of the Interior in 2003 for an alleged failure to comply with the Movement and Stay of Foreigners Act, including the lack of national interest in granting him residency. Appeals lodged before the Administrative and Constitutional Courts were also dismissed, the Courts reaffirming the authorities' argument that Mr Hoti had failed to provide evidence of three uninterrupted years of employment. The applicant was granted five temporary extensions to his residence permit on humanitarian grounds, however, permission was in the interim denied by the Ministry for a failure to provide a valid travel document and on appeal this reasoning was endorsed by the Administrative Court.

Bringing a claim before the European Court of Human Rights (the Court) for violations of his art.8 right to respect for private and family life, in conjunction with art.14 and art.1 of Protocol No.12 prohibitions on discrimination, the applicant alleged that he was not given adequate opportunity to regularise his residency status, that his opportunities to travel and work were negatively impacted, and that the legal framework itself is not equipped to provide a solution.

Held

- (1) The issue of exhaustion of domestic remedies was rejected after adjoining it to the merits of the case (unanimous).
- (2) The alleged violations of art.14 in conjunction with art.8 and art.1 of Protocol No.12 were rejected as inadmissible and manifestly ill-founded (unanimous).
The applicant's argument that the legislative framework itself discriminated against former SFRY citizens was rejected on the basis that it had not been shown on the evidence that he had ever held SFRY citizenship.
- (3) The claim under art.8 was declared admissible (unanimous).
The Court rejected the argument of the Government that the claim should be struck out as the matter had already resolved in accordance with art.37(1)(b) of the Convention owing to the grant of temporary residency status on humanitarian grounds to the applicant. Distinguishing its previous case-law on the status of aliens following the break-up of a state where clear assurances had been given by the authorities, the Court held that the temporary residence status granted did not have the effect of removing the uncertainty of the applicant's status.
On the issue of temporal admissibility, the Court affirmed that although the Convention only entered into force in Croatia in 1997, the challenges encountered by the applicant in regularising his residency status should be considered a continuous situation and that an understanding of the previous facts was essential regardless.
Finally, the Court rejected the argument of the respondent government that the applicant had abused his right of individual application by making submissions to the Court that he was previously a citizen of the SFRY. It was emphasised that the applicant's citizenship was in dispute and had been stated differently on various official documents, thereby giving rise to reasonable doubt on his part.
- (4) There had been a violation of art.8 (unanimous).

The Court emphasised two key distinctive aspects of the facts, namely the regularisation of the status of aliens following the dissolution of the SFRY and the statelessness of the applicant. The Court distinguished the present case from its previous case-law on art.8 with respect to the erasure of individuals from the register of domicile in Croatia in the wake of the dissolution of the SFRY and cases concerning the denial of rights to “settled migrants” as one in which the applicant had not already been legally registered or domiciled in Croatia and one presenting a unique set of circumstances. Accordingly, the Court held that the art.8 claim should instead be examined in the context of the existing case-law on aliens who were unable to formally regularise their residence in the host state.

The right to respect for private and family life under art.8 was held to entail a positive obligation on the part of the state to provide both effective and accessible protection for the right. The judges noted that although the applicant did benefit from a private life in Croatia, his status was nevertheless uncertain and depended upon discretionary one-year extensions requiring either a travel document or the consent of the Ministry of the Interior to obtain. The evidence supporting the decision of the Government to deny permanent residency status to the applicant on the basis that he could not demonstrate three uninterrupted years of employment was called into question. The Court held that although the applicant was absent for fifteen days during his 1986–1989 employment period, the decision of the authorities to reject his application on this basis was “overly formalistic”, particularly in view of the guarantees of employment offered by the applicant.

The impossibility of obtaining a valid travel document with which to apply for residency was cited by the Court, along with the failure of the authorities to provide the applicant with administrative assistance. The failure of the domestic courts to assess the applicant’s private life and other art.8 considerations on examining residency appeals was similarly noted. It was therefore concluded that the respondent state had not complied with the positive obligation to provide effective and accessible procedures to enable residency to be determined in accordance with the requirements of art.8.

- (5) The respondent state was ordered to pay EUR 7,500 plus any tax chargeable in respect of non-pecuniary damage and EUR 3,000 to cover costs and expenses to the applicant within a period of three months (unanimous).
- (6) The remainder of the claim by the applicant for just satisfaction was dismissed (unanimous).

Cases considered

Abuhmaid v Ukraine (App. No.31183/13), judgment of 12 January 2017

A.S. v Switzerland (2017) 65 E.H.R.R. 12

B.A.C. v Greece (App. No.11981/15), judgment of 13 October 2016

Blečić v Croatia (2006) 43 E.H.R.R. 48

Fernández Martínez v Spain (2015) 60 E.H.R.R. 3

Gross v Switzerland (2015) 60 E.H.R.R. 18

Harakchiev and Tolumov v Bulgaria (App. Nos 15018/11 and 61199/12), judgment of 8 July 2014

Jeunesse v the Netherlands (2015) 60 E.H.R.R. 17

Kafstailova v Latvia (App. No.59643/00), judgment of 7 December 2007

Kurić and Others v Slovenia (2013) 56 E.H.R.R. 20

Ramadan v Malta (2017) 65 E.H.R.R. 32

Roche v the United Kingdom (2006) 42 E.H.R.R. 30

Shevanova v Latvia (striking out) (App. No.58822/00), judgment of 7 December 2007

Sisojeva v Latvia (2007) 45 E.H.R.R. 33

Udovičić v Croatia (App. No.27310/09), judgment of 24 April 2014
Üner v the Netherlands (2007) 45 E.H.R.R. 14

Commentary

The Hoti judgment represents a significant advancement in the protection afforded to the right to private and family life of stateless persons under art.8 of the Convention. The Court affirmed the broad nature of art.8 as encompassing the right to develop human relationships, aspects of social identity, including the social and community ties of migrants. The Court, for example, expressly noted that the applicant had not maintained familial or other links outside of Croatia and the long duration of his actual residency. The unique complexity of the circumstances facing the applicant in the wake of the dissolution of the SFRY however, was similarly cited throughout the judgment as one of the core reasons for the uncertainty surrounding the applicant's status and may thereby limit the potential of the Hoti case as a precedent for other stateless groups.

The language of the judgment was initially cautious and deferential, reaffirming the sovereign discretion of states under international law to decide upon matters of entrance, residence and expulsion of aliens from their territories. The judges took the opportunity to emphasise that the scope of the Convention does not extend to mandating the allocation of particular types of residence permit as this remains within the exclusive remit of the national authorities. The detailed intervention of the Office of the UN High Commissioner for Refugees (UNHCR) in the present case served to highlight its international significance. The UNHCR underlined the flaws in the citizenship policies of SFRY successor states, arguing that a great number of people had been left stateless and that there had been a disproportionate impact upon minority communities. The erasure of stateless persons unable to fulfil the criteria for temporary or permanent residence in Croatia from the register of domicile had the effect of preventing those persons from regularising their residency to secure legal status and thereby curtailed the enjoyment of a range of fundamental rights. The Court however, was careful to distinguish the present case from those involving erasure of individuals from the register of domicile on the basis that the applicant was in fact never officially resident in Croatia and thereby avoided examining deficiencies in the law and policy framework more broadly.

The Court can nevertheless be seen to have taken a strong stand in protection of the art.8 rights of stateless persons in Hoti, reminding states of the symbiosis between international law and the Convention rights as they relate to the protection of stateless individuals.

Right of access to Supreme Courts

Lower courts—procedural errors—excessive formalism—bearer of procedural errors' consequences—access to court—art.6(1)

☞ Croatia; Formalism; Proportionality; Right of access to court

Zubac v Croatia (Application No.40160/12)

European Court of Human Rights (Grand Chamber): Judgment of 5 April 2018

Facts

The applicant, Ms Vesna Zubac, is a Bosnia and Herzegovina national residing in Bijela (the Republic of Montenegro). The event at the root of this case is a contract the applicant's father-in-law entered in 1992 for the exchange of his house in Dubrovnik (Croatia) for one in Trebinje (Bosnia and Herzegovina). After he died in 2002, his son, MZ (who was also the applicant's husband) took legal action before the Dubrovnik Municipal Court to cancel the contract on the basis that the latter had been signed under constraint in a war context and was disproportionate.

From 2002 to February 2005, MZ was represented by M.C., a Montenegrin lawyer. When he first filed the action, MZ indicated the value of the subject matter of the dispute at 10,000 Croatian kunas (HRK). At a hearing in April 2005, the new Croatian lawyer who had taken over the case, modified the value of the subject matter of the dispute from HRK 10,000 to HRK 105,000. The defendants opposed this modification arguing its sole objective was to enable the claimant, MZ, to lodge an appeal on points of law. At the hearing, the Municipal Court did not take any decision on this specific matter and reserved its decision concerning the request for an injunction preventing any disposal of the property in dispute which had been asked by MZ.

In September 2005, the Municipal Court dismissed the claim and ordered MZ to pay defendants' litigation costs and expenses on the basis of the increased value of the subject matter of the dispute. In October 2009, MZ's appeal was rejected by the Dubrovnik County Court. MZ then lodged an appeal on points of law with the Supreme Court of Croatia. His wife (the applicant) took over the case when he died a few months later in October 2010.

On 30 March 2011 the Supreme Court found the appeal on points of law inadmissible since the value of the subject matter of the dispute was below the statutory threshold of HRK 100,000. Indeed, according to the Court, the value of the subject matter could not be modified later than at the preparatory hearing or at the first session of the main hearing. The applicant finally lodged a complaint before the Constitutional Court which found the latter inadmissible on the basis that the case raised no constitutional issues.

The applicant complained before the European Court of Human Rights that her right of access to Court under art.6(1) had been breached by Croatia.

Held

- (1) There had been no violation of art.6(1) (unanimous).

Concerning the restriction on the applicant's access to the Supreme Court, the Court noted that the applicant had lodged an "ordinary" appeal on points of law which the Supreme Court found inadmissible on the basis that the value of the claim did not reach the threshold of HRK 100,000. It relied on s.40(3) of the Civil Procedure Act to consider that the value of the subject matter of the dispute had been changed too late. Moreover, the applicant did not amend her civil action which was required by law for the value to be modified. Finally, the applicant could have lodged an "extraordinary" appeal on points of law (which does not require the HRK 100,000 threshold) but did not use this option.

Concerning the question of whether the restriction pursued a legitimate aim, the Court considered that the threshold pursued the legitimate aim of restraining access to the Supreme Court only to matters of the requisite significance.

Finally, the Court had to analyse whether there was a reasonable relationship of proportionality between that aim and the means employed to attain it. The Court drew special attention to three criteria. The first criterion, the foreseeability of the restriction, was met since the Supreme Court's case-law has been consistent concerning the need to modify the value of the subject matter of the dispute before the litigation stage. Moreover, the Civil

Procedure Act is clear concerning the need to adopt a separate decision in order to modify this value—which her Croatian lawyer should have been aware of. Secondly, the question of who should bear the adverse consequences of the errors made during the proceedings was analysed by the Court. It considered that the procedural mistakes were mainly and objectively imputable to the applicant. Indeed, the fact that the Municipal Court had not ruled on the applicant's proposal to change the value of the subject matter of the dispute and had ordered the applicant to pay defendants' litigation costs and expenses on the basis of the increased value, was an error. However, these errors could have been avoided if the applicant had been more diligent in the first place. Thirdly, the question of whether there was an excessive formalism restricting the applicant's access to the Supreme Court was considered by the Court. It found that the Supreme Court should not be bound by the errors of the lower courts. To the contrary, the rule of law is a fundamental principle in a democratic society and the Supreme Court is there to ensure legal certainty and proper administration of justice. It should therefore not turn a blind eye to procedural errors.

Cases Considered

Andrejeva v Latvia [GC] (2010) 51 E.H.R.R. 28

Bąkowska v Poland (App. No.33539/02), judgment of 12 January 2010

Běleš and Others v the Czech Republic (App. No.47273/99), judgment of 12 November 2002

Brualla Gómez de la Torre v Spain (App. No.26737/95), judgment of 19 December 1997

Examiliotis v Greece (no. 2) (App. No.28340/02), judgment of 4 May 2006

Garzičić v Montenegro (App. No.17931/07), judgment of 21 September 2010

Laskowska v Poland (App. No.77765/01), judgment of 13 March 2007

Mohr v Luxembourg (dec.) (App. No.29236/95), judgment of 20 April 1999

Prince Hans-Adam II of Liechtenstein v Germany [GC] (Application No.42527/98), judgment of 12 July 2001

Stanev v Bulgaria [GC] (2012) 55 E.H.R.R. 22

Commentary

In the present case, the Court reiterated that the right of access to court applies to Courts of Appeal or of Cassation in a way which depends on the special features of the proceedings at stake and that the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal. Furthermore, the Court considers that since Supreme Courts should only deal with cases of a certain importance, the establishment of a financial threshold is legitimate and reasonable. However, in the application of this threshold which represents a restriction on access to the superior courts, the Court considers that three criteria should be met. First, the restriction must be foreseeable. The Court has given particular importance to whether the procedure to access higher courts was foreseeable as well as whether the judicial practice was coherent and consistent. Secondly, the Court considers that the applicant should not bear an excessive burden in respect to the procedural errors which occurred and prevented the access. If there have been errors on both sides (the applicant and the judicial authorities), the Court will analyse whether the applicant has acted diligently and to whom the errors are mainly or objectively attributable. However, it should be noted that Supreme Courts are responsible to assess whether the threshold has been met and cannot be bound by errors made by lower courts. Finally, the third criterion to be met concerns the fact that restrictions should not involve excessive formalism. The Court considers that there has been a use of excessive formalism when the procedural rules do not serve the aims of legal certainty and the proper administration of justice and only prevent the applicant from accessing the higher courts.

Removal of children from their mother

Domestic violence—child abduction—foster care—forced removal—best interest of the child—right to family life—art.8

Adoption; Best interests; Children's welfare; Norway; Parental responsibility; Parental rights; Right to respect for private and family life

Mohamed Hasan v Norway (Application No.27496/15)

European Court of Human Rights (Fifth Section): Judgment of 26 April 2018

Facts

The applicant, Ms Ivan Mohamed Hasan, an Iraqi national born in 1979, moved to Norway in 2006 after marrying C, who is an Iraqi-born and had lived in Norway since 1999. Their first daughter, A, was born in February 2008 and their second daughter, B, in June 2010.

A heated argument took place on 7 April 2009 and a few days later, the applicant said C had hit her and attempted strangulation with an electrical cord. The mother and daughter were taken to a crisis centre and the next day the applicant was treated for pain and bleeding in hospital. She requested protection for her fear of C's family finding and killing her and consented to A being placed in an emergency foster home. She withdrew the consent when discharged from hospital the following day and after welfare authorities expressed concerns for the child's safety should they move back in with C, the applicant stated she did not wish to move back into his home. However, a few days later they moved back in with C and the applicant refused to give evidence against him. Due to C's previous violent behaviour, welfare authorities asked the applicant to consider moving back into the crisis centre or risk forced removal of her daughter and so the applicant complied with the request. While at the centre, she had contact with C and after allowing him to enter the premises, the centre no longer wished to host her. A was placed in emergency foster care again due to uncertainties surrounding the ability of the mother to protect her child against the father's violence. In October 2009, the applicant was admitted into hospital due to a suspected ectopic pregnancy. The hospital staff felt so threatened by C's aggressive behaviour that they notified the child welfare authorities and he was described as "out of control" when visited by them.

Five months after the couple's second daughter was born, both children were placed in emergency foster care in November 2010. During a contact meeting in June 2011 with their biological mother, the children were abducted by two masked figures, who also caused injury to the applicant. The biological father was later identified as the perpetrator responsible for orchestrating the abduction. Based on the historical incidents, the authorities issued an emergency order to placing the daughters in emergency foster care at a secret address and the children could not be returned to the applicant unless she had ceased all contact with her husband and settled in her own flat. The parents appealed and this was granted in part so they were allowed supervised contact with the children but the emergency foster placement was upheld. Returning them to the applicant would place them at risk and the children had now formed such a stable attachment to their foster parents that it would be harmful to remove them when they were considered so vulnerable as a result of the trauma they experienced with their biological parents.

The applicant complained that the decisions to remove her parental responsibility for A and B and to authorise their adoption had entailed a breach of her right to respect for her family life as provided for in art.8

Held

- (1) The application is declared admissible (unanimous). The Government did not contest that the domestic decisions are interpreted as an interference with the applicant's right to respect for her family life. The Court, however, considered necessary to examine whether this interference was "necessary in a democratic society" to ensure A and B's "rights and freedoms" and secure their "health and morals" and whether this protection of the children's best interests should be regarded as more significant than the adult's right to private family life.
- (2) There had been no violation of art.8 (unanimous). The purpose of art.8 is to protect individuals and prevent arbitrary actions to be committed by public authorities. The notion of necessity however, as explored in the case-law considered, encompasses reaction to a specific social need which needs to be addressed. Nevertheless, a fair balance must be struck between competing interests of the parties involved with fair evaluations and assessments conducted—so in this case the child's best interests trumps the parents right to a private family life because they placed their children at risk. The Court emphasised that what is at the best interests of the child involved must be considered of utmost importance over any other interests, thus overriding the parents' wishes if needs be, and there is broad consensus surrounding this including within international law. The decision to remove parental responsibility was justified because it considered the best interests of the children. Domestic authorities were motivated by their commitment to protecting A and B and ensuring they were adopted and brought up in a safe environment by well-suited carers who the children had now formed attachments to. A and B had lost their attachments to their biological parents and thus removal from adoptive parents would have harmful implications for the children. Due to this best interest-centric view of the more defenceless party in the case, there had been no violation of the applicant's rights

Cases considered

- Aune v Norway* (2012) 54 E.H.R.R. 32
Gnahoré v France (2002) 34 E.H.R.R. 38
Görgülü v Germany (App. No. 74969/01), judgment of 26 February 2004
Johansen v Norway (1997) 23 E.H.R.R. 33
Jovanovic v Sweden (App. No. 10592/12), judgment of 22 October 2015
K. and T. v Finland (2001) 31 E.H.R.R. 18
Neulinger and Shuruk v Switzerland (2012) 54 E.H.R.R. 31
P., C. and S. v United Kingdom (2002) 35 E.H.R.R. 31
Paradiso and Campanelli (2017) 65 E.H.R.R. 2
R. and H. v United Kingdom (2012) 54 E.H.R.R. 2
Wagner and J.M.W.L. v Luxembourg (App. No. 76240/01), judgment of 28 June 2007
Y.C. v United Kingdom (2012) 55 E.H.R.R. 33

Commentary

The unfortunate set of facts and the decision of the Court that there had been no violation of the mother's right to family life demonstrate the challenges in balancing parents' rights and children's best interests. A removal order can irreversibly separate families, having a tremendous effect on parents and their children and therefore both the national courts and the Court agreed that this could be used only as a last resort. In

this case, all other avenues and attempts to protect the children were exhausted before a foster care order was imposed. As the Norwegian Child Welfare Act of 17 July 1992 explains, measures such as foster care should not be maintained against the will of the parents unless the children are at risk of harm, physically or psychologically. Furthermore, although contact with biological parents is usually an entitlement, again, if for the sake of the child's safety, it would be better to have no contact or knowledge of whereabouts, then this shall be the case.

What was even more challenging in this case regarding the removal order is that nobody questioned the ability of the applicant to raise her kids. The facts show that she had been granted a divorce by the time the child welfare authorities were discussing the foster order; she had passed a Norwegian language course; she had established a small social network in her town; and she was attending employability support sessions in order to improve her career prospects. However, her ability to provide suitable care for her children was overshadowed by C's threat and her inability to stop any contact with him. The physical threat he posed to the children and the traumatic experiences they had experienced because of their abduction were too high risks for the domestic authorities and the Court to allow any contact between the parents and the children, although the mother was not a threat to her children herself.

Despite the challenging facts, the unanimous decision of the Court shows that although it was rather unfortunate to have the children removed from their mother, the best interests of the child dictate that the Court has a duty to ensure a child's development in a sound environment, and a parent cannot be entitled under art.8 to have such measures taken as would harm the child's health and development.

Mistaken entitlement to unemployment benefits

Unemployment benefits—unjust enrichment—mistake of the state—legitimate expectation to acquire property—excessive individual burden—right to property—art.1 Protocol No.1

☞ Croatia; Overpayments; Peaceful enjoyment of possessions; Public interest; Recovery of benefits; Unemployment benefits

Cakarevic v Croatia (Application No.48921/13)

European Court of Human Rights (First Section): Judgment of 26 April 2018

Facts

After becoming unemployed, the applicant was awarded unemployment benefits for a duration of 468 days starting from 11 December 1995 by the Rijeka Employment Bureau. In June 1997, she applied for an extension of the duration of unemployment benefits due to her ongoing inability to work. Her entitlement to unemployment benefits was renewed until further notice.

However, in two decisions of March 2001 and April 2001, the Rijeka Employment Bureau terminated the applicant's entitlement to unemployment benefits and ordered her to repay the amount of HRK 19,451.69 (EUR 2,600) on the ground that she had continued to receive the payments beyond the statutory time-limit. The applicant appealed seeking to annul the decisions. In September 2004, the Administrative Court held that the decision regarding the right of the applicant to unemployment benefits was ill-founded. Yet, it reversed the second decision in respect of the repayment of the due sum and instructed the parties to start civil proceedings before a competent municipal court in order to seek relief. The applicant's appeal to quash the 27 March 2001 decision was dismissed by the Rijeka Employment Bureau, and subsequently

by the High Administrative Court in July 2012. Finally, the Constitutional Court declared the applicant's complaint inadmissible.

Following the applicant's rejection of an out-of-court settlement, the Rijeka Employment Bureau brought a civil action against her for unjust enrichment. She submitted medical documentation which proved that she suffered from poor health, and that she lived in a difficult economic situation due to her inability to work. The Rijeka Municipal Court decided that the applicant could not be held responsible for the Bureau's own mistake. In 25 February 2009, the Rijeka County Court overturned the Municipal Court's decision and ordered the applicant to pay the due sum plus statutory interest on the ground that the legal basis for the unemployment benefit had ceased to exist on 10 June 1998. The Supreme Court subsequently declared the applicant's appeal on two points of law inadmissible and the Constitutional Court also dismissed her constitutional complaints. Enforcement proceedings were instituted in 2013 and were still ongoing at the time of the European Court of Human Rights (the Court) released its judgment on the applicant's complaints regarding an alleged violation of art.1 of Protocol No.1 and art.8 of the Convention.

Held

- (1) The complaint was found admissible (unanimous).
- (2) There had been a violation of art.1 of Protocol No.1 to the Convention (unanimous).
The Court had to determine whether art.1 of Protocol No.1 applied *rationae materiae* and whether, in the specific circumstances of the case, the applicant had a "legitimate expectation", within the autonomous meaning of the Convention, of retaining the funds received as unemployment benefits without her entitlement to those benefits being called into question retrospectively. In this case, the applicant had received the contested payments from 10 June 1998 to 27 March 2001 on the basis of an administrative decision entitling her to unemployment benefits. The social security authorities were solely responsible in determining whether the applicant fulfilled the statutory conditions to receive such payments and in extending the applicant's entitlement to those benefits. They continued to make the payments albeit, under statutory law, she was only entitled to unemployment benefits for a time-limit of twelve months. The applicant had not contributed in anyway whatsoever to the authorities making an error and her good faith in receiving the unemployment benefits was not contested. In addition, there was no express mention of the expiry of the entitlement to the benefits on a certain date within the administrative decision, and it took three years for the authorities to react to the undue payment. Therefore, the applicant was legitimately led to believe that she was entitled to these payments in order to cover for her living costs and basic subsistence needs.
On the merits, the Court established that there had been an interference with the applicant's right to the peaceful enjoyment of her possessions under art.1 of Protocol No.1 and whether a fair balance was struck between the pursued legitimate aim of the public general interest and the applicant's right under art.1 of Protocol No.1. While it was noted that states possess a wide margin of appreciation in terms of implementing social and economic policies, such a margin narrows when the competent authorities have committed a mistake which can only be attributed to them. The Court has held that states should be given the possibility to correct their mistakes in the context of the discontinuation of unemployment benefits, so as to avoid unjust enrichment. Yet, mistakes that are solely attributable to the authorities should not be remedied at the expense of the individual concerned. The applicant was found to have acted in good faith. Her belief that she was entitled to unemployment benefits was legitimately based on the Rijeka Employment Bureau decision, which did not expressly mention the statutory time-limit of twelve months. Furthermore, the Court found that the authorities had

failed in their duty to act in good time and in an appropriate and consistent manner. Subsequently, the state failed to take responsibility for its own mistake and placed the whole burden on the applicant. The possibility of payment in sixty instalments offered by the Rijeka Employment Bureau to the applicant still represented a significant sum of money which would put at risk her subsistence, especially since the unemployment benefits were her only source of income. The national courts, in deciding on unjust enrichment, failed to take into account the health and financial situation of the applicant.

- (3) The Court found it unnecessary to examine art.8 separately from the first complaint, since the arguments advanced by the parties were the same.
- (4) The judges rejected the applicant's claim in respect of pecuniary damage. However, the Croatian Government was ordered to pay EUR 2,600 to the applicant in terms of non-pecuniary damage, as well as EUR 2,130 for the costs and expenses incurred before the domestic courts and the Court.

Cases considered

- Anheuser-Busch Inc. v Portugal* [GC] (2007) 45 E.H.R.R. 36
Bélané Nagy v Hungary [GC] (App. No.53080/13), judgment 13 December 2016
Beyeler v Italy [GC] (2003) 36 E.H.R.R. 5
Broniowski v Portugal [GC] (2006) 43 E.H.R.R. 1
Chassaganou and Others v France [GC] (1999) 29 E.H.R.R. 615
Chroust v the Czech Republic (App. No.4295/03), judgment 20 November 2006
Depalle v France [GC] (2012) 54 E.H.R.R. 17
Freitag v Germany (App. No.71440/01), judgment 19 July 2007
Gashi v Croatia (App. No.32457/05), judgment of 9 October 2008
Hutten-Czapska v Poland [GC] (2007) 45 E.H.R.R. 4
Iatridis v Greece [GC] (2000) 30 E.H.R.R. 97
Konstantin Stefanov v Bulgaria (App. No.35399/05), judgment 27 October 2015
Kopecky v Slovakia [GC] (2005) 41 E.H.R.R. 43
Krstic v Serbia (App. No.45394/06), judgment 10 December 2013
Moskal v Poland (2010) 50 E.H.R.R. 22
Perdigao v Portugal [GC] (App. No.24768/06), judgment 16 November 2010
Pine Valley Developments Ltd v Ireland (1992) 14 E.H.R.R. 319
Platakou v Greece (App. No.38460/97), judgment 11 January 2001
Radchikov v Russia (App. No.65582/01), judgment 24 May 2007
Simecki v Croatia (App. No.15253/10), judgment 30 April 2014
Stretch v the United Kingdom (2004) 38 E.H.R.R. 12
Tunnel Report Limited v France (App. No.27940/07), judgment 18 November 2010
Zammit and Attard Cassar v Malta (2017) 65 E.H.R.R. 17
Zolotas v Greece (No.2) (App. No.66610/09), judgment 29 January 2013

Commentary

The Court was unanimous in its findings and essentially reaffirmed its previous case-law on the right to property and unemployment benefits. One notable aspect of this case is that, on the one hand, the Court confirms the existence of a wide margin of appreciation of Contracting States in respect of social and economic policies. Yet, such a margin narrows considerably when the action of the State would place an excessive burden on the individual. The whole case was about finding a fair balance between the general

interest of the public and the interests of the individual whose right to property has been interfered with. In *Moskal v Poland*, the Court had ruled on the importance for the state to be able to correct its own mistakes when the latter would result in unjust enrichment. This is essential to ensure that principles of social justice are respected. However, in distinguishing the present case from *Moskal*, the Court placed emphasis on the interests of the individual who has benefited from unjust enrichment. Indeed, the circumstances of the case were rather extreme, since the unemployment benefits were the applicant's sole source of income and only allowed her to meet her subsistence needs. Moreover, she did not own a bank account or any significant property and was unable to work because of health reasons. This shows that the Court would carefully consider several factors, such as the margin of appreciation states enjoy, the errors committed by states, and the financial situation of an individual in receipt of benefits, and that the Court would limit the margin of appreciation states enjoy if the survival of an individual is at stake.

Challenging adoption proceedings

Guardian—family relationship—adoption proceedings—right to respect for private and family procedural requirements—art.8

Adoption; Children's guardians; Nationality; Right to respect for private and family life; Russia; Ukraine

Lazoriva v Ukraine (Application No.6878/14)

European Court of Human Rights (Fourth Section): Judgment of 17 April 2018

Facts

The case concerned an attempt by the applicant to become the legal tutor, a guardian for children under fourteen, for her sister's (KTO) second child (KOS). The applicant had become the guardian of her sister's first child, who also was staying with her in 2007 after the Mayor of Magadan had recognised that the child's parents did not take care of her. In 2007, KTO gave birth to KOS in Chernivtsi, with KOS's nationality disputed. In 2008, the Shevchenkivskyy District Court in Chernivtsi ordered KOS be placed into an orphanage and, though this was overturned in a 2010 order by the same court, KOS was taken into care numerous times between 2010 and 2012. During this period, the applicant visited her nephew. On 5 July 2012 the Shevchenkivskyy Court deprived KTO of her parental rights in respect of KOS, holding that she had not cared for him and had not played a part in his upbringing.

Having become aware of her nephew's situation in July 2012 the applicant contacted the Childcare Service of Chernivtsi numerous times throughout the year expressing a desire to become the child's legal tutor. Nevertheless, when the applicant travelled to Chernivtsi in October 2012, the applicant was unable to initiate proceedings as KOS had been adopted. SSV and SOV, a married couple who had met with KOS in the orphanage in August, adopted him after the Executive Committee of Chernivtsi accepted that adoption was their preferred form of placement. During the adoption hearing, it was considered that the requested adoption was in the interests of the child in being raised in "stable life conditions and in [an atmosphere of] harmony".

On 1 February 2013 the applicant lodged an appeal with the Chernivtsi Court of Appeal arguing that they had failed to take into account the fact that KOS had close relatives; they had not checked KOS's nationality; KOS was a Russian national; they had not followed necessary procedures for the adoption of foreign nationals; and they had disregarded her requests to be the child's legal tutor. In April 2013, the

Court of Appeal refused to examine the applicant's appeal as it did not concern her right or interest in becoming the child's legal tutor and contained no matter which could be the subject of a separate claim. The applicant appealed this decision, claiming that the Court of Appeal had not examined her arguments, but the appeal was also rejected on 10 July 2013 by the Higher Specialised Court for Civil and Criminal Matters as it had failed to demonstrate that the Court of Appeal's decision had been unlawful. This resulted in the applicant bringing the case before the European Court of Human Rights (the Court) claiming a violation of her rights under arts 8 and 6(1) of the Convention.

Held

- (1) The case was declared admissible by the Court as it was not manifestly ill-founded within the meaning of art.35(3)(a) nor inadmissible on any other grounds.
 - (2) There had been a violation of art.8 (unanimous).
- In determining the general principles involved within the case, the Court noted that the existence of "family life" with regards to art.8 was "essentially a question of fact depending upon the real existence in practice of close personal ties". It was also recognised that close relationships that fell short of "family life" would generally fall under the scope of "private life" within art.8. The Court then articulated the "essential object" of art.8, with the Court stating that it is "to protect the individual against arbitrary action by the public authorities." In acknowledging the object of the provision, the Court went on to accept that art.8 has both positive and negative obligations attached but these obligations do not have a precise definition. In applying these principles, "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole". In striking such a balance the Court also noted that, with regards to both their positive and negative obligations, states do enjoy a certain margin of appreciation. Finally, the Court stated that, while art.8 contains no explicit procedural requirements, an applicant must be involved in relevant decision-making processes to a degree sufficient to provide him or her with the requisite protection of his interests.

In applying these principles to the applicant's case, the Court saw that there were three legal questions to be answered: (i) whether the case concerns a right or interest protected by art.8, and, in particular, whether it concerns the applicant's "family life" or "private life"; (ii) whether there was an interference with the applicant's right to respect for "family life" or "private life"; and (iii) whether the Ukrainian authorities' and Courts' alleged failure to give due consideration to the applicant's intention to become her nephew's legal tutor and/or their failure to involve her in the adoption decision-making process constitute a violation of art.8. With regards to the first question, the fact that KOS had never lived with the applicant and that she had only visited once in the five years before the adoption led the Court to find the applicant had failed to establish a family relationship. Nevertheless, the Court did accept that the applicant seeking to maintain and develop her relationship with her nephew would be covered by "private life" under art.8, with this the result of "private life" being considered broader and encompassing the "right to establish and develop relationships with other human beings". Considering the applicant's relation to KOS, the Court found that the case did engage the applicant's "private life". The Court then sought to determine whether the state's interference with the applicant's art.8 rights was in compliance with the requirements of the provision. The Court found that, although acknowledging the applicant's intention, the state had failed to consider the proposition meaningfully. Equally, they had failed to clarify why adoption had served the best interests of KOS and, even though "she had acted diligently in line with the advice she had been given by the Childcare Service", had failed to take into

- consideration the applicant's arguments concerning time constraints. As a result, the interference with the applicant's private life was not in compliance with the procedural requirements implicit in art.8 of the Convention.
- (3) The applicant's complaint under art.6(1) was declared admissible, due to its relation to the art.8 claim. However, the Court considered it not necessary to examine separately as a result of the finding of a violation of art.8 (unanimous).
 - (4) The finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant (unanimous).

Cases considered

- A, B and C v Ireland* [GC] (2011) 53 E.H.R.R. 13
A.H. v Russia (App. Nos 6033/13 and 15 others), judgment of 17 January 2017
Anayo v Germany (App. No.20578/07), judgment of 21 December 2010
E.B. v France [GC] (App. No.43546/02), judgment of 22 January 2008
Elsholz v Germany [GC] (2002) 34 E.H.R.R. 58
Fernández Martínez v Spain [GC] (2015) 60 E.H.R.R. 3
Harroudj v France (App. No.43631/09), judgment of 4 October 2012
I. and U. v Norway (App. No.75531/01), judgment of 21 October 2004
K. and T. v Finland [GC] (2003) 36 E.H.R.R. 18
N.Ts. v Georgia (App. No.71776/12), judgment of 2 February 2016
Vujica v Croatia (App. No.56163/12), judgment of 8 October 2015
Zampieri v Italie (dec.) (App. No.58194/00), judgment of 3 June 2004
Znamenskaya v Russia (App. No.77785/01), judgment of 2 June 2005

Commentary

There are two areas of interest visible throughout the judgment which should be considered. First, although it was a prominent point of contestation, by both the applicant and within a supporting submission by the Russian Federation, the Court did not engage in any considered discussion revolving around KOS's nationality. The dispute concerning KOS's nationality was put forward by the applicant and supported by a submission by the Russian Federation, claiming that, as his mother was Russian, the adoption of KOS was in contravention of their obligations under the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters. The Convention provides the rules for legal cooperation between member states' courts in civil, family and criminal matters and is in force between the following countries: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Turkmenistan, Tajikistan, Ukraine, Uzbekistan. Nevertheless, other than a discussion in the concurring judgment of Judge Yudkivska who argued that since the child had been born in Ukraine, he "automatically became a Ukrainian national" under Ukrainian law and thus there was no question concerning his nationality, the majority did not assess the nationality issue when determining the violation of art.8. Considering the contentious nature of this part of the complaint, the failure of the majority of the Court to discuss its status and implications in detail is surprising.

The decision that the finding of a violation was itself just satisfaction is also interesting. In the judgment, the Court recognised that the applicant had her right to a "private life" interfered with by the state as the adoption had the effect of "breaking the link between the applicant and her nephew" and defeated her attempt to become his legal tutor. This was accompanied by the subsequent finding that the state had violated her rights under art.8 through the procedural deficiencies of the adoption procedure. Consequently, the Court asserted that the finding of the violation was in and of itself sufficient just satisfaction for the

non-pecuniary damage sustained by the applicant. However, this decision seemingly paid no attention to their previous recognition that the applicant's art.8 rights had been interfered with in the case. In this regard the concurring judgments of Judges De Gaetano and Yudkivska are particularly illuminating. In both of their opinions, the Judges stated that the decision to have KOS adopted by S.S.V and S.O.V as opposed to having the applicant become his legal tutor was both "right" and "in the best interests of the child". Although not discussed within the main judgment, it seems that the Court considered that the decision to adopt KOS was indeed the best decision considering the facts of the case. Despite the acceptance by the Court that the right to private life might be restricted by adoption proceedings, this is not enough for the Court to interfere with established adoption proceedings that seem to be in favour of a child's best interests.

Parliamentary protection from court proceedings

Parliamentarians—civil proceedings—timed-barred proceedings—lengthy proceedings—right of access to courts—art.6—lack of an effective remedy—art.13

☞ Greece; Immunities; Limitations; Members of Parliament; Right of access to court; Right to effective remedy

Dimitras v Greece (Application No.11946/11)

European Court of Human Rights (First Section): Judgment of 19 April 2018

Facts

The applicant, Mr Panayotis Dimitras, lodged a criminal complaint on 1 June 2007 with the Athens First Instance Court. He submitted that ET, in her capacity as General Secretary for Gender Equality of the Greek Ministry of Interior, Public Administration and Decentralisation, made false statements in the press on 4 March 2007 which amounted to slander against Dimitras in his role as Executive Director of the non-governmental organisation "Greek Helsinki Monitor."

The applicant's original complaint against ET was dismissed by the court on 10 January 2008, but an appeal led to the indictment of ET on 6 February 2008, with a hearing date set for 25 June 2008. On 17 June 2008 ET unsuccessfully appealed the indictment, leading to a new hearing date of 18 September 2008. In this hearing ET raised an objection concerning lack of competence of the trial court, leading to the court declaring itself not to have competence, referring the case to the Athens Court of Appeal on 6 April 2009. A new hearing date was set for 13 May 2009 but was postponed to 5 October 2009 citing a material witness's absence as the reason. Because the courts had not been sitting at this time due to parliamentary elections, the hearing was again deferred to 17 February 2010. In this hearing, ET submitted a certificate showing that she had been elected to the Greek Parliament on 4 October 2009 and applied to have the proceedings suspended in accordance with art.62 of the Constitution. The Athens Court of Appeal suspended criminal proceedings until ET was granted leave from Parliament. Following notification on 16 July 2012 from the Greek Parliament to the Ministry of Justice that ET had ceased to be a member of parliament as of 11 April 2012, the Court of Appeal published a judgment on 26 October 2012 in which the offence of which ET had been accused had become time-barred because more than forty-two months had passed since the alleged commission, thus ending the criminal prosecution on 21 March 2013.

Dimitras complained to the European Court of Human Rights (the Court) that the Greek Parliament's refusal to waive ET's parliamentary immunity, resulting in the allegedly committed offence becoming

time-barred, was a breach of art.6(1), which provides for the right to access to a court. Further, the Court was to determine if the length of proceedings before the domestic courts had violated the “reasonable time” requirement, also provided by art.6(1), as well as if lack of effective remedy had violated both arts 6(1) and 13.

Held

- (1) The complaint related to the foreseeability of the legislation on statutory limitation was declared inadmissible and the rest of the application admissible (unanimous).
- (2) There had been no violation of art.6(1) related to the applicant’s right of access to a court (unanimous).
The Court, observing that the applicant complained that access to a court had been impeded owing mainly to the Parliament’s refusal to lift ET’s immunity and the offence becoming time-barred, and accepting that the offence became time-barred on 4 September 2010, considers that any subsequent events, which includes the refusal to lift parliamentary immunity, had no bearing on the complaint. The court reiterated that the right of access to a court is not absolute but subject to limitations, providing the state a certain margin of appreciation despite the Court having final assessment. In this case, the “essence” of the right was not violated. In relation to similar cases in which the state failed to provide access to the courts, the Court found that it was due to negligence or circumstances attributable to the state, which in the present case was not identifiable. The Court notes that the delay in proceedings until 4 September 2010 was mostly the result of appeals, or unforeseen events, noting that the courts had conducted urgent preliminary enquiries and marked case files as urgent, taking all available steps to prevent the case becoming time-barred. Further, the Court attaches importance to the accessibility and effectiveness of other judicial remedies available to the applicants, notably civil courts, and considers that the applicant did have such remedies and therefore there had been no violation of the right of access to a court.
- (3) There had been a violation of art.6(1) related to the length of the proceedings (unanimous). With respect to the length of proceedings, the Court found the period to be taken into consideration started on 1 June 2007, when the applicant lodged the criminal complaint, and ended on 26 October 2012, when the Court of Appeal considered that the alleged offences had become time-barred. The total period of consideration lasted a total of five years and almost five months for one instance. Noting no excessive delays prior to 4 September 2010, the Court notes more than two years had passed from the date the offence became time-barred to the attendant Court of Appeal judgment and that the government did not provide any reason why the domestic courts waited for ET’s status as a parliamentarian had ended to hold a hearing to rule that the offence had been time-barred. Therefore, the overall length of the proceedings was held to be excessive, failing to meet the “reasonable time requirement and amounting to a violation of art.6(1).
- (4) There had been a violation of art.13 (unanimous).
In relation to the applicant’s complaint under art.13 guaranteeing effective remedy before a national authority for an alleged breach of art.6(1) to hear the case in a reasonable amount of time, the court observed that the Greek legal system did not offer the applicant at the material time effective remedy for addressing the length of proceedings. The Court notes that there was nowhere for the applicant to remedy his right to a hearing in a reasonable amount of time as guaranteed by art.6(1).
- (5) The respondent State was ordered to pay the applicant:
 - a) €3,000 in non-pecuniary damage

- b) €600 in respect of costs and expenses
(6) The Court dismissed the remainder of the applicant's claim for just satisfaction.

Cases Considered

- Al-Dulimi and Montana Management Inc v Switzerland* [GC] (App. No.5809/08), judgment of 26 November 2013
Anagnostopoulos v Greece (App. No.54589/00), judgment of 3 April 2003
Baka v Hungary [GC] (2015) 60 E.H.R.R. 12
Frydlender v France [GC] (2001) 31 E.H.R.R. 52
Kart v Turkey (App. No.8917/05), judgment of 3 December 2009
Korkolis v Greece (App. No.63300/09), judgment of 15 January 2015
Lupeni Greek Catholic Parish v Romania [GC] (App. No.76943/11), judgment of 29 November 2016
Papachelas v Greece (2000) 30 E.H.R.R. 923
Rokas v Greece (App. No.55081/09), judgment of 22 September 2015
Syngelidis v Greece (App. No.24895/07), judgment of 11 February 2010
Isalkitzis v Greece (App. No.72624/10), judgment of 19 October 2017

Commentary

The facts of the case and the judgment reiterated the systematic failures of the Greek judicial system to process and hear cases in line with the "reasonable time" requirement of art.6. The Court relied on its previous case-law built by complaints brought against Greece because of lengthy proceedings. The case is of interest, however, because of the role Parliament played in barring the proceedings. The applicant sought to show that the government had knowingly and deliberately, through acts of omission in perhaps a coordinated manner, proceeded without urgency in order to allow the statute of limitations on the alleged offence expire. He argued that since the act had been committed previous to ET's election to Parliament, the authorities should not have suspended proceedings. In this case, it was found that the offence became time-barred before the refusal of Parliament to lift ET's immunity, effectively simplifying the task of the Court to establish if any undue barriers to access to the courts were apparent, finding that there were none. It is, however, of interest that the Greek Constitution has been misused in numerous occasions to protect Parliamentarians from court proceedings even in cases that the wrongful acts had been committed before individuals were elected to Parliament, and the technicalities of the case led to a missed opportunity for the Court to closely review the issue.

Book Reviews

Detention of Terrorism Suspects: Political Discourse and Fragmented Practices,
by Maureen Duffy, (Hart Publishers, 2018), 320 pages, hardback, £70, ISBN:
978-1-84946-8640.

The week following the events of 13 November 2015, then-President Hollande addressed a full plenary session of the National Assembly to present the methods and protocols to be undertaken under the state of emergency. The death toll was announced at 130, the largest on French territory since the end of the Algerian war. This is what Hollande, hardly popular, came to declare before the representatives of the nation: France was now at war.

Counter-terrorism has pounded the drums of war for as long as we can remember it: my generation and the one that came before has faced a vocabulary that has much to do with annihilation, control and power than it does about policing, enforcement and domestic illusion of peacetime. In a new opus by Professor Maureen Duffy, the political veil under which much of the mechanisms supporting the literary conscription is exposed for all of its noisy and dangerous purpose: to turn fear, the weapon and consequence of terrorism, into the weapon and consequence of governance. An extended part drawing parallels with Kafka's kaleidoscope provides an apt allegory for our times.

We lawyers and scholars have long sought escape from the political miasma that has plagued our work, in all areas of conflict. It tried to set itself apart from political vocabulary, be unaffected by electoral cycles, and maintain a lexicon of its own. There is, however, no discipline as politicised as human rights, and no domain more entrenched in myth as terrorism. Giving as much as a cursory glance at Professor Duffy's table of contents is the equivalent of an intellectual whiplash: there is no event we have been spared, but none that has not been a watershed element in the failure to provide an accurate, clear and universally recognised definition of terrorism. Professor Duffy covers policy, law, and especially popular expectations reflected in media coverage that politicians feel the need to answer. The source material ranges far and wide, from published white papers to the now accepted twitter feed of the current US president. The second chapter, on the aforementioned fragmented practices, exposes our shortcomings. As such, we leave ideological and political violence to be qualified by leadership or by the press, both of which holding a vested interest in a specific event being labelled as such (or not). Professor Duffy details this overwhelming influence through examples that characterised the state of constant exemptions following 9/11. Reviewing executive orders and detention practices in the first few years of the "war on terror" 17 years later is an edifying moment. Without being repetitive, Professor Duffy questions our own vocabulary, positions and press coverage with a humbling and at times sardonic gift of hindsight.

What strikes the reader in Professor Duffy's book is the impossibility to derive any form of legal certainty in the ever-evolving landscape that matches political currents. This is, by any means, not new at all, but provides a context for the failures or successes of counter-terrorism policies and the consequent terror litigation. The political discourse hardly relies on vetted threat assessments, legal expertise or intelligence analysis that could allow both prosecutors and the general public to rely on its effectiveness and improve its sense of general safety. Such is the power of the word "terrorism": the more we accept there are threats we cannot counter—a reality of counter-terrorism—the more fear spreads and contaminates political governance in a way that leads to permanent emergencies. The situation in France or the US gives only glaring and evident examples, but no country seems immune to the need to harness state power to gain momentum.

The rule of law is the second victim. Human rights are, at best, discarded, at worst, vilified. Our profession is described as lax, passive and yielding, three qualifiers that at no point reflect the reality of

legal transparency and accountability. In this seemingly endless race to control the narrative around terrorism, legal defenders appear absent or out of breath. The clean-cut, clinical chapter-by-chapter breakdown of our current discourse by Professor Duffy is a breathless spiral into what can be described as permanent emergency. The enemy is never defined, the threat is rarely assessed, the response increases in seriousness, checks and balances are progressively dissolved. Duffy's opus contains two outstanding characteristics: that of being an illustration of the whirlwind in which we are embroiled, and one of detached mesmerisation as to the powers violence can unleash in societies that proved, ultimately, not to be so stable. A chapter on false premises and the otherisation of terror suspects follows a chronological order that displays the quick unravelling of legal norms after 9/11. It is worth mentioning, at this point, that Professor Duffy does not approach the event in an academic or detached manner. She painstakingly recalls her own day, explaining how the date itself became a concept, stuck in time, a watershed moment for everyone at that time. We are all tempted to believe that we are not impacted by the emotional toll of body counts on terrorism. It would be a mistake. It is worth reflecting on this: it is possible to commit to human rights and attached values while understanding that terrorism itself is a violation of human rights.

Where are the lawyers then? Where are we in this constant instrumentalisation of human rights law and the objective, reasonable nature of our duty in the face of the subjective and emotional component of mass, indiscriminate attacks? We appear in litigation over the CIA rendition, detention and interrogation (RDI) programme, or before local courts challenging the state of emergency in France, Donald Trump's travel ban, but we appear mostly overwhelmed. The definition of a crime has escaped us. It seems, throughout the book, it could well have never been within our remit to define this specific crime. The degree of exemption that it seeks has excommunicated the law from the political discourse. From the struggle to grant habeas (Part II, Chapter 4) to executive "otherisation" of suspects and detainees (Part II, Chapter 5), we seem bound to lose.

As such, no matter how committed lawyers and scholars can be to learning from excruciating violations of human rights, it is the use of the press and the campaigns that will allow whether there will be a "French Guantanamo" or a coalition to "eradicate ISIS", that will not press for transparency on the use of lethal force and argue for legitimacy before legality at international organs. We are scattered around the globe and, frankly, stretched thin: for if there is not a definition of terrorism, there could hardly be limits to counter-terrorism and terror prevention, an idea already put forward by Professor Fiona de Londras (Fiona de Londras, "Evaluation and Effectiveness of Counter-Terrorism", invited lecture, Universitair Centrum Sint-Ignatius Antwerpen, 23 October 2015). The domination of "terror" over political discourse is absolute yet erratic.

Many lessons are to be drawn from the whiplash caused by reviewing 16 years of politically manipulative crimes: that the rule of law can provide the stability it needs, while still being beholden to an executive that circumvents; that human rights have only begun the battle to win the hearts and minds of the population it protects; that our institutions are lacking the political will to share the burden of terrorism definition and application. In 2018, the threat is different, new, evolves as we have failed to, obsesses over technology the way we do. It is impossible not to wonder if the largest impact ever made, besides the bodies of victims, does not simply lie with the anthology of political ignorance Professor Duffy has compiled. Her book provides a valuable, if depressing insight. It should be essential reading for politicians, practitioners and academics. We know the story—we have lived through it, experienced it, and commented on it. We have participated in the last 17 years; we have different degrees of influence and of input. It proves necessary and healthy to take time to assess what has been done and what is coming, what our strengths are and where our flaws lie. Professor Duffy issued more of an anthology for the older generation, an analysis for the new one. We may be at a crossroads, and it is time we identify what must be changed, starting with unifying and harmonising those fragmented practices to consolidate human rights protections.

Sarah Kay

Opinion

States of Denial: What the Search for a UK Bill of Rights Tells Us about Human Rights Protection Today

Conor Gearty*

Bill of Rights; Brexit; Human rights; Political parties

Abstract

The drive by the Conservative Party to dismantle human rights protection in the UK has found a new focus recently in the country's planned withdrawal from the EU, and (it is said therefore to follow) the removal of the Union's Charter of Fundamental Rights from domestic law. This is not to say that the Party's old enemy the Human Rights Act has been embraced. This Opinion piece assesses the continuing push for a UK bill of rights, a project that is likely, after Brexit, to return to centre stage. The author sees in the plan an indirect move towards the restriction of rights within Britain and in particular the withdrawal of rights protection from unpopular groups. For this reason he argues that the initiative should be resisted, however attractive the notion of a British bill of rights might seem to some to be.

I. Double-edged law

My late colleague at LSE, Stan Cohen, spent much of the last two decades of his life reflecting on how societies can successfully mask from themselves the harm they are doing, “knowing about atrocities and suffering” while at the same time achieving “states of denial” about the impact they have—this being the riveting title of his most important work on the topic.¹ With Christine Chinkin and Fred Halliday, Stan founded the centre for the study of human rights at LSE, of which for seven years I had the honour to be director. Preparing for my interview for the post by swotting up in the usual way on those whom I had to impress, I was struck by how Stan’s idea of denial fitted well with the thought I had had then of human rights as “a visibility project”, as a means through which the unseen can make themselves seen, the ignored impose themselves on unwilling eyes with the assertion that they too are just as human as their reluctant watchers. (The agency is important here, making clear the holders of human rights are not mere vehicles for another’s display of compassion and/or charity.)

Of course, Stan Cohen saw law as a potentially important mechanism of denial:

“Powerful forms of interpretive denial come from the language of legality itself. Countries with democratic credentials sensitive to their international image now offer legalistic defences, drawn from the accredited human rights discourses. This results in the intricate textual commentaries that circulate between governments and their critics or within legal-diplomatic loops and UN committees.

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¹ S. Cohen, *States of Denial. Knowing About Atrocities and Denial* (Cambridge: Polity, 2001).

Does the second clause of article 16(b), para 6 apply to all the state parties? Do the minimum standards of prison conditions apply to detention during interrogation? Interesting questions indeed.”²

We are familiar with such techniques of evasion within domestic legal discourses as well as in the international sphere that Cohen identifies in this extract: “We care deeply about human rights; it’s just that there was no breach here—and we have looked at it so very carefully with all our lawyers helping.” As Cohen put it, “Many such legalistic moves are wonderfully plausible as long as common sense is suspended”.³ Then a key paragraph for this short essay:

“The type of legalism that appears to recognise the legitimacy of human rights concerns is more difficult to counter than crude literal denials. The organisation [Amnesty; Liberty; the NGO involved] has to show that behind the intricate legal façade lies another reality … Interpretive denials are not fully-fledged lies; they create an opaque moat between rhetoric and reality.”⁴

I believe that the push for a bill of rights for Britain is a move in the direction of this opaque moat, part of the construction of a new rhetoric of rights to mask our increased—and increasingly accepted—rights-abusing inclinations. With law comes legitimacy. Echoing Cohen, to be outwith the protection afforded by any such bill is to be *plausibly* without rights whatever *common sense* might suggest.

As presently envisaged and in today’s political climate, a British bill of rights is certain to diminish rights protection in significant ways. The effect of making changes through enactment of substantial legislation of this sort will be both to reflect and deepen further a disturbing shift that is already underway in what we conceive of as human rights, or (now to put all the cards on the table) more accurately who we think should be entitled to them—away from rights rooted in humanity and towards entitlement dependent on national belonging. The hint is in the title, a *British* bill of rights to replace a Human Rights Act. Our “real” or as Cohen might put it “common sense” idea of the inevitable universality of the idea of human rights entails is already under threat. With a British bill of rights of the sort that is presently being discussed it risks becoming a minority view, first eccentric and marginal, then eventually old-fashioned and quaint, and eventually forgotten. Common sense will have changed.

Law can do this: progressives are used to applauding its power as a force for social improvement. These days we must beware of its potential in the other direction, its capacity in reflecting a political move towards reaction and regression to drive that process faster and deeper, to pull intolerance and racism further from the side-lines and place them centre stage.

II. Changing rights-talk

These are large and aggressive claims about the direction in which a British bill of rights will take us, and they need now to be justified. No bill of rights carries automatically these implications, casts these dark shadows around itself. In fact no bill of rights necessarily does anything in itself at all, speaks in any specific way about this or that. There is no essentialist core to what a “bill of rights” is, one that is separable from the circumstances of its enactment and its enforcement. As Lord Steyn once famously reminded us, “In law, context is everything”.⁵ That context has changed around what a bill of rights in the UK is imagined to be, gone through various iterations in the past, and it is in relation to where we are now that the critical remarks here need and can be defended.

So how did we get to the point that it is claimed we have reached today? We already, of course, have a bill of rights, part of the settlement of 1688–89 and celebrated even by Mrs Thatcher who in the summer of 1988 led Parliament in a motion to “beg leave to express to Your Majesty our great pleasure in celebrating

² Cohen, *States of Denial. Knowing About Atrocities and Denial* (2001), p.107.

³ Cohen, *States of Denial. Knowing About Atrocities and Denial* (2001), p.108.

⁴ Cohen, *States of Denial. Knowing About Atrocities and Denial* (2001), p.108.

⁵ *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 1 A.C. 532 at [28] per Lord Steyn.

the tercentenary of these historic events of 1688 and 1689 that established those constitutional freedoms under the law which Your Majesty's Parliament and people have continued to enjoy for three hundred years".⁶ This was the time when a bill of rights connoted an intervention to secure legislative sovereignty against over-weening executive power. (Perhaps we need something similar today, as the courts battle on behalf of the legislature to resist executive demands on Brexit?) Nine years before Mrs Thatcher made these remarks, “[h]idden within Margaret Thatcher's 1979 election manifesto” had been a promise of all-party discussions on a bill of rights but once in power “this commitment [had been] air brushed away”.⁸ In those late 1970s, the idea had been a reaction to the collectivism of the Labour administrations of Harold Wilson and James Callaghan, when the idea of a bill of rights was conceived by Tory strategists as a way of impeding the socialist progress made possible by the “elective dictatorship”⁹ facilitated by the UK's constitution which so infuriated Tories at the time—until they got to exercise it themselves.

It was probably for the same reason that Labour's National Executive Committee refused to allow Labour's first proposal to incorporate the European Convention on Human Rights, in 1976, to be adopted as Party policy.¹⁰ Things changed for Labour during the long period of Tory rule under first Mrs Thatcher herself and then John Major, such that by the mid-1990s the Labour leadership (first John Smith and then of course Tony Blair) felt not only compelled but were also content to embrace the proposal for a new bill of rights as an early item on any new Labour administration's agenda.¹¹ This new bill of rights was in practice always going to take the shape of the European Convention on Human Rights because, first, this obviated the need for any drafting quarrels (exposing, no doubt, residual Labour concerns about impeding the socialist dream) and, secondly, it was what leading judges were in favour of, thus draining the proposal of any (electorally dangerous) potential radicalism.¹² Just as when Labour had agreed the right of individual petition to the Strasbourg Court in 1966, here was a Party of the Left using rights law to declare itself less scary to power than its public commitments might otherwise have suggested and than its opponents might have asserted.

Why did the Human Rights Act not close down the debate about a bill of rights for Britain? Of course there were and are those for whom it is and always will be a limited document, covering not very much at all, a half loaf in need of urgent expansion. But it is not these radical human rights aggrandisers who have been making the critical running: the Human Rights Act has hardly been thrown out of kilter by dissatisfied human rights absolutists. As with so much else in our politics, the running has been made by the Right. So what have these more conservative opponents of human rights been exercised about? Of course some have been concerned about the record of the Strasbourg Court, the problem of “rights inflation”, the tendentious application of the principle of consensus, and much else of a similarly technical nature: Sir Noel Malcolm's excellent critical monograph, *Human Rights and Political Wrongs*, published by Policy Exchange in 2017, falls into this category.¹³ Malcolm's new bill of rights would deal only with “real, essential rights”¹⁴ and there are proposals in the political arena that, it is true, take a similarly academic

⁶ House of Commons Debates, 7 July 1988, col.1233: <https://www.margaretthatcher.org/document/107286> [Accessed 2 October 2018].

⁷ *R. (Millar) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁸ F. Klug, “A Bill of Rights: What For?”, in C. Bryant MP (ed.), *Towards a New Constitutional Settlement* (London: The Smith Institute, 2007), Ch.5. The text is accessible at http://www.lse.ac.uk/humanRights/aboutUs/articlesAndTranscripts/FK_SmithInstitute_07.pdf [Accessed 2 October 2018] with the quote in the text at p.2 [Accessed 25 July 2018]. The same author's *A Magna Carta for Humanity: Homing in on Human Rights* (London: Routledge, 2015) contains an excellent account of the whole debate on a bill of rights.

⁹ The phrase was that of Lord Hailsham, used as the title of his Dimbleby lecture broadcast on BBC television on 14 October 1976: <https://www.bbc.co.uk/programmes/p00fr9gh/broadcasts> [Accessed 2 October 2018].

¹⁰ A Charter of Human Rights, 1976. Klug fn.8, above, para.11. See the debate on Lord Wade's bill in the House of Lords: House of Lords Debates, 25 March 1976 vol.369 cols 775–817: <https://api.parliament.uk/historic-hansard/lords/1976/mar/25/bill-of-rights-bill-hl> [Accessed 2 October 2018]. The fear of liberal interference with socialist policy took shape as a critique of the potential but inevitable involvement of the judiciary in the interpretation of such a bill.

¹¹ *Bringing Rights Home* (Labour Party, 1996).

¹² For example, T. Bingham, “The ECHR: Time to Incorporate” (1993) 109 L.Q.R. 390.

¹³ N. Malcolm, *Human Rights and Political Wrongs. A New Approach to Human Rights Law* (London: Policy Exchange, 2017), available at: <https://policyexchange.org.uk/wp-content/uploads/2017/12/Human-Rights-and-Political-Wrongs.pdf> [Accessed 2 October 2018].

¹⁴ Malcolm, *Human Rights and Political Wrongs. A New Approach to Human Rights Law* (2017), p.140.

approach to the subject. But it is not what fires the public debate, this sort of scholastic engagement with a *recherché* legal specialism. Nor is it any move that is proposed in the exactly opposite direction, towards a dramatically embellished document. Efforts to come up with a set of new and better rights are fairly derisory from those driving this process: after all none of them is remotely interested in the commitment to social justice that lies behind the Left's flirtation with a bill of rights. Bits and pieces of the old common law are added here and there in their occasional drafts but in the main it is more of the same sort of thing, civil liberties, due process and so on. No, what makes this subject political box office is not what the rights cover nor any supposed defects in their drafting or interpretation but—as earlier intimated—whom these rights reach.

III. The reach of rights

The shape of today's bill of rights initiative has as its main design the limiting of the rights in any such document to only a portion of those within the country to whom at present, under the Human Rights Act, these rights are available. The issue is with reach not content, the universality of the rights contained in the Act rather than with their substance. Now, the portion of those in the UK who will still be able to avail of these rights under any such new regime may well be large but it will remain a portion nonetheless. Basic rights will be for some—but not others. That is the point of this bill of rights debate, at least so far as those with the power to deliver it are concerned. Other, more innocent proponents of a wider, better bill may have right on their side but they have no power to deliver what they want and so all that their destructive critique of the status quo does is play into the hands of those who do.

To understand how we can possibly commit to a bill of rights which is partial in its application while still believing that we remain committed to human rights, as protagonists all still largely say and think they do (at least for now), another of Stan Cohen's mechanisms of denial floats to the surface, the timeless one between the “deserving” and “undeserving” or as Cohen put it, “some victims [of rights violations] are seen as more deserving than others” so “[c]ombining equity with social justice means that deserving victims should be helped more than underserving victims”.¹⁵ Cohen has in mind individual situations but the point applies just as well to the larger, legislative canvass. Once protagonists of our new bill of rights have persuaded us of this distinction, turning the partisan arguments of the highly political into legislative truth will not be that difficult: some of us “deserve” our human rights while others of us do not.

So who is it that the Human Rights Act protects that the proponents of a brand new UK bill of rights would seek, *sub silentio* on the whole, to exclude? Naturally of course it is foreigners, or to give them the names by which they were initially camouflaged, suspected terrorists and asylum seekers. But it is also bad people, in particular prisoners. The early running was made by the prime minister responsible for the Human Rights Act itself, Tony Blair, inveighing about “barmy” court rulings such as the at-that-time recent one which had protected from deportation Afghans who had secured entry to the UK via a plane hijack. Reacting to this and other decisions, Blair called on his Home Secretary John Reid to seek to achieve a better balance between liberty and security so far as human rights law was concerned and also to develop proposals to tighten the law on probation after one notorious case where a released prisoner had murdered a 40-year-old woman, with probation staff having “been so ‘distracted’ by the prisoner’s human-rights claims that they lost sight of their duty to protect the public”¹⁶.

Indeed, around this time, combining two categories of the undeserving in one, a Home Secretary had lost his job over a supposed failure adequately to manage the deportation of foreign prisoners.¹⁷ With hindsight we can see here the beginnings of the populist turn that has so transformed our political culture

¹⁵ Cohen, *States of Denial. Knowing About Atrocities and Denial* (2001), p.71.

¹⁶ “Revealed: Blair Attack on Human Rights Law”, *Observer* (14 May 2006): <https://www.theguardian.com/politics/2006/may/14/humanrights.ukcrime> [Accessed 2 October 2018].

¹⁷ “Clarke is fired in Cabinet Purge”, *BBC News* (5 May 2006): http://news.bbc.co.uk/1/hi/uk_politics/4975938.stm [Accessed 2 October 2018].

in recent years. But in the mid-2000s it was largely seen-off at least so far as successive Labour governments were concerned. The plan to rewrite human rights law was dropped and the House of Lords' decision declaring the overt discrimination against foreigners in the post-11 September terrorism laws to be a breach of human rights was dutifully implemented.¹⁸ When in 2006 the new Conservative leader of the opposition renewed his Party's opposition to the Human Rights Act, naturally under cover of the proposal for a new and better bill of rights,¹⁹ Labour attempted a vague emulation of the policy but the Party's heart was not in it.²⁰

That Tory initiative of 2006 was an early indication of what was to come.²¹ Today's story begins in 2010. The then Conservative leader David Cameron had a visceral dislike of the European Convention on Human Rights in general and the European Court of Human Rights in particular, derived we can only assume from his time as a special adviser to Michael Howard in the Home Office, during which period cases like *Chahal*²² and *McCann*²³ had created fury on the newly emerging populist Right. Time and time again during this period speeches and Party documents moved from technical critique of the Human Rights Act to boasts about how their proposals would deprive bad people—mainly foreigners—of rights protection.²⁴ Conservative intentions with regard to human rights were of course initially hampered when they entered government by their ongoing dependence for power on their coalition partners, the Liberal Democrats. They finally shook off the Liberal Democrats in 2015 and so were able if they so wished to forge ahead with the realisation of their plans for a new bill of rights.

To make it even easier they had to hand by then a draft drawn up by one of their own strong supporters, Martin Howe QC, one of the many voices to contribute to the report of the Commission on a bill of rights that had been set up during the Conservative/Liberal coalition.²⁵ That Commission agreed on very little, with the majority subscribing to the most bland and vague set of assurances about the need to have the Convention rights at the “core” of any new bill of rights²⁶ and for such a document to be “written in language which reflected the distinctive history and heritage of the countries within the United Kingdom”.²⁷ Martin Howe's contribution was altogether more incisive.

Article 26 of his draft Bill, headed “Application of the Bill of Rights as regards persons” was as follows:

- “1. The rights and freedoms in this Bill of Rights shall be enjoyed by individuals who are citizens of the United Kingdom.
- 2. Citizens of other Member States of the European Union shall be entitled to those rights to the extent provided for by or under the Treaty on European Union or the Treaty on the Functioning of the European Union.

¹⁸ “Reid humbled by U-Turn on Human Rights”, *Telegraph* (21 July 2006): <https://www.telegraph.co.uk/news/1524451/Reid-humbled-by-U-turn-on-human-rights.html> [Accessed 2 October 2018].

¹⁹ Mr Cameron's Conference speech included the following on human rights: “I believe that yes, the British people need a clear definition of their rights in this complex world. But I also believe we need a legal framework for those rights that does not hamper the fight against terrorism. That is why we will abolish the Human Rights Act and put a new British bill of rights in its place.” The full text of the speech is at <https://www.theguardian.com/politics/2006/oct/04/conservatives2006.conservatives> [Accessed 2 October 2018].

²⁰ “Brown: We Need a Bill of Rights as well as Human Rights Act”, *Guardian* (25 October 2007): <https://www.theguardian.com/politics/2007/oct/25/humanrights.constitution> [Accessed 2 October 2018]. See generally, L. Maer, “Background to Proposals for a British Bill of Rights and Duties Standard Note: SN/PC/04559”, Parliament and Constitution Centre Alexander Horne, Home Affairs Section: researchbriefings.files.parliament.uk/documents/SN04559/SN04559.pdf [Accessed 2 October 2018].

²¹ For a wide-ranging review focusing on Tory attitudes to the Strasbourg Court, see H. Fenwick and R. Masterman, “The Conservative Project to ‘Break the Link Between British Courts and Strasbourg’: Rhetoric or Reality?” (2018) 80(6) M.L.R. 1111. See also the earlier S. Greer and R. Slove, “The Conservatives’ Proposals for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?” [2015] E.H.R.L.R. 272. Not all Conservatives share the Party’s mainstream hostility: D. Grieve, “Is the European Convention Working?” [2015] E.H.R.L.R. 584; and more generally, D Grieve, “Can a Bill of Rights Do Better than the Human Rights Act?” [2016] 2 P.L. 223 [The Harry Street Lecture, 2015].

²² *Chahal v United Kingdom* (1996) 23 E.H.R.R. 413.

²³ *McCann v United Kingdom* (1996) 21 E.H.R.R. 97.

²⁴ C.A. Gearty, *On Fantasy Island. Britain, Europe, and Human Rights* (Oxford: Oxford University Press, 2016), Ch.1.

²⁵ See Commission on a Bill of Rights. *The Choice Before Us* (December, 2012): <http://webarchive.nationalarchives.gov.uk/20130206065653/https://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf> [Accessed 2 October 2018]

²⁶ Commission on a Bill of Rights. *The Choice Before Us* (2012), para.12.11.

²⁷ Commission on a Bill of Rights. *The Choice Before Us* (2012), Overview para.86.

3. Non-citizens shall be entitled to the rights and freedoms in the Bill of Rights save for those set out in Articles ; and nothing in this Bill of Rights shall prevent restrictions being placed on the political activities of non-citizens.”

Howe’s view was that that while “the core and central rights in the Bill should be enjoyed by citizens and non-citizens alike ... it may be desirable carefully to consider whether some of the rights which are more civic in nature ought to extend to non-citizens”.²⁸ The Commission dissentents Helena Kennedy and Phillippe Sands regarded his approach as “deeply retrograde and inconsistent with a fundamental principle, namely that rights should be secured for all persons within the United Kingdom without discrimination”.²⁹ But if the plan for a bill of rights gets properly off the ground, it will be bound to develop ideas such as these since that will (in the absence of trail-blazing additions to rights) be the whole point of the exercise. Howe is not to be faulted for his honesty or the clarity of his vision of the future extent of rights-protection.

IV. Looking to the future

If this view of what will happen is thought alarmist, let us consider the political context in which any such proposal for a UK bill of rights would be likely to gain traction. The initial hostility to the Human Rights Act may have been rooted in a dislike of certain kinds of foreigners and bad people—asylum seekers and terrorists, prisoners as well—but it quickly got dragged into the Conservative Party’s civil war on Europe. The notorious *Hirst* decision in 2005³⁰ was the route in for fresh critique of the European Court of Human Rights at a time when Eurosceptics like David Davis—a key player in making *Hirst* centre stage—could not have imagined themselves taking on their true enemy—Brussels—and so were content to settle for smaller Strasbourg fry. How times change. That war in the Tory party has of course now been conclusively won by the UKIP faction and as they ham-fistedly and chaotically “take back control” they find themselves, for now, with no energy to continue hostilities with what was after all always for them only a proxy enemy. The *Hirst* line of cases is being implemented and ministers have put the bill of rights on the back-burner.³¹

But when the dust settles on Brexit what then? The decline in Britain’s status and prosperity will already have become evident even to the most fervent little Englanders. The UKIP faction will remain in control of the Conservative Party. An election will have to be fought and won, the carcass of British sovereignty still judged worth fighting for by those who have done so much to destroy its living essence. The search will be on for the scapegoats necessary to blind the electorate to the reality of the country’s impotence. The EU will remain the default enemy even after Brexit. So too might well the millions of Irish who remain in Brexit Britain, blamed for Irish intransigence in not obeying its former master on the European question, and the foreigners—as essential as ever to keeping England’s show on the road—will have resolutely refused to leave. The bill of rights proposal will return, its protagonists now more open than ever about their desire to limit it to citizens. The Council of Europe will be the new European institution that it will be essential to leave, so as to enable a “taking back control” of our liberties and rights. And while the European Court of Human Rights could live with a lot of changes in the name of subsidiarity it will not be able to tolerate the explicit removal of rights from non-citizens. We have seen exactly this play out in the summer furore over the Home Secretary Sajid Javid’s enthusiasm for facilitating the trial and possible execution of two men who have recently been deprived of their UK citizenship.³² The usual

²⁸ Commission on a Bill of Rights. *The Choice Before Us* (2012), p.214.

²⁹ Commission on a Bill of Rights. *The Choice Before Us* (2012), p.228.

³⁰ *Hirst v United Kingdom* (No.2) (2005) 42 E.H.R.R. 849.

³¹ The details are at Ministry of Justice, *Responding to Human Rights Judgments. Report to the Joint Committee on Human Rights on the Government’s Response to Human Rights Judgments 2016–17* (Cm 9535, December 2017), pp.27–28.

³² “Sajid Javid tells US: We Won’t Block Death Penalty for ISIS ‘Beatles’” *Telegraph* (23 July 2018): [https://www.telegraph.co.uk/news/2018/07/22/uk-drops-death-penalty-guantanamo-opposition-opens-door-execution/\[pay wall\]](https://www.telegraph.co.uk/news/2018/07/22/uk-drops-death-penalty-guantanamo-opposition-opens-door-execution/[pay wall]) [Accessed 2 October 2018]. At the time of writing the Government

Brexiteer activists led the charge via the usual papers with Strasbourg and the Human Rights Act being their main targets. And, reflecting the theme of this article, the complaint was not about human rights protection per se but about its unwarranted extension to these nasty (truly non-British) people.³³ It may be that an EU withdrawal agreement will insist on the continued oversight of UK law by the Strasbourg Court but this will not save the Human Rights Act of course and will also certainly not stop obsessive Brexiteers arguing that such commitments should, post-Brexit, be ignored.

The proponents of a new bill of rights for Britain do not necessarily know what they are advocating: as we have seen with Brexit, ambition combined with stupidity leads to an intentional neglect of detail, which can then be devastating when camouflaged by a mode of expression and confidence of demeanour that misleads gullible listeners with its appearance of intelligence. The UK Labour Party provides little cause for hope: Labour's chances of winning any post-Brexit election under an aging and possibly pro-Brexit leader trying only to repeat his great success of 2017 in not losing too badly are surely not as high as they ought to be. There is scope for optimism, however, in the vigour of Scotland's engagement with human rights, in what is likely to be a rebellion against the DUP in Northern Ireland when the nature of the Brexit settlement comes more clearly into view, and even (though this would run against the grain of generations of judicial conservatism) in the willingness of the courts to engage in the fabrication of some kind of tradition of common law rights.³⁴

The direction of travel towards a meaner and nastier Britain with its chauvinist Bill of Right has to be resisted—the Human Rights Act with its respect for parliamentary sovereignty and equality of esteem must be our last stand, against (to borrow a term from the Government's description of post-Brexit Britain) an Armageddon³⁵ in which a new kind of apartheid is created, with a rights-abiding society on one side of the line and the chaos of state-supported oppression (of the supposedly "undeserving") on the other. If Stan Cohen were somehow sentient in some sort of afterlife he would be turning around with fascinated horror at the extent to which his sociological insights are being vindicated.

appears to be backtracking on its promise of cooperation with the US authorities in the cases under consideration: <https://www.independent.co.uk/news/uk/politics/isis-jihadis-beatles-death-penalty-home-office-suspend-sajid-javid-a8465641.html> [Accessed 2 October 2018].

³³ N. Timothy, "Britain Cannot Serve Justice to Returning Jihadists Until We Tear Up Our Human Rights Laws", *Telegraph* (26 July 2018): <https://www.telegraph.co.uk/news/2018/07/26/britain-cannot-serve-justice-returning-jihadists-tear-human/> [pay wall] [Accessed 2 October 2018].

³⁴ *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262. See J.E.K. Murkens, "Judicious Review: The Constitutional Practice of the UK Supreme Court" (2018) 77(2) C.L.J. 349; M. Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 C.L.P. 85.

³⁵ "Revealed: Plans for Doomsday Brexit", *Sunday Times*, 3 June 2018: <https://www.thetimes.co.uk/article/revealed-plans-for-doomsday-no-deal-brexit-02mld2jg2> [pay wall] [Accessed 2 October 2018].

Point of View

UK Referendum Practice and Regulation Needs Urgent Reform

Alan Renwick

Jess Sargeant *

Politics and law; Referendums; Transparency

The use of referendums in the UK, as in many other countries, has increased dramatically over the past few decades. Since the UK's first non-local poll in 1973, there have been a total of 13 referendums, including three UK-wide votes. The two most recent referendums—2014 Scottish independence referendum and 2016 referendum on Brexit—have dominated the politics of the past five years. Yet there has been little thought as to how referendums fit into the UK's wider democratic system, with parliamentary sovereignty at its heart. Legislation was introduced in 2000 to regulate the conduct of referendums, but it is limited in scope and is now 20 years old. Given deep changes in the nature of political communications and democratic expectations, it is badly out of date. Reform is urgently needed.

For these reasons, the Constitution Unit at University College London established an Independent Commission on Referendums last year. Comprising 12 distinguished individuals drawn from all sides of recent referendum debates, the Commission worked for nine months and delivered its report this summer.¹ It makes almost 70 recommendations to improve the use and conduct of referendums, which stem from three core points:

- First, referendums have an important role to play within the democratic system, but how they interact with other parts of that system is crucial. They should be viewed as co-existing alongside, rather than replacing, representative institutions. They can be useful tools for promoting citizen participation in decision-making, but they are not the only, or necessarily the best, way of doing so.
- Second, referendums should be conducted in a way that is fair and effective. The rules should enable a level playing field between the competing alternatives. Those rules should also empower voters to find the information they want from sources they trust, so that voters feel confident in the decisions they reach.
- Third, the regulation of referendums must keep up with the changing nature of political campaigning, particularly campaigning through social media.

The role of referendums in the democratic system

Most democracies set out in their constitutions or in other higher law the circumstances in which referendums can or should be held and the mechanisms through which they can be triggered. Such

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¹ Independent Commission on Referendums, *Report of the Independent Commission on Referendums*, London, Constitution Unit, 2018, available at: <https://www.ucl.ac.uk/constitution-unit/research/electionsandreferendums/icreferendums> [Accessed 3 October 2018].

institutionalised rules determine the purposes for which referendums are used, what processes must surround a referendum and how referendums interact with representative institutions.

By contrast, the UK has very few such rules. Referendums are mandated ad hoc by primary legislation. Conventions have emerged for holding referendums on fundamental constitutional questions to do with devolution and the EU; in some cases, these conventions have even been codified in law. Nonetheless, the use of referendums has largely been driven by political pragmatism rather than constitutional principle.

That is not to say that referendums cannot play a valuable role in the UK. In the absence of a codified constitution, they can provide a mechanism for entrenching key constitutional features: decisions explicitly endorsed by the electorate are hard to reverse without further reference to the people. The 1997 referendums on Scottish and Welsh devolution and 1998 referendum on the Good Friday Agreement are good examples of this. But, in the absence of a stronger legal framework regarding their use, decision-making by referendum is far less protected than in many other democracies, and therefore additional caution is required.

The Commission considered whether politicians' discretion to call referendums should be regulated. In the absence of a codified constitution, however, it would be difficult to restrict the topics on which a referendum could be held, and the lack of consensus on the topics on which a referendum should be required, beyond those already set out in statute, would make mandatory referendums difficult too.

Rather than introducing new rules on when referendums can be held, the Commission therefore urges the development of new norms: we need a broad culture change in how referendums are conceived in our democracy. It has become commonplace over the last 25 years for politicians, political parties, and campaigners to promise or call for referendums on a whole variety of issues when doing so seemed likely to bring them benefits: defusing a disagreement, giving the appearance of taking an issue seriously, or drawing attention to an idea. But, as we now know, a referendum on a major issue is a big event: quite apart from the impact of the decision made through the referendum, which can be very large, the process of holding the referendum and its aftermath can be deeply polarising and strain the rest of the political system.

Political actors should think carefully before committing to hold a referendum and, if they do so, they should adhere to best practice. Above all, that means ensuring that any proposal for change is prepared and scrutinised in detail. Referendums work best when they come at the end of a thorough policy development process. The recent Irish Citizens' Assembly, which paved the way for that country's referendum on abortion, offers a promising model for the future. The Commission urges that a range of mechanisms for preparing for referendums should be explored in the UK. Sometimes, referendums made be replaced entirely with other, more deliberative, forms of citizen participation, combined with thorough parliamentary scrutiny.

The Commission also argues that, wherever possible, referendums should be post-legislative: they should be held on a precise proposal that has already passed through parliament. That is the rule in many democracies, such as Denmark and Ireland. This ensures that the proposals are specific and fully developed, and that they have the support of parliament. Pre-legislative referendums held on general principles risk that the proposals are unclear, making it difficult for voters to make a fully informed choice and difficult for parliament to know what exactly they have been asked to implement.

There may, however, be some circumstances in which holding a post-legislative referendum is not possible: for example, when a referendum is required to begin a process, such as the negotiation of Scottish independence. In such cases, a two-referendum process may be necessary. The government calling the referendum should provide as much clarity as possible for voters, producing a detailed White Paper on what it intends to happen in the event of a vote for change. The legislation enabling the referendum should set out the whole decision-making process. If the plan set out in the White Paper is delivered, the change

can go through. If not, a further referendum would be required. It would be for the parliament or assembly that passed the legislation to decide whether that further referendum is needed.

The regulation of referendum campaigns

Since the current legislation regulating referendums called by the UK parliament—the Political Parties, Elections and Referendums Act (PPERA)—was enacted in 2000, we have held five referendums under its terms, and the nature of campaigning has changed considerably. Learning lessons from past UK referendums and taking inspiration from international practice, the Commission has considered all aspects of the conduct of campaigns and makes recommendations on how this framework could be improved.

In the run-up to the EU referendum, the UK government's decision to spend £9.3 million on a leaflet advocating a vote to remain created significant controversy. PPERA bans governments from publishing anything relating to a referendum within 28 days of the poll. But this allows for unlimited spending in the early weeks of the campaign, potentially tilting the playing field. The Commission recommends that restrictions should be extended to the whole of the campaign period, but narrowed to apply only to campaigning activity so that the business of governing can go on.

The system of formally designating a lead campaigner on each side of the debate in referendums is unique to the UK. The Commission believes that it works well, but that the process of designation could be improved. First, it should take place earlier: at present, it could happen as late as four weeks before polling day, leaving campaigns with little time to prepare. Further, if there are two applications for one side and only one for the other, as happened prior to the EU referendum, the latter can be confident of designation and therefore gain an advantage in terms of planning. Second, as referendum campaigners receive public money, their leading figures should be subject to a “fit and proper person” test.

The UK has a more comprehensive framework of financial regulation of campaigns than most other democracies, even those that hold more referendums. But improvements could still be made. Data has become a valuable “alternative currency” for campaigners, so the Information Commissioner’s Office and the Electoral Commission should consider how they can best work together to accurately capture the true cost of campaigns. A challenge particular to the financial regulation of referendums is ensuring accountability when campaign groups are temporary. At present, large campaigns have six months to submit their spending returns. Reducing this to three months could allow faster action where necessary.

Since 2000 the nature of campaigning has changed dramatically and has increasingly moved online, this poses a number of challenges for referendum regulation.² Unlike in the broadcast media, there are no restrictions on the use of online paid political advertising. This is consistent with print media but there is a question as to whether such disparities remain justified—the Commission urges an inquiry into political advertising across all media. A further problem is that many of the rules to promote transparency are not fit for purpose in regulating online campaigning. For example, imprint rules requiring campaign materials to declare their source only apply to printed materials. Campaign spending categories make it almost impossible to tell what campaigners are spending on social media. The Commission recommends that these gaps in transparency be closed and that a repository of online political advertising should be created.

Implementing the Commission’s recommendations

Implementing the Commission’s recommendations will require changes of different kinds. First, the norms and expectations surrounding the use of referendums will need to shift. The Commission urges anyone proposing a referendum to think carefully about whether a referendum is the best mechanism for that

² See A. Renwick and J. Sargeant, ‘What new challenges does the changing nature of campaigning pose for referendum regulation?’ *The Constitution Unit Blog*, 9 January 2018, available at: <https://constitution-unit.com/2018/01/09/what-new-challenges-does-the-changing-nature-of-campaigning-pose-for-referendum-regulation/> [Accessed 2 October 2018].

decision, whether adequate preparation has taken place, and whether the proposals are sufficiently clear. Its report sets out a checklist of points that ought to be considered. Second, some recommendations will require changes in legislation. This should be done for referendums in general: at the UK level, PPERA should be amended; the Commission also urges the devolved administrations to consider introducing generic legislation on the conduct of referendums in their jurisdictions. Finally, the Commission identifies a number of areas that deserve further inquiry, and it hopes these will be taken forward.

Bulletin

The Court issued, inter alia, judgments and decisions in the following cases in June–July 2018:

Article 2

- *Fatih Çakir and Merve Nisa Çakir v Turkey*, finding a procedural failure into the investigation into the death of the applicants' relatives in a car crash, where the court failed to examine the extent to which issues of road safety played a role in the accident;
- *Toubache v France*, finding a disproportionate use of force where a gendarme opened fire on a fleeing car, killing a passenger in the back seat;
- *Semache v France*, finding that the police had been negligent in regards to providing medical treatment for a suspect subjected to a "double embrace" restraint technique that had led to his death;
- *Makarová v United Kingdom*, rejecting as inadmissible the complaints by the applicant, sister of a Czech man killed in London, about the investigation and trial in which the assailant who had pleaded self-defence was acquitted;
- *Mazepa v Russia*, finding that the investigation into the killing of journalist, Anna Politovskaya, had been inadequate in failing to pursue inquiries effectively into who had hired the contract killers;
- *Sarishvili-Bolkvadze v Georgia*, finding regulatory failings in that the applicant's relative had died of medical negligence in a hospital which did not have the necessary permits and attended by doctors who were not properly qualified, and in that there were defects in the proceedings for civil compensation.

Article 3, Article 5(1) and (3), Article 6(1) and (3) and Article 10

- *Mariya Alekhina v Russia*, finding in respect of the applicants, known as members of "Pussy Riot", that they had been mistreated due to the overcrowded conditions of their transfers to and from court and the way in which they had been exposed in court in a glass cage, with armed guards and a dog; that their continued pre-trial detention was based on inadequate, stereotyped reasoning; that they had been hampered at trial in exchanges with their defence lawyer due to the glass cage; and that there had been breach of freedom of expression in their conviction and prison sentence for their actions in a church and in the banning of their video recordings on the internet.

Articles 3 and 6

- *TK v Lithuania*, finding that removal of the applicant prisoner's spectacles and failure to return them over some months disclosed degrading treatment and that the inability of the applicant to challenge the reliability of child victims' pretrial testimony through suitable measures, such as ensuring the examination at trial of the children's mother, breached fair trial guarantees.

Article 4

- *SM v Croatia*, finding defects in the investigation into the applicant's allegations that she had been forced into prostitution.

Articles 5(1) and 18

- *Rashad Hasanov v Azerbaijan*, finding that the applicants, members of an NGO, were held on charges of making Molotov cocktails which were inconsistent, lacking clarity and unsupported by evidence, and therefore disclosing no reasonable suspicion of having committed an offence; this was also found to breach art.18 (limitation on restrictions on rights) as the applicants had been targeted as part of a crackdown on civil society.

Articles 5(1), 4 and 5

- *Fernandes Pedroso v Portugal*, finding that there had been no plausible suspicion on which to hold the applicant, a former member of parliament, on charges of involvement in a paedophile ring, that the applicant had not had adequate access to file materials to challenge his detention and that he had not enjoyed an effective right to compensation for these shortcomings.

Article 5(3)

- *Lakatos v Hungary*, finding that the applicant had been held for three years in pre-trial detention without good reason.

Article 5(5)

- *Vasilevskiy and Bogdanov v Russia*, finding a violation as the amount of compensation paid for time spent in wrongful imprisonment was far too low.

Article 6(1)

- *Allégre v France*, finding no lack of access to court or lack of legal certainty where the applicant was unable, due to variation in Court of Cassation case-law, to bring a private prosecution years after the criminal proceedings had been discontinued;
- *Bursa Barosu Baskanlığı v Turkey*, finding a breach due to lack of enforcement of decisions annulling permission for an American company to build a starch factory on farmland;
- *Tchkhonelidze v Georgia*, finding a breach where the applicant, a senior regional official tried for bribery, complained of police entrapment without response from the trial court;
- *Topal v Moldova*, finding a breach where a regional assembly annulled a law retrospectively with effect on the applicant's ongoing pension proceedings.

Article 6(1) and (3)(a), (b) and (d)

- *Pereira Cruz v Portugal*, finding a violation in that one applicant had not been able to have evidence examined at the appellate level, but no violations as regards the other complaints by applicants about the hearing of witnesses and amendments of facts in the charges against them in the context of a high-profile paedophile ring case.

Article 6(1) and (3)(b) and (c)

- *Dridi v Germany*, finding a breach in that public notification at the court building of the applicant's trial was not sufficient notification where the court knew his address overseas and due to refusal of an adjournment for the applicant's lawyer to prepare the defence.

Articles 6(1) and (3)(d)

- *Dimitrov and Momin v Bulgaria*, finding no breach where the applicants were convicted of rape after a trial in which the victim's statements were admitted as evidence without the accused having the opportunity to question her—the victim had died before the trial;
- *Kartvelishvili v Georgia*, finding a breach where the courts refused the request of the applicant prisoner, facing charges of possession of a knife, for his cell-mates to give evidence on his behalf.

Articles 6, 8, 13 and 14

- *Negrea v Romania*, finding breaches of arts 6 and 13 as regards the unreasonable length of proceedings for abuse of authority, and finding complaints of discrimination in the allocation of family allowances to Roma families were not made out.

Article 6 and Article 1 of Protocol No.1

- *Telbis and Viziteu v Romania*, finding no violations where the wife, daughter and niece of the convicted suspect in a bribery case were subject to confiscations and seizures of property.
- *O'Sullivan McCarthy Mussel Development Ltd v Ireland*, rejecting as inadmissible the applicant company's complaints about being barred from harvesting mussel seed in Castlemaine harbour by the Irish authorities, acting in response to EU environmental directives;
- *Ronald Vermeulen v Belgium*, finding that the applicant had been denied access to court in his dispute about the results of a civil service entrance examination.

Articles 6(2) and 7 and Article 1 of Protocol No.1

- *GIE.Srl v Italy* (Grand Chamber), finding in respect of confiscations of land due to unlawful site development, even though none of the applicant companies nor the individual applicant had been formally convicted, that there had been a breach of art. 7 for the applicant companies, that the property rights of all the applicants had been infringed and that there had been a breach of presumption of innocence for the individual applicant.

Article 8

- *Centrum för Rättvisa v Sweden*, finding that the legislative framework for bulk interception of communications by the authorities met the requirements of the Convention;
- *ML and WW v Germany*, finding no violation where the German courts refused the claims of the applicants, who had served a sentence for murder and been released, that media outlets should not continue to make available on their websites information about their convictions;
- *Alpeyeva and Dzhalagoniya v Russia*, finding a breach where the authorities had invalidated former Soviet Union passports, causing hardship to the two applicants who as a result had difficulties in accessing health care and employment;
- *Zezev v Russia and Gaspar v Russia*, finding violation where the applicants, foreign nationals, had been subject to expulsion on security grounds without adequate safeguards in the procedures;
- *Antkowiak v Poland*, rejecting as inadmissible complaints by the applicants, an adoptive couple, about the decision of the authorities to return a child to its biological parents after the biological mother changed her mind about the adoption;

- *Frölich v Germany*, finding no violation where the domestic courts refused the applications for contact and information rights lodged by the applicant who claimed to be the biological father of a child living with the mother and her husband.

Articles 8 and 13

- *Voynov v Russia*, finding breaches where the applicant prisoner was detained in a prison more than 4,000 kilometres from his home and family.

Article 10

- *Rungainis v Latvia*, finding no violation where the applicant, chairman of a bank, was fined in defamation for comments alleging misappropriation of funds by the former president of the bank;
- *Kula v Turkey*, finding a violation where a university academic was subject to a disciplinary docking of salary for taking part in a TV debate outside his home town without authorisation of the university;
- *Girleanu v Romania*, finding a violation where the applicant journalist was convicted and fined for sharing classified military information in seeking to verify it without, however, having published the information.

Article 11

- *Association of Academics v Iceland*, rejecting as manifestly ill-founded complaints by the applicant association, which represents trade unions including those in the health care field, against legislative restrictions on the right to strike and introduction of compulsory arbitration;
- *Bakir v Turkey and Imret v Turkey (No.2)*, finding that the conviction of the 13 applicants for membership of an illegal organisation or for spreading propaganda for such an organisation based on their participation in demonstrations undermined their freedom of assembly;
- *Zehra Foundation v Turkey*, finding no violation where the national courts dissolved a foundation on grounds that it aimed at establishing a state based on sharia law.

Article 14 in conjunction with Articles 6 and 8

- *Hulya Ebru Demirel v Turkey*, finding discrimination where the applicant was dismissed from her job due to being a woman, and a breach of art.6 due to lack of reasons in the Supreme Administrative Court decision on the issue.

Article 1 of Protocol No.1

- *Beinarovic v Lithuania*, finding a violation in respect of three applicants, where their rights to restitution of property had been annulled due to the land's status as important urban forest, and the applicants had been required to engage in cumbersome alternative procedures to vindicate their rights in another form;
- *Volokitin v Russia*, finding a violation where Russia, which had accepted the obligation to redeem Soviet-era bonds, had failed to set up a mechanism by which the applicants could obtain compensation;
- *Aielli v Italy; Arbito v Italy*, rejecting as inadmissible complaints about the re-adjustment of certain old age pensions in light of the budget deficit.

Article 1 of Protocol No. 1 and Article 13

- *Sandu v Moldova and Russia*, finding, in respect of complaints lodged by over 1,000 individuals and three companies, that there were breaches by Russia in that the applicants had been denied access to their land and property in the separatist region (Moldovan Transnistrian Republic), for which they had no remedy available.

Rule 39: interim measures

- The Court granted an interim measure in the case of *Oleg Sentsov*, a film director arrested in the Crimea and transferred to Russia: it has requested the applicant to cease his hunger strike and indicated that the Russian authorities should ensure he receives appropriate treatment in an institutionalised medical setting;

The Court held hearings in the following case in June–July 2018:

- *Rooman v Belgium* (Grand Chamber), concerning the complaints of the applicant, a Belgian and German national detained in a social protection facility, about the adequacy of his psychiatric treatment, in particular that he does not receive treatment in German.

Vincent de Gaetano (Malta) has been elected as Section President.

CPT

From June–July 2018, the CPT made the following visits: a six-day visit to the Republic of Moldova, and a nine-day visit to Greece focusing on psychiatric patients and detained foreign nationals.

It issued the following reports: the six reports on its visits to Azerbaijan from 2004 to 2017, finding *inter alia* that torture and ill-treatment of detainees, together with corruption in the criminal justice system, was endemic and systematic; its report on its ad hoc 2017 visit to Serbia, making findings about police ill-treatment of suspects; and on its 2017 visit to Poland.

Council of Europe

GRECO (the Council of Europe group of states against corruption) issued a report in which, *inter alia*, it called for Ireland to improve its efforts to ensure judicial independence in the appointment and promotion of judges; and it also criticised Poland for weakening the independence of courts and judges.

The Council of Europe's Committee of Ministers issued a Recommendation on the rights of children in the digital environment.

The Council of Europe's Commissioner for Human Rights, Dunya Mijatović, paid a visit to Greece and called for more to be done to protect the rights of migrants fleeing from their own countries.

The Venice Commission of the Council of Europe issued an opinion that the “Stop Soros” provisions on illegal immigration in Hungary should be repealed as it hindered legitimate NGO work.

ECRI (the European Committee against Racism and Intolerance) issued a report stating that 2017 had seen an unrelenting rise in populism, hate speech and resentment in Europe, with hatred against non-nationals and migrants being a predominant feature.

Signatures and ratifications

- The United Kingdom and Norway ratified the Lanzarote Convention (the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse),

- which obliges states to take measures to protect children from sexual violence, to protect victims and prosecute offenders.
- Greece ratified the Istanbul Convention (the Council of Europe Convention on combating and preventing violence against women and domestic violence).

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during June–July 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 7

- *Nexans France and Nexans v Commission* (T-499/14), 12 July 2018, a group of undertakings in the submarine power cables and extra high voltage underground cable industry were found to be in breach of art.101 of the TFEU and applied for leniency. The applicants contended that information obtained by the Commission was done so unlawfully, an argument which was rejected.
- *České dráhy v Commission* (T-325/16), 20 June 2018, on a decision by the Commission of a breach of competition law rules by the Czech national rail carrier owned by the state. On infringement of the right to private and family life, it was held that the investigation carried out was proportionate, and also did not infringe the right to good administration.

Articles 17, 41, 47, 48, 52

- *Klyuyev v Council* (T-240/16), 11 July 2018, on sanctions against Ukraine which had affected the former Head of Administration of the President of Ukraine, and were extended. The applicant requested an annual review of the measures, but they were nevertheless maintained. The applicant's claims on most grounds were rejected. However, he was successful in arguing that the Council committed a manifest error of assessment, as it had concluded that it was not required to take into account the evidence produced by the applicant, make further enquiries of the Ukrainian authorities, when that evidence called into question the basis for his listing.

Articles 17, 52

- *K. Chrysostomides & Co v Council* (T-680/13), 13 July 2018, on a challenge against the authorisation of a memorandum of understanding which restricted Cypriot banks. It was held that there was no unlawful restriction on the right to property, as claimed by the applicants, because any restriction was proportionate and justified.

Article 31

- *Curto v Parliament* (T-275/17), 13 July 2018, in which the applicant was hired as an accredited parliamentary assistant. Her manager sought to dismiss her on the grounds that first, she did not come to work for a week, and second, she was on sick leave for two weeks in Italy without permission, which considered as unauthorised leave. The applicant argued that she was on sick leave due to harassment at work and anxiety arising from the harassment. It was held that the manager's behaviour was a breach of the right to respect for health, safety and dignity of employees.

Article 41

- *The Goldman Sachs Group v Commission* (T-419/14), 12 July 2018, a group of undertakings in the submarine power cables and extra high voltage underground cable industry were found

- to be in breach of art.101 of the TFEU and applied for leniency. All arguments related to breaches of the right to good administration were rejected.
- *NKT Verwaltungs and NKT v Commission* (T-447/14), 12 July 2018, a group of undertakings in the submarine power cables and extra high voltage underground cable industry were found to be in breach of art.101 of the TFEU and applied for leniency. An argument regarding a refusal of access to exculpatory evidence from the file was rejected as unfounded and was held not to be a breach of the right to good administration.
 - *OW*(T-597/16), 7 June 2018, the applicant worked for the European Aviation Safety Agency (EASA) in the Air Operations Section, but following a restructure was reassigned to a coordination post from a managerial post, which she contested. She argued she did not have the opportunity to express her dissatisfaction with this decision to her managers, but it was held that she did in fact do so, so there was no breach of rights.

Article 47

- *Simpson v Council* (T-646/16), 19 July 2018, the applicant was a translator at the Council, on grade 6, and passed a Competition for promotion to grade 9 but was not upgraded, unlike three of his counterparts. He was only promoted to grade 7 on the basis that automatic upgrades were only allowed when in the best public interest. He contested this decision. The appeal was set aside because of an infringement of the principle of the right to a judge assigned by law and sent back to the chamber of the General Court.

The Court of Justice of the European Union

The Court issued, *inter alia*, judgments and decisions in the following during June–July 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 4

- *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)* (C-220/18 PPU), 25 July 2018, a European arrest warrant was issued by Hungary for a Hungarian national in Germany to be surrendered. He did not consent to his surrender. An undertaking was made that he would not be subject to inhuman or degrading treatment if surrendered to Hungary. It was held that the undertaking had to be extended to temporary detention prior to prison, and needed to be assessed in detail, before the surrender, otherwise there was a risk of breaching art.4.

Articles 4, 47

- *Minister for Justice and Equality (Défaillances du système judiciaire)* (C-216/18 PPU) 25 July 2018, three European arrest warrants were issued by Poland to Ireland. The subjects challenged their surrender on the ground that they would not receive a fair trial in Poland. The Court of Justice held that the right to a fair trial was something the executing authority must consider in deciding whether or not to execute the warrant.

Articles 7, 9, 21 and 45

- *Coman* (C-673/16), 5 June 2018, in which Coman, a Romanian American national married Hamilton, an American national. Coman worked in Brussels whilst Hamilton remained in the United States. When seeking to live together in Romania, the authorities refused grounds

of family reunification as they did not recognise same-sex marriages. It was held that this was contrary to the right to respect for private and family life.

Article 8

- *Wirtschaftsakademie* (C-210/16), 5 June 2018, in which the applicant, Wirtschaftsakademie, had been ordered by the Independent Data Protection Centre in Germany to take down its Facebook fan page, because of the unauthorised collection of data, which was later processed. Wirtschaftsakademie contested this and claimed that they are not responsible for the data collection or processing by Facebook. It was held that both the Wirtschaftsakademie and Facebook were jointly responsible for the data processing.

Article 10

- *Jehovan todistajat* (C-25/17), 10 July 2018, Finnish Data Protection Board prohibited Jehovah's Witnesses from processing personal data when preaching door-to-door unless legal requirements were satisfied. It was held that preaching extends beyond the private sphere of a member of a religious community who is a preacher and the religious community is a controller of personal data.

Articles 16, 20

- *Spika* (C-540/16), 12 July 2018, in which the applicants contested the additional fishing opportunities granted to four other operators on the grounds that it created unequal conditions for competing to secure such opportunities. It was held that there may be unequal conditions but that this is acceptable provided that the method pursues one or more general interests recognised by the EU and respects the principle of proportionality.

Articles 18, 19 and 47

- *Alheto* (C-585/16), 25 July 2018, in which the applicant is a refugee under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). She travelled to Bulgaria from Jordan and lodged an application for protection in Bulgaria. It was held that a Palestinian who has refugee status from UNRWA cannot obtain refugee status in the EU while they are receiving effective protection or assistance from that UN agency.

Articles 47, 48, 51

- *Kolev* (C-612/15), 5 June 2018, eight customs officers were accused of taking bribes in order to waive customs inspections. It was held that the right of access to a lawyer does not preclude national legislation that allowed the national court to dismiss the lawyers chosen by two different persons because of a conflict of interest between those persons, to allow the instruction of new lawyers, or to appoint new lawyers.

European Court of Human Rights

The European Court of Human Rights issued, inter alia, judgments and decisions in the following during June–July 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 7, 8, 11

- *Centrum för Rättvisa v Sweden* (App. No.35252/08), judgment of 19 June 2018, in which the Court considered a public interest challenge to bulk interception of communications in Sweden. It held that the state's regime was compatible with the Convention.

UK Appellate Courts

The appellate courts in the United Kingdom issued, *inter alia*, judgments and decisions in the following during June–July 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 7, 8, 11 (with arts 47, 52)

- *Stunt v Associated Newspapers Ltd* [2018] EWCA Civ 1780, in which the case entails a dispute as to the misuse of personal information by journalists in their reporting on the appellant. The Court of Appeal agreed to refer a question to the Court of Justice as to whether s.32(4)–(5) of the Data Protection Act 1998 is compatible with Directive 95/46/EC.

Article 5

- *A and B v Criminal Injuries Compensation Authority and Secretary of State for Justice* [2018] EWCA Civ 1534, in which two Lithuanian nationals, A and B, were unsuccessful in their challenge to a decision by the first respondent to deny them compensation after being trafficked to the UK in 2013 for exploitative labour.

A Human Rights Approach to Illicit Financial Flows in Switzerland

Juan Pablo Bohoslavsky*

✉ Base erosion and profit shifting; Confiscation; Exchange of information; Freezing orders; Human rights; Money laundering; Switzerland; Tax evasion

Abstract

This article discusses, from a human rights perspective, whether the Swiss policies and efforts aimed at curbing illicit financial flows and their impact on the enjoyment of human rights within and outside Switzerland are effective and comprehensive. The article deals with questions related to international commitments and legal framework on curbing illicit financial flows applicable in Switzerland, how the automatic exchange of information for tax purposes works, how to reduce corporate tax abuse and harmful tax competition, the institutional and legal framework for tracing stolen assets and curbing money-laundering, including aspects related to prosecutions and freezing, confiscation and repatriation of stolen assets. While good practices are identified, it also indicates areas where there is room for improvement.

I. Illicit financial flows and human rights

Illicit financial flows in a narrow sense are funds which are illegally earned, transferred or utilised, and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks.¹ The illicit nature stems from two distinct but overlapping causes: the first relating to the proceeds of crime, the second initially deriving from legitimate economic activities that ultimately become illicit owing to the contravention of laws.

In a broader sense, illicit financial flows encompass in addition all kinds of artificial arrangements that have been put in place for the essential purpose of circumventing the law or its spirit, including certain legal “tax-optimisation” schemes, making use of legal loopholes that allow, for example, transnational corporations to shift around profits to zero or low corporate tax jurisdictions, without undertaking any real economic activities in those jurisdictions.²

Activities related to illicit funds can also be clustered according to the illicit motivations involved.³ Those may be market and regulatory abuse, tax abuse, tax evasion or abuse of power, including the theft of state funds and assets, and the profit from crime or corruption. Commonly used methods to evade or avoid taxation include trade misinvoicing and transfer mispricing. Transfer mispricing refers to a practice of multinational companies: a subsidiary of a company avoids paying taxes in a relatively high-tax country by selling its products at a loss to a subsidiary in a low-tax country, which then sells the product to final

* United Nations Independent Expert on Debt and Human Rights. The author wishes to extend his gratitude for the comments on the drafts of the report (A/HRC/37/54/Add.3) on which this article is based and the generous material, information, insights, critiques and questions received from Mark Herkenrath and Olivier Longchamp. He also thanks Frederique Bourque, Juana Sotomayor and Gunnar Theissen from the Office of the UN High Commissioner for Human Rights for their dedication during their research and editorial work while writing the report.

¹ Dev Kar and Karly Curcio, “*Illicit financial flows from developing countries: 2000–2009* (Washington DC: Global Financial Integrity, 2015), p.3.

² United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report 2014* (Geneva, 2014), p.173.

³ Alex Cobham, “The impacts of illicit financial flows on peace and security” African Study for Tana High-Level Forum on Security in Africa” (April 2014), p.5, available at https://www.africaportal.org/documents/12549/IFFs_and_Security_1.pdf [Accessed 2 October 2018].

customers at market price and yields the profit. While tax evasion, which breaks national tax laws, is illegal, many tax avoidance schemes comply with existing laws and regulations, or at least go unchallenged in situations where tax authorities have scarce capacity and information.

While it is recognised that estimates of the amount of illicit financial flows leaving developing countries are, to some extent, imprecise, such flows are deemed to be substantial.⁴ The amount of illicit financial flows leaving developing countries may be close to \$1 trillion per year,⁵ most of which can be linked to trade, tax evasion and tax avoidance.⁶ A significant percentage of such funds are deposited in financial centres, depriving developing countries of financial resources vital for the realisation of economic, social and cultural rights.

The Paradise Papers of 2017, the Panama Papers of 2016 and the Swiss Leaks of 2015 indicated that politically exposed persons, high-net-worth individuals and transnational corporations are particularly likely to engage in cross-border tax evasion or avoidance, corruption or the misappropriation of public funds.⁷ The likelihood of such deviance is higher among such actors owing to their positions of power and their ability to engage in cross-border financial transactions, or to the significant personal or corporate benefits that encourage such harmful behaviour.

Illicit financial flows are a global phenomenon and have adverse effects on all countries, which are losing tax revenues and funds for domestic investment. However, those effects are particularly harsh for developing countries, which frequently lack adequate financial resources for establishing well-functioning institutions in the fields of education, food security, health, social security, water and sanitation, justice and law enforcement.⁸ Reality shows that more resources will not always be translated into more investment on social welfare, as those could be appropriated by domestic elites and/or still existing onshore tax evasion. Yet, available resources are a precondition for those governments willing to promote the realisation of economic and social rights of the population, besides other adverse human rights implications that illicit financial flows entail (see below) which must be prevented.

Illicit financial flows nourish unsustainable debt and undermine efforts to enhance genuine social development. States and the international community have acknowledged the adverse effects of illicit financial flows in the 2030 Agenda for Sustainable Development. Target 16.4 of the Sustainable Development Goals explicitly notes the commitment of states to significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organised crime. In this context, the approval in 2016, by the Swiss Federal Council, of a report on illicit financial flows from developing countries needs to be highlighted.⁹

In order to meet target 16.4, countries of origin and of destination must make joint efforts. This primarily requires taking appropriate steps to prevent illicit financial flows from entering its financial sector and to ensure that banks operating in any given country exercise due diligence with clients, in particular politically exposed persons and high-net-worth individuals. Such efforts also entail ensuring financial transparency and participation in multilateral exchanges of information in the field of taxation to reduce the likelihood that individuals can engage, undetected, in tax evasion and tax avoidance. In addition, sanctions should

⁴ Regarding definition of illicit financial flows, see, e.g. A/HRC/31/61 and A/HRC/28/60. A comprehensive definition was included in the report of the Swiss Federal Council on illicit financial flows from developing countries of 12 October 2016, available at: www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64112.html [Accessed 2 October 2018].

⁵ Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004–2013* (Washington DC: Global Financial Integrity, 2015), available at: www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf [Accessed 2 October 2018]; see also Global Financial Integrity, *Illicit Financial Flows to and from Developing Countries: 2005–2014* (Washington DC: Global Financial Integrity, 2017), available at: www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf [Accessed 2 October 2018].

⁶ See Juan Pablo Bohoslavsky, “Tax-Related Illicit Financial Flows and Human Rights” (2018) 3(25) *Journal of Financial Crime* (forthcoming).

⁷ For further information on the Paradise Papers, Panama Papers and Swiss Leaks, see www.cicj.org/investigations/ [Accessed 2 October 2018].

⁸ Organization for Economic Cooperation and Development (OECD), *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* (Paris, 2014); S. Cohen, et al., *Tax Abuses, Poverty and Human Rights* (London: International Bar Association, 2013).

⁹ See www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64112.html [Accessed 2 October 2018].

be imposed in a timely, transparent and proportional manner against financial institutions that have failed to exercise due diligence, in order to guarantee that neither theft, nor hiding of funds, pay.

Countries of destination should, furthermore, ensure that illicit funds can be frozen, seized and returned in a timely and human rights-compliant manner to their legitimate owners in the countries of origin, in line with the United Nations Convention against Corruption and relevant international human rights law, which requires states, to the maximum of their available resources, to achieve the full realisation of economic, social and cultural rights.¹⁰

Apart from depriving governments first and foremost of resources required to realise progressively economic, social and cultural rights, there are other connections between illicit financial flows and human rights. They also undermine efforts to build up effective institutions to uphold civil and political rights and the rule of law in the countries of origin. Illicit financial outflows and their non-repatriation undermine civil and political rights and the rule of law in countries of origin and destination. The existence of illicit unregulated money contributes to the spread of other criminal activities, such as illegal weapons, smuggling, terrorism and the infiltration of criminal interests in the public sector. That includes funding of political parties or election campaigns in contravention of domestic regulations, contributing to the risk of state capture and subverting the right to vote and to participation in public affairs on a non-discriminatory basis.

All in all, the flow of illicit funds destroys trust in public institutions and the rule of law, and it shrinks the fiscal space for investing in public health care, education, social security and other public goods and services. Illicit financial flows also contribute to the build-up of unsustainable debt as governments lacking domestic revenue may resort to external borrowing.¹¹

Are the Swiss policies and efforts at national and international levels, aimed at curbing illicit financial flows and their impact on the enjoyment of human rights within and outside the country, effective and comprehensive? Is there room for improvement? These are the core questions this article tries to answer.

Why assess Switzerland and its policies towards curbing illicit financial flows? This country is a prominent financial centre and a leading global location for cross-border management of private assets, with an estimated world market share of 25 per cent. The Swiss financial sector accounts for 9.1 per cent of gross domestic product (GDP) and assets held in Swiss banks by non-resident custody account holders amount to SwF 2.92 trillion.¹² Integration of human rights due diligence into the financial sector and lending policies of Switzerland would therefore significantly reduce risks and prevent adverse human rights impacts. At the same time, this country study could help make global policy discussion around illicit financial flows more informed and realistic.

In my capacity as United Nations Independent Expert on Foreign Debt and Human Rights, I conducted an official visit to Switzerland from 25 September to 4 October 2017. The mission report, which this piece is based on,¹³ was presented and discussed by the Human Rights Council on 28 February 2018. The main objective of the mission was to study Swiss policies and efforts, at the national and international levels, aimed at curbing illicit financial flows, tax abuse and corruption and their impact on the enjoyment of human rights within and outside Switzerland. The visit also focused on the integration of human rights due diligence into the activities of public and private financial institutions operating in Switzerland.¹⁴

Section II presents the efforts made by Switzerland and challenges related to the curbing of illicit financial flows, describing also the relevant international commitments and legal framework, and explains how the automatic exchange of information for tax purposes works in practice. Section III discusses how to reduce corporate tax abuse and harmful tax competition. Section IV describes the institutional and legal

¹⁰ See International Covenant on Economic, Social and Cultural Rights art.2(1); see also A/HRC/31/61 and A/HRC/28/60.

¹¹ The causal links between illicit financial flows and human rights were studied in detail by the author in two reports submitted to the UN Human Rights Council dated on 10 February 2015 (A/HRC/28/60) and 15 January 2016 (A/HRC/31/61).

¹² Federal Department of Finance, State Secretariat for International Financial Matters, "Swiss financial centre: key figures October 2017", tables 1 and 8; and Swiss National Bank, "Banks in Switzerland 2016", vol.101, pp.22–23.

¹³ A/HRC/37/54/Add.3.

¹⁴ This second focus of the mission report has not been incorporated into this article.

framework for tracing stolen assets and curbing money-laundering, including aspects related to prosecutions and freezing, confiscation and repatriation of stolen assets. Finally, in Section V concluding remarks and recommendations are presented for discussion.

II. Efforts and challenges related to the curbing of illicit financial flows

The policies of Switzerland in relation to illicit financial flows have seen a positive change. Since 2008, many initiatives have been undertaken to strengthen the regulation of the Swiss banking sector, following revelations that banks domiciled in Switzerland facilitated tax evasion or lacked adequate due diligence procedures to prevent politically exposed persons from using Swiss jurisdiction to hide stolen assets. These policies are set out in a 2016 report of the Federal Council and include efforts to prevent and combat illicit financial flows by addressing the root causes of such flows in countries of origin,¹⁵ including through international development cooperation.

1. Background

Before 2009, there was widespread cross-border tax evasion by foreign nationals from various jurisdictions, facilitated by banks operating in Switzerland. The data relating to tax evasion by US tax payers is revealing in itself. In 2009, UBS reached a \$780 million settlement for facilitating tax evasion by US taxpayers. By the end of January 2016, 80 additional banks operating in Switzerland had entered into non-prosecution agreements with the US Department of Justice. The list of banks includes the Swiss branches of many well-known international commercial banks. The non-prosecution agreements include statements of facts providing details about how the respective banks or their employees had organised tax evasion schemes for their clients. Under the “Swiss Bank Programme”, banks received a penalty based on the value of the assets held in undisclosed accounts. In total, the penalties imposed amounted to over \$5.5 billion.¹⁶

There are no indications that such practices have been limited exclusively to clients in one jurisdiction. For example, account documents leaked from the Geneva-based private banking arm of HSBC, a foreign bank operating in Switzerland, indicated that HSBC had business relationships with people from dozens of countries, among them several alleged tax dodgers, dictators and traffickers in blood diamonds and an alleged arms dealer who channelled mortar bombs to child soldiers in Africa.¹⁷

In April 2016, the Swiss Financial Market Supervisory Authority pointed out that, despite significant efforts to adopt legislation and improve procedures to detect suspicious transactions, the risk of continued abuse of the Swiss financial market for the purpose of money-laundering had not been eliminated.¹⁸ Reports of the suspected involvement of financial institutions in facilitating tax evasion or money-laundering have continued to appear in the media.¹⁹ The risk is also highlighted by the involvement of several Swiss banks in the Petrobras corruption scandal and in the suspicious cash flows linked to the 1Malaysia Development Berhad (1MDB) sovereign fund,²⁰ the subject of an investigation triggered by a report of a suspicious transaction by a Swiss financial institution to the Swiss Financial Intelligence Unit.

¹⁵ Federal Council, “Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern” in German only, 12 October 2016.

¹⁶ United States Department of Justice, “Swiss Bank Programme”, available at: www.justice.gov/tax/swiss-bank-program [Accessed 2 October 2018]; US Tax Program, “Swiss banks-penalty-statistics”, available at: www.ustaxprogram.com/penalty-statistics/ [Accessed 2 October 2018]; and, for details about non-prosecution agreements and penalties, United States Department of Justice, “Joint statement between the U.S. Department of Justice and the Swiss Federal Department of Finance”, available at: www.justice.gov/tax/file/631356/download [Accessed 2 October 2018].

¹⁷ International Consortium of Investigative Journalists, “Banking Giant HSBC Sheltered Murky Cash Linked To Dictators And Arms Dealers”, 8 February 2015, available at: www.icij.org/investigations/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers/ [Accessed 2 October 2018].

¹⁸ Mark Branson, Chief Executive Officer of the Swiss Financial Market Supervisory Authority, “Combating money-laundering is a duty of every banker”, statement to the Annual Media Conference 2016, 7 April 2016.

¹⁹ “Credit Suisse faces tax probes in multiple countries”, *Financial Times*, 31 March 2017; and “Verdacht auf Steuerhinterziehung: Steuerrazzia bei deutschen UBS Kunden” in German only, *Hanmelsblatt*, 27 September 2017.

²⁰ Office of the Attorney General of Switzerland, “Annual Report 2016”, p.19.

2. International commitments

Switzerland has committed itself to significantly reducing illicit financial and arms flows and to strengthening the recovery and return of stolen assets by 2030, in line with target 16.4 of the Sustainable Development Goals. Switzerland has also endorsed the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, as a part of which states have committed themselves to combating tax evasion and corruption, enhancing tax transparency and making sure that all companies, including multinationals, pay taxes to the governments of countries where economic activity occurs and value is created.

Switzerland has been party to the United Nations Convention against Corruption since 2009 and to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD) since 2000. Furthermore, the country is actively participating in the Action Plan on Base Erosion and Profit Shifting of OECD, participates in the automatic exchange of tax information (AEOI) between countries to fight tax evasion and tax avoidance at the international level, and is also a member of the Financial Action Task Force (FATF).

Switzerland underwent several Financial Action Task Force peer reviews analysing the level of compliance of its anti-money-laundering and counter-terrorist financing system and policies. According to the Task Force's latest mutual evaluation report in 2016, the Swiss anti-money-laundering regime is technically robust and has achieved good results, but would benefit from some improvements in order to be fully effective. In the report, it was found that the Swiss financial system was exposed to a high risk of laundering of assets derived from offences that had mostly been committed abroad. In its report, the Task Force welcomed several legislative measures that strengthened the Swiss anti-money-laundering framework but recommended that sanctions for money-laundering be made sufficiently dissuasive. The Task Force concluded that the country was compliant with six recommendations, largely compliant with 25 and partly compliant with nine.²¹ Switzerland is currently taking steps to address some of the deficiencies identified in the report.²²

3. Legal framework

Measures to avoid the entry of illicit funds into the country are central to an effective anti-money-laundering strategy. The Federal Act on Combating Money-Laundering and Terrorist Financing (Anti-Money-Laundering Act) provides the legal basis for efforts to combat the laundering of assets derived from corruption, aggravated tax offences or other felonies.

The Act sets out specific due diligence obligations for financial intermediaries, in particular with regard to dealing with politically exposed persons, in order to prevent "dirty money" deposits in Swiss accounts. Banks also have a duty to verify the identity of their customers and determine the beneficial owners of the assets held in their accounts.²³ They are required to re-evaluate the terms and, potentially, the continuity of their business relationship with politically exposed persons over time. Moreover, if a transaction raises any doubts, financial intermediaries are expected to take proactive measures and alert the Money-Laundering Reporting Office of Switzerland to investigate the transaction.

Banking secrecy (art.47 of the Federal Act on Banks and Saving Banks) is not absolute. When suspicious transactions are reported in good faith,²⁴ the ban on revealing secret information shared in the context of

²¹ Financial Action Task Force, *Anti-money-laundering and counter-terrorist financing measures—Switzerland, fourth round mutual evaluation report* (Paris, 2016), p.11, available at: www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf [Accessed 2 October 2018].

²² Federal Council, "Federal Council defines thrust of follow-up work on FATF mutual evaluation report on Switzerland", 28 June 2017, available at: www.admin.ch/gov/en/start/documentation/media-releases-federal-council.msg-id-67338.html [Accessed 2 October 2018].

²³ Federal Act on Combating Money-Laundering and Terrorist Financing art.3.

²⁴ Federal Act on Combating Money-Laundering and Terrorist Financing art.11.

a professional or business relationship does not apply. Financial intermediaries have a duty to report suspicious transactions to the authorities where the possibility that the assets are of criminal origin cannot be excluded. However, the distinction between mandatory and voluntary reporting by financial intermediaries leaves room for underreporting of questionable transactions.

Changes to Swiss criminal provisions may have improved the reporting of suspicious transactions by banks. On 1 January 2016, art.305 bis (1) of the Swiss Criminal Code entered into force. The article provides that any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he or she knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty. However, laundering assets derived from an aggravated tax misdemeanour is only a criminal offence in Switzerland if the tax evaded in any tax period exceeds SwF 300,000. In other words, bank employees may only incur criminal liability for money-laundering if they should have good reason to suspect that they are assisting a wealthy client in committing a serious tax offence.²⁵ Such high thresholds do not exist for assisting in the evasion of federal, cantonal or communal taxes, which can be punished in Switzerland by a fine of up to SwF 10,000, and, in more serious cases, by a fine of up to SwF 50,000.²⁶

While such provisions may encourage enhanced due diligence regarding high-net-worth clients, they may be insufficient to prevent money-laundering or the facilitation of tax evasion within the Swiss banking sector. First, the SwF 300,000 threshold is rather high. Second, Swiss prosecution authorities often face difficulties when assessing whether the evaded tax exceeds the specified amount, as this requires knowledge of the tax law of various foreign jurisdictions. Third, Swiss law only penalises tax fraud as defined in arts 59(1) and 186 respectively of the Federal Act on the Harmonization of Direct Taxation at the Cantonal and Communal Levels of 14 December 1990 and the Federal Act on Direct Federal Taxation. The term "tax fraud" does not cover all forms of tax evasion, as it requires the falsification of documents. Lastly, the fines for assisting tax evasion are low and may not be sufficient to discourage such behaviour.

Although it may be too early to assess the impact of art.305 bis (1), prosecutors have indicated that they were not aware of any criminal investigation launched under that provision. In addition, the Swiss Financial Intelligence Unit has not received many reports of suspicious transactions related to tax fraud. This can be partly explained by the fact that Swiss banks have pushed their clients to regularise their deposits or have terminated business relationships with suspicious clients.

4. Automatic exchange of information for tax purposes

On 1 January 2017, the Convention on Mutual Administrative Assistance in Tax Matters, which allows for automatic, spontaneous exchange of tax information as well as exchange of information on request, entered into effect in Switzerland. On the same date, the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information entered into force in Switzerland.

The introduction of the automatic exchange of information for tax purposes is an important step in the fight against tax evasion. It will hamper foreign nationals from participating jurisdictions in their efforts to hide undeclared assets in Swiss bank accounts. Swiss residents who have moved assets abroad in order to evade Swiss taxes are similarly affected, as the Swiss tax administration will receive bank account information related to them for assets held abroad. However, jurisdictions participating in the system must have well-functioning and independent tax enforcement authorities that can use the data exchanged and enforce compliance with tax obligations.

It is remarkable that Switzerland has started, as of 1 January 2017, along with 38 other jurisdictions, the automatic exchange of information for tax purposes. The automatic exchange of information standard

²⁵ Criminal Code.

²⁶ Federal Act on the Harmonization of Direct Federal Taxation at the Cantonal and Communal Levels of 14 December 1990 art.56(3) and Federal Act on Direct Federal Taxation of 14 December 1990 art.177.

requires Switzerland to provide financial account information related to accounts held with Swiss financial institutions by tax residents in foreign jurisdictions to the states concerned once a year. In return, Switzerland receives information from participating jurisdictions about accounts held abroad by Swiss residents. On 1 January 2018, Switzerland introduced the automatic exchange of information with 40 further jurisdictions, with a first exchange of information planned for autumn 2019.²⁷

The automatic exchange of information system may not be an effective tool for curbing tax evasion in developing countries that do not meet the technical requirements for participation therein. Like other developed countries, Switzerland should consider expanding the number of developing countries participating in the new global standard by providing technical assistance and allowing low-income countries to gradually implement the provision of taxation information. Switzerland can build upon its expertise acquired in development cooperation projects aimed at strengthening national tax administrations and has, since 2015, been providing technical assistance in the context of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and participates in the African Tax Administration Forum, which supports capacity-building in African states. The participation of developed and developing countries is crucial to efforts to enhance transparency and international tax cooperation at the global level.

The stringent requirements set by OECD in terms of confidentiality and data management remain difficult for some countries to meet, although such standards are important in protecting the right to privacy. Information provided to foreign tax authorities could potentially be misused for purposes other than the investigation of tax offences. In some countries, human rights defenders and opponents of governments have been prosecuted for alleged tax offences in a rather suspicious or selective way, suggesting that prosecution is motivated less by a desire to ensure tax justice than by the wish to obstruct their legitimate activities and reduce civic space.

OECD requires full reciprocity from its counterparts when entering into data-exchange agreements, which implies a certain level of administrative and technical capacity and infrastructure. A number of developing countries have difficulties meeting such requirements.

Switzerland is also active in the field of exchange of tax information on request with more than 100 jurisdictions, including several developing countries, based on double-taxation agreements, tax-information-exchange agreements and the Federal Act on International Administrative Assistance in Tax Matters.

III. Reducing corporate tax abuse and harmful tax competition

Switzerland has also begun implementing various measures to avoid profit shifting by multinational corporations, such as action 13 of the Base Erosion and Profit Shifting Project of the OECD. The aim is to ensure that corporate tax revenues are paid where real economic activities are taking place, labour is performed and profits are made. Switzerland might consider requiring multinational enterprises to publicly report, on a country-by-country basis, the taxes they have paid, as non-public reporting is insufficient to ensure tax transparency by transnational corporations.

In 2016, the government presented the Swiss electorate with a comprehensive corporate tax reform package, which included measures to bring Swiss corporate tax regimes into line with OECD standards in order to combat base erosion and profit shifting by multinational companies. The new law would have outlawed certain tax reduction regimes that are no longer accepted internationally, replacing them with patent box regimes and other avenues for tax reduction and profit shifting from abroad.

In February 2017, the proposal put forward by the government and the Parliament of Switzerland did not garner majority support in a public referendum. In September 2017, the Federal Council published a

²⁷ See <https://www.efd.admin.ch/efd/en/home/themen/wirtschaft--waehrung--finanzplatz/finanzmarktpolitik/automatic-exchange-of-information-aeoi-.html> [Accessed 2 October 2018].

revised “tax proposal 17” for public consultation, with the aim of ensuring the compliance of Swiss corporate tax regimes with OECD standards.²⁸ Attention to the potential human rights impact of the revised tax reform in foreign countries needs to be paid. Essentially, “tax proposal 17” aims to keep taxation for multinational corporations and other businesses at low levels to attract businesses to and persuade them to establish their headquarters in Switzerland. Attracting businesses may well bring benefits for the country in the form of tax receipts and employment opportunities. However, excessive tax competition between countries is harmful, as it has resulted in the dramatic reduction of corporate tax payments by large corporations worldwide and contributed to the reduction of public revenues for investment and the rise in unsustainable public debt in many countries, especially in the developing world.

Importantly, the reduction of corporate tax rates for businesses or tax exemptions for transnational corporations should not undermine the ability of federal, cantonal or local government institutions in Switzerland to meet their human rights obligations, in particular in the fields of education, social security, health and culture. Nor should corporate tax reforms result in a shifting of tax burdens from businesses to low- or middle-income households.

Low tax regimes provide incentives for profit shifting and result in reduced tax revenues in those countries where most of the real business takes place, thus shrinking the fiscal space of states to fulfil their human rights obligations. This is why the Swiss government, at the federal, cantonal and local levels should be called upon, to carry out a social and human rights impact assessment of the tax reform package, which should include an assessment of the impact of the package on tax revenues available for the realisation of economic and social rights within Switzerland and abroad, in particular in developing countries.²⁹

In this context, It should be recalled that art.141(a) and (g) of the Federal Act on the Federal Assembly requires the government to submit assessments on the impacts of draft laws on the economy, society, environment and future generations and assess their compliance with fundamental rights and binding international law. A recent Swiss Federal Audit Office report indicated, however, that only one-third of all Federal Council dispatches met the minimum requirements regarding the assessment of impact on society and the environment.³⁰

Unfortunately, the information available on “tax proposal 17” does not include a detailed assessment of the nature of the reform package’s impact on the enjoyment of economic, social and cultural rights in Switzerland and abroad.

IV. Institutional framework for tracing stolen assets and curbing money-laundering

It is of paramount importance that the state play a balanced and nuanced role in ensuring accountability, transparency and fairness in the financial sector when dealing with human rights abuses and illicit financial flows. The supervision of Swiss banks through self-regulatory norms set by the Swiss Bankers Association and regulation by the Swiss Financial Market Supervisory Authority are therefore crucial.

The staffing, resources and powers of the Swiss Financial Market Supervisory Authority need to be proportional to the size of the Swiss financial market and the volume of assets managed by its financial institutions. The Authority should have sufficient capacity to supervise all banks and financial intermediaries adequately, irrespective of their size.

Investigations of recent cases show that, although the majority of banks fulfilled their duties under the Federal Act on Combating Money-Laundering and Terrorist Financing, a minority had failed to do so. In the Petrobras case, for instance, the Swiss Financial Market Supervisory Authority revealed that 75 per

²⁸ Federal Council, “Federal Council initiates consultation on tax proposal 17”, 6 September 2017, available at: www.admin.ch/gov/en/start/documentation/media-releases.msg-id-68007.html [Accessed 20 October 2018].

²⁹ For the principles that should inform such assessments, see A/HRC/37/54.

³⁰ Swiss Federal Audit Office, *Prognosen in den Botschaften des Bundesrates: Evaluation der prospektiven Folgenabschätzungen von Gesetzentwürfen* in German only (Bern, 2016), available at: <https://biblio.parlament.ch/e-docs/389085.pdf> [Accessed 13 September 2018].

cent of the approximately 20 Swiss banks involved applied money-laundering rules in conformity with the Swiss legal regime. However, the Authority noted that, with regard to the remaining 25 per cent of banks, there were concrete indications that the anti-money-laundering measures they had in place were inadequate.³¹ The Authority has dissolved one bank, withdrawn the fiduciary licences of a number of companies and ordered the disgorgement of illegally generated profits in the context of enforcement.

The Swiss Financial Market Supervisory Authority published in 2011 an investigation into the due diligence obligations of Swiss banks handling assets of politically exposed persons, indicating that it had initiated administrative proceedings against four out of the 20 banks audited. The names of those four banks, with regard to which serious gaps were found, were not made public. Hence, the general public has been left to wonder which banks had serious flaws in their due diligence procedures or carried out clarifications solely with a view to safeguarding the bank's own reputation, with little consideration being given to the risk of money-laundering.³² Neither is there any information available as to whether sanctions were imposed and, if so, on which financial institutions.

It is also commendable the Swiss Financial Market Supervisory Authority for publishing, since 2014, annual enforcement reports³³ and for recently issuing press statements indicating measures taken against particular financial institutions in the most egregious cases of non-compliance. However, the enforcement reports do not name the financial institutions subjected to sanctions. The purpose of enforcement is to avoid repetition of infringements and ensure individual corporate accountability for non-compliance with banking regulations.

Financial intermediaries are required to submit information about suspicious transactions to the Money-Laundering Reporting Office of Switzerland. After gathering information on the origin of the assets or on suspect persons, the Office may forward it to prosecutors for potential action. In 2016, the Office received 2,909 suspicious transaction reports related to financial transactions of a total value of SwF 5.32 billion. Currently, most suspicious transaction reports are received from banks, with only a very small number of fiduciaries reporting suspicious transaction to the Office. After review, in 2016, 71.3 per cent of all cases were forwarded to the judicial authorities.³⁴

1. Prosecution

The Office of the Attorney General of Switzerland and cantonal prosecutors have specialised units for financial crimes and crimes related to money-laundering. Complex, large-scale investigations have been conducted at both the federal and cantonal levels, including cases involving predicate offences committed outside Switzerland.

In 2016, prosecution authorities and courts received 766 suspicious transaction reports from the Money-Laundering Reporting Office of Switzerland. In about half of all cases, the proceedings were dismissed, 108 cases resulted in the issuing of a judgment by a court and only 3 per cent resulted in the acquittal of the defendant.³⁵ In addition, criminal investigations into money-laundering cases can be opened by the federal and cantonal prosecution authorities in response to requests for mutual legal assistance, police reports, complaints filed by members of the public and reports from other federal and cantonal authorities. In total, every year between 200 and 300 cases result in convictions.³⁶

³¹ Mark Branson, Chief Executive Officer of the Swiss Financial Market Supervisory Authority, "Combating money-laundering is a duty of every banker", statement to the Annual Media Conference 2016, 7 April 2016.

³² See Swiss Financial Market Supervisory Authority, "Due diligence obligations of Swiss banks when handling assets of 'politically exposed persons'. An investigation by FINMA", 28 October 2011, p.9.

³³ See www.finma.ch/en/documentation/finma-publications/reports/enforcement-reports/ [Accessed 2 October 2018].

³⁴ Federal Office of Police, *MROS 19th Annual Report: 2016* (Bern, 2017), section 2(2)(4).

³⁵ Federal Office of Police, *MROS 19th Annual Report: 2016* (Bern, 2017), p.14.

³⁶ Financial Action Task Force, *Anti-money-laundering and counter-terrorist financing measures—Switzerland, fourth round mutual evaluation report* (Paris, 2016), table 10.

The Swiss authorities have successfully identified and dismantled several sophisticated money-laundering networks. In the 1MDB and Petrobras cases, the Office of the Attorney General of Switzerland initiated dozens of proceedings in which the alleged offence was large-scale corruption resulting in losses amounting to the equivalent of hundreds of millions, if not billions of Swiss francs for Malaysia and Brazil.³⁷ In the 1MDB case, assets intended for the economic and social development of Malaysia estimated to be as high as several billion dollars had been transferred to Swiss accounts held by former officials of Malaysia and the United Arab Emirates.³⁸

In some instances, national efforts to ensure accountability for economic crimes committed in multiple jurisdictions can be undermined if a mechanism for genuine international cooperation is not in place. The Swiss authorities have, in the past, faced difficulties in ensuring accountability where efforts to bring a successful prosecution domestically depended on the political will of foreign authorities to prosecute the underlying criminal acts committed in their jurisdictions.

2. Freezing, confiscation and repatriation of stolen assets

Switzerland has demonstrated an increasing willingness to freeze and confiscate stolen assets. The first case involved the freezing of several million Swiss francs related to former Philippine ruler Ferdinand Marcos when he was forced into exile in 1986. Other prominent cases include Sani Abacha, of Nigeria, Mobutu Sese Seko, of the Democratic Republic of the Congo, Vladimiro Montesinos, of Peru, and Jean-Claude Duvalier, of Haiti. In January 2011, Switzerland swiftly froze accounts belonging to former presidents of Egypt and Tunisia and their entourages and, in February 2014, assets belonging to a former president of Ukraine. Switzerland has also frozen the assets of politically exposed persons from Libya and the Syrian Arab Republic in the context of international sanctions. In total, over the past 30 years, Switzerland has returned about \$2 billion of illicit assets to their countries of origin.³⁹

The freezing of large assets held by corrupt and human rights abusing leaders has, however, raised questions about why Swiss financial institutions managed such assets for many years without alerting the authorities as to their suspicious nature or carrying out due investigations. Allegations that those leaders were involved in corruption or responsible for human rights violations were circulating widely when they were still in power.

In 2011, Switzerland adopted a law aimed at facilitating the freezing and return of stolen assets of politically exposed persons and their entourages. In 2014, the country further refined its policies by adopting a comprehensive strategy on freezing, confiscating and returning the illicitly acquired assets of politically exposed persons, which included preventive and repressive measures.⁴⁰

The Swiss legal framework was further strengthened by the revision, in December 2015, of the Foreign Illicit Assets Act. The Act provides for the freezing of assets when the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system. In such circumstances, the Act provides for the seizure of assets on the reasonable presumption that they must have been acquired by illicit means, thus reversing the burden of proof. The Act specifies that the aim of the restitution of assets is to strengthen the rule of law and to improve the living conditions of the inhabitants of the country of origin.

³⁷ Financial Action Task Force, *Anti-money-laundering and counter-terrorist financing measures—Switzerland, fourth round mutual evaluation report* (Paris, 2016), para.183.

³⁸ Federal Office of Justice, *Annual activity report 2016: mutual legal assistance*, p.14.

³⁹ Federal Department of Foreign Affairs, “No dirty money: the Swiss experience in returning illicit assets”, available at: www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschüre-no-dirty-money_EN.pdf [Accessed 2 October 2018].

⁴⁰ Federal Department of Foreign Affairs, “Stratégie de la Suisse concernant le blocage, la confiscation et la restitution des avoirs de potentiats (‘Asset Recovery’)\”, in French only, available at: www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/finanzplatz-wirtschaft/Strategie-Schweiz-Sperrung-Einziehung-Rueckfuehrung-Potentatengelder_FR.pdf [Accessed 2 October 2018].

However, according to art.3(2)(a) of the Foreign Illicit Assets Act, assets can only be frozen if the government or certain members of the government of the country of origin have lost power, or a change in power appears inevitable. In other words, under this Act, Switzerland cannot freeze the assets of politically exposed persons while they are still firmly in power, unless such an action is carried out on the basis of an international sanctions regime or in the, highly unlikely, event that a request for mutual legal assistance in criminal matters is received from the country of origin while the leader in question is still in power.

Adequate strategies need to be developed at the international and national levels to reduce the risk of financial support and services strengthening leaders involved in criminal conduct and resulting in the continued perpetration of serious human rights violations. Regrettably, compared to measures in place to prevent the financing of terrorism, international standards to prevent the provision of financial services to states and individuals responsible for serious violations of human rights remain underdeveloped.⁴¹

The Swiss authorities have encountered challenges concerning judicial confiscation. For instance, under Swiss criminal law, prosecutors are required to provide evidence that any assets frozen relate to a crime. Thus, proving that there is a link between a given crime and the assets frozen is usually key to ensuring the seizure, confiscation and return of stolen assets. Assets can only be seized from a politically exposed person or his or her entourage based on presumption of their illicit origin in situations covered by the Foreign Illicit Assets Act. Certain narrowly defined conditions must be fulfilled: the country of origin must be unable to engage in mutual legal assistance owing to the total or substantial collapse, or impairment, of its judicial system; the wealth of the asset holder must have increased inordinately, facilitated by the exercise of a public function; and there must have been notoriously high levels of corruption during his or her term of office.⁴²

In all other situations, when asset recovery proceeds on the basis of mutual legal assistance, the Swiss authorities seize assets pursuant to a mutual legal assistance request if the condition of dual criminality is met, and provide the requesting state with evidence enabling the courts of the requesting state to order the confiscation of the assets frozen in Switzerland. Based on the confiscation decision in the requesting state, the frozen assets are then returned to the requesting state. However, the Money-Laundering Reporting Office of Switzerland reports that the chances of obtaining information from abroad vary depending on the foreign country in question.⁴³ In addition, due process standards in Switzerland allow holders of accounts containing stolen assets to challenge freezing and expropriation decisions. As highlighted by the European Court of Human Rights a number of times, while due process is very important from a human rights point of view (even more important than UN Security Council resolutions),⁴⁴ adequate measures should be taken to ensure that judicial guarantees do not result in stolen assets only being returned after extremely lengthy legal procedures before the Swiss courts.

Efforts to return stolen assets to Egypt illustrate the difficulties in this regard. On the same day that former President Hosni Mubarak was ousted, the Swiss Federal Council issued an order freezing all his assets and those of his entourage. Subsequently, close to \$700 million of assets were frozen. Criminal prosecutions were launched in Egypt and Switzerland. However, in December 2016, after several years of investigations, the Attorney General of Switzerland announced that he would drop criminal proceedings against several persons and order the unblocking of SwF 180 million. Following an analysis of Egyptian court decisions by the Office of the Attorney General of Switzerland, it was concluded that it was unlikely that a link could be established between the funds in question and a crime committed in Egypt.⁴⁵

⁴¹ For a more detailed analysis, see A/HRC/28/59.

⁴² Foreign Illicit Assets Act arts 4 and 15.

⁴³ See Federal Office of Police, *MROS 19th Annual Report: 2016* (Bern: Federal Office of Police, 2017), section 2(2)(6).

⁴⁴ *Al-Dulimi and Montana Management Inc v Switzerland* (App. No.5809/08), judgment of 21 June 2013; *Nada v Switzerland* (App. No.10593/08), judgment of 12 September 2012.

⁴⁵ Federal Council, "Arab Spring: Attorney General meets Egyptian authorities in Cairo", 17 December 2016, available at: www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64958.html [Accessed 2 October 2018].

In December 2017, the Federal Council decided to unfreeze the remaining assets from Egypt with immediate effect, given that the Egyptian courts had dropped all relevant criminal proceedings with possible links to Switzerland.⁴⁶ The assets have only remained blocked because criminal procedures in Switzerland are still ongoing. The result is rather unfortunate. Despite more than five years of investigations and regular exchanges between the Swiss and Egyptian authorities, it appears unlikely that the assets frozen in Switzerland will be returned to Egypt for the benefit of the local population.

The innovative Foreign Illicit Assets Act was of no assistance in this case. The Swiss authorities maintained that Egypt was not a failed state without a functioning judicial system. Therefore, asset recovery efforts took place exclusively on the basis of mutual legal assistance requests. However, the Swiss authorities could not continue to block assets indefinitely, without sufficient proof that they had been acquired by irregular means.

It is therefore necessary to strengthen the Swiss legal framework for asset recovery by reversing the burden of proof to the extent permitted by international human rights standards. The Swiss authorities should be empowered to seize assets from politically exposed persons where there are well-founded reasons to believe that those assets derive from corruption or other criminal conduct. In such cases, the onus should be on the corresponding account holder to demonstrate that all assets held by him or her have been acquired by legitimate means.

The Swiss authorities have also occasionally faced difficulties in guaranteeing that assets returned are used for the benefit of the population, as required by the Foreign Illicit Assets Act. The authorities have learned from past cases and have taken measures to prevent returned funds from being misappropriated again.⁴⁷

It needs to be recalled that participation and transparency are core human rights principles that should guide the restitution of stolen assets, as stated in the principles for disposition and transfer of confiscated stolen assets in corruption cases welcomed at the Global Forum on Asset Recovery held in Washington DC from 4 to 6 December 2017.⁴⁸ It is important that stolen funds are returned to their legitimate owners in a timely manner, that the owners of those funds have a say in their final use and that there is full transparency and accountability regarding the use of the funds after their return.

Many countries from which assets have been stolen are going through transitional periods, dealing with past atrocities. When the regulatory authorities or criminal courts find that financial intermediaries have failed to exercise the required due diligence when receiving or managing returned funds, human rights victims of the country concerned need and deserve an explicit public apology from the respective financial institutions and compensation. Such an approach constitutes an important step in rebuilding trust in the context of transitional justice and may often be as important as the actual return of the stolen assets.

V. Conclusions and recommendations for discussion

Switzerland has adopted a human rights policy aimed at coherence and the promotion and protection of human rights at home and abroad.⁴⁹ This implies a great challenge, in particular in the financial field. In order to enhance financial and fiscal transparency around the world, national and international actions and effective coordination and cooperation between states are essential.

⁴⁶ Swissinfo, "Freeze of foreign assets in Swiss banks extended", 20 December 2017, available at: www.swissinfo.ch/eng/tunisia--egypt--ukraine-freeze-of-foreign-assets-in-swiss-banks-extended/43770116 [Accessed 2 October 2018].

⁴⁷ See Federal Council, "Memorandum of Understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the return, monitoring and management of illegally acquired assets confiscated by Switzerland to be restituted to the Federal Republic of Nigeria", 4 December 2017, available at: www.newsd.admin.ch/newsd/message/attachments/50734.pdf [Accessed 2 October 2018].

⁴⁸ Global Forum on Asset Recovery, Communiqué, available at: star.worldbank.org/star/sites/star/files/20171206_gfar_communique.pdf [Accessed 2 October 2018].

⁴⁹ Federal Department of Foreign Affairs, Human Rights Strategy 2016–2019.

In recent years, through a number of efforts, the Federal Council has achieved progress in curbing illicit financial flows that undermine the rule of law and the enjoyment of human rights in Switzerland and in other jurisdictions. The fact that the Government of Switzerland expects all businesses based in Switzerland, including public and private financial institutions, to respect human rights wherever they operate should be welcomed. As a part of this stance, businesses and financial institutions are also required to exercise human rights due diligence throughout their business and client relationships.

Switzerland can play a key role in curbing illicit financial flows and become a front-runner in integrating human rights into the public and private financial sectors. This article has identified good practices that other financial centres could follow but also indicates areas where there is room for improvement. For instance, measures could be taken to strengthen the accountability, regulation and supervision of the Swiss financial market to prevent adverse human rights impacts caused by illicit financial flows.

Human rights considerations should be systematically integrated into the financial policies of public and private institutions based in Switzerland. First, ensuring human rights due diligence is a legal obligation under international human rights standards.⁵⁰ Second, further embedding human rights in financial policy would enhance the reputation of the Swiss financial sector, strengthen the credibility of the sector's human rights policies and help to make the Swiss financial market a leader in sustainable finance. Lastly, and most importantly, such a move would improve the protection and enjoyment of human rights in Switzerland and abroad.

Integrating human rights due diligence into the financial regulatory field should be considered an evolving duty, given that the asymmetric power relations undermining human rights and underlying the operations of financial markets need to be continuously addressed.

In the light of these conclusions, a number of recommendations recently made to the government and public institutions in Switzerland, as well as public and private financial institutions operating in the country are presented for discussion. They were part of a mission report discussed with the Swiss government at the UN Human Rights Council during its session on 28 March 2018.⁵¹

First, regarding the government and public institutions in Switzerland, it is crucial to take further steps to prevent the undetected entry of illicit financial flows into the Swiss financial market, as well as ensure that banks and financial intermediaries exercise sufficient due diligence with clients, in particular politically exposed persons and high-net-worth individuals, and assess the effectiveness of the existing regulatory framework. There should also be introduced sufficiently dissuasive, proportionate and effective sanctions for financial institutions and their employees who fail to exercise due diligence or assist in tax evasion or money-laundering.

Another proposal is to reduce significantly the SwF 300,000 threshold for the amount of tax that must be evaded within one year before criminal responsibility is incurred for money-laundering when assisting a foreigner in tax fraud. The offence should also cover all forms of tax evasion and should not be limited to tax fraud.

It is important to continue efforts to encourage all financial intermediaries to systematically submit suspicious transaction reports to the Money-Laundering Reporting Office of Switzerland and to expand the Office's power so that, in the absence of a suspicious transaction report in Switzerland, it can obtain information in the possession of financial intermediaries from its foreign counterparts. It is equally relevant to expand the number of developing countries participating in the automatic exchange of information on taxation matters by further increasing technical assistance and allowing low-income countries to gradually meet requirements relating to the exchange of taxation information.

⁵⁰ Committee on Economic, Social and Cultural Rights, General Comment No.24; Guiding Principles on Business and Human Rights; and Guiding Principles on Foreign Debt and Human Rights.

⁵¹ A/HRC/37/54/Add.3.

As envisaged, Switzerland needs to bring corporate tax regimes into conformity with OECD standards by abolishing tax-reduction schemes that facilitate profit shifting by transnational corporations, without replacing those schemes with new avenues for tax reduction; and continue to support measures at the international level to reduce harmful tax competition between countries.

What is clearly missing is to carry out a human rights impact assessment of the proposed corporate tax reform, in particular its impact on revenues available for the realisation of economic and social rights within Switzerland and in developing countries.

There is a need to increase the staff, resources and powers of the Swiss Financial Market Supervisory Authority in proportion to the size of the Swiss financial market and the volume of assets managed by its financial institutions, to ensure that the Authority has sufficient capacity to supervise all financial intermediaries adequately and irrespective of their size.

It would be important to publicly identify financial institutions that have been subjected to sanctions or corrective action, to ensure individual corporate accountability for non-compliance with banking regulations. Also crucial is to ensure that stolen assets derived from corruption, misappropriation of public funds and other criminal conduct can be seized by the Swiss authorities when mutual legal assistance is possible, but unsuccessful, because criminal prosecutions fail to take place in foreign jurisdictions or do not meet international due process standards. It should be possible to seize such assets where the holder has failed to demonstrate that they are derived from legitimate economic activities.

Revising the Foreign Illicit Assets Act to allow for the freezing and confiscation of assets derived from corruption or other criminal conduct by politically exposed persons while they are still in power, and ensure that stolen funds are returned to their rightful owners in a timely manner; that the owners of those funds have a say in their final use and that there is full transparency and accountability regarding the funds' use after they are returned should also be considered.

Regarding public and private financial institutions specifically operating in Switzerland, they need to enhance their reporting of suspicious transactions related to corruption, money-laundering or tax evasion to the Money-Laundering Reporting Office of Switzerland, as well as ensure that assets managed by them are not invested in businesses or provided to state actors responsible for corruption, tax evasion or violations of human rights or international labour standards.

Finally, they need to adopt policies to prevent the provision of financial services or support to individuals, companies or states responsible for gross violations of human rights; and implement the Guiding Principles on Business and Human Rights and the Guiding Principles on Foreign Debt and Human Rights.

Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit

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✉ Brexit; Citizenship; EU nationals; Fundamental rights; Human rights

Abstract

The aim of this article is to offer a fundamental rights reading of Union citizenship at a time where individual life choices based on the assumed certainty of Union citizenship and the right to free movement are put in jeopardy. The withdrawal of a Member State from the EU serves as a prism through which to revisit the conception of Union citizenship. The article starts by providing a close analysis of the evolving case-law of the Court of Justice of the European Union (the Court) on that citizenship. The article then highlights the potential of a normative, fundamental rights approach to Union citizenship that includes individuals in the EU legal order and protects them against exclusion through the removal of that fundamental right. That allows a coherent interpretation of the recent case-law on citizenship, the Charter of Fundamental Rights of the EU and the general principles of Union law as derived from constitutional traditions of the Member States and international law. If Union citizenship is understood as such a fundamental rights-based concept, then the intrinsic connection between being a Union citizen and a national of a Member State of the Union competes with the protection of Union citizenship as a fundamental right that is conferred on each individual. Union citizenship is not just an objective status that states can confer and remove.

Introduction

This article enters new territory with the claim that primary law enshrines an individualistic fundamental rights-based conception of Union citizenship. The article offers an analysis of the material trend in the recent jurisprudence of the Court that, together with the Charter of Fundamental Rights of the EU and the constitutional traditions of the Member States, can be coherently explained with the conception of Union citizenship as a fundamental right. The argument proceeds in three steps.

It first demonstrates that Union citizenship is not simply a Treaty-conferred dispositive status, but that existing primary and secondary law limits the disposition on citizenship and the rights that come with it.

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The case-law of the CJEU highlights a tendency towards Union citizenship as a fundamental right that cannot be taken away by a Member State, either through the decision of a state authority or the collectivity of the people of a state, or by the EU itself. To this end, the recent case-law of the Court on Union citizenship protecting the individual against exclusion will be examined closely. Part I analyses the recent jurisprudence of the Court concerning Union citizenship in the citizen–state relationship and in the state–state relationship, with the focus on the protection of Union citizens against physical exclusion from Union territory, i.e. measures of expulsion or extradition that are obstacles to free movement. This is followed by close scrutiny of the case-law for protection of Union citizens against legal exclusion through loss of their citizenship.

The article then adopts in Part II the normative perspective of Union citizenship as a fundamental right. This section concludes with framing a normativity of Union citizenship as a fundamental right which the analysis supports. The conception of Union citizenship has attracted much debate in the literature. It has been proposed to differentiate on the basis of the function of citizenship between market citizenship, social citizenship, or republican citizenship.¹ Closely related is the question whether Union citizenship is a *sui generis* concept, categorically different from the concept that has formed within the nation state.² Professor Barnard makes the case that all citizenship operates the distinction between inclusion of some and exclusion of others.³ Others have focused on the rationale of each Union citizenship right.⁴ This section argues for a conception of Union citizenship rooted in the normativity of a fundamental right. In examining the EU Charter of Fundamental Rights, the constitutional traditions of the Member States and international law, the analysis arrives at a normative turning point. The normativity of Union citizenship as a fundamental right will not only capture the analysis but also prevent a sharp decline in the protection of Union citizens in case of the withdrawal of a Member State from the Union. From there, it will be demonstrated that protection against removal of Union citizenship is the logical consequence.

The article turns in Part III to three counterarguments that have been raised or could potentially be raised. The first concerns a purported categorical difference between citizenship in the state and in the EU. The second counterargument is that art.20(1) of the Treaty on the Functioning of the European Union (TFEU) inseparably and permanently connects Union citizenship with EU membership of the state of nationality. The third counterargument is the claim that art.50(1) of the Treaty on European Union (TEU) permits the collective decision of a state to withdraw from the EU, thereby removing citizenships and related rights.

The article explores the implications of this fundamental rights-based conception of Union citizenship by reference to the departure of a Member State from the EU. With the withdrawal of the UK from the Union pursuant to art.50 of the TEU becoming effective by default in March 2019, the Treaties will cease to apply between the UK and the remaining Member States. Brexit thus amounts to a fundamental test for a still new legal institution of supranational citizenship: it challenges the very viability of Union citizenship as a concept that has, just as citizenship in Member States, at its core the individual's claim to protection. More radically, the second and third part of the article make the case that since citizenship rights and Union citizenship as such are fundamental rights, they can survive the UK's withdrawal from the EU. The most obvious argument against this proposition is that citizenship rights derive from the EU Treaties, so if those Treaties cease to bind then the rights must disappear as well. The Treaties could confer individual rights that are powerful and far-reaching, yet that alone would not explain in itself what happens when the instrument from which they originate is removed. However, if Union citizenship is seen as a

¹ Dmitry Kochenov, "The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?" (2013) 62 *Int'l Comp L. Q.* 97; Catherine Barnard, *The Substantive Law of the European Union* (5th edn, Oxford University Press, 2016), p.325, with references in fn.40.

² Barnard, *The Substantive Law of the European Union* (2016), p.325.

³ Barnard, *The Substantive Law of the European Union* (2016), p.326.

⁴ Daniel Thym, "The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens" (2015) 52 *Common Market L. Rev.* 17, 18.

fundamental right, then it acquires a normativity of its own that is distinct from the classic normativity of a treaty that ultimately rests on the (continuing) consent of sovereigns. That normativity sustains citizenship post-exit of the state. In the political discussion at least, it is by far more difficult to argue that Union citizenship is similar to being a citizen in the Member State than that citizenship in a state is conceptually different from citizenship in the Union, even if that means arguing for an understanding of state sovereignty that directly diminishes individual protection. By contrast, this article will outline a coherent conception of Union citizenship that has the implication that Brexit does not extinguish the Union citizenships held by UK or EU27 nationals. Rather, current citizenships will continue as a matter of law.

I. Analysing the evolution of the Court's citizenship case-law

Pursuing the aspiration to create a “Europe for citizens” dating back to the early 1970s, the 1992 Maastricht Treaty inserted a new Part Two into the EC Treaty, entitled “Citizenship of the Union”.⁵ The roots of this citizenship go even further back, with the idea of removing obstacles to free movement of workers dating back to the establishment of the Organization for European Economic Cooperation.⁶ Developing the Single Market after founding a free trade area and a customs union, the conception of Union citizenship was greeted with the expectation that it would manifest the principle of non-discrimination and equal treatment of workers and non-workers, and it would give back the person-quality to workers beyond their market-functionality while raising the level of protection for non-workers.

After revision by the 2007 Lisbon Treaty,⁷ Union citizenship is now contained in Title II of the Treaty on European Union (TEU)⁸ and Part Two of the Treaty on the Functioning of the European Union (TFEU).⁹ Article 9 of the TEU and art.20(1) of the TFEU establish citizenship of the Union, held by every person holding the nationality of a Member State, while para.2 of art.20 of the TFEU lists rights that this Union citizenship encompasses: the right to reside in another Member State; the right to vote and stand in certain elections; diplomatic and consular protection; and the right to petition to the European Parliament and to the European Ombudsman. These rights are provided for in more detail in arts 21–25 of the TFEU. The right to reside in another Member State than the home state (art.21 of the TFEU) and the right to vote and stand for candidate (art.22 of the TFEU) are directly applicable individual rights.¹⁰

This section demonstrates that the case-law of the Court extends citizenship law beyond the wording in the Treaties. This case-law has established Union citizenship as the fundamental status of individuals. From that basis, it has progressively strengthened the right to reside in the EU territory to comprise the right not to be excluded through either expulsion or extradition.

1. Union citizenship as fundamental status in the citizen-state relationship

In its constant case-law since *Grzelczyk*,¹¹ the Court has qualified Union citizenship, under art.20(1) of the TFEU, as the “fundamental status” of individuals. The deontological quality of this status, its function and capacity to yield rights, have attracted much debate.¹² The test lies in the rights that are based on the status, without being explicitly provided in the Treaties or the implementing legislation. The Court has

⁵ Treaty on European Union [1992] OJ C 191/1, 29 July 1992.

⁶ Catherine Barnard and Fraser Butlin, “Free Movement vs. Fair Movement: Brexit and Managed Migration” (2018) 55 Common Market L. Rev. 203, 208.

⁷ Treaty of Lisbon [2007] OJ C 306/1, 17 September 2007.

⁸ Treaty on European Union (Consolidated version) [2016] OJ C 202/13, 7 June 2016.

⁹ Treaty on the Functioning of the European Union (Consolidated version) [2016] OJ C 202/47, 7 June 2016.

¹⁰ See Niamh Nic Shuibhne, “The Developing Legal Dimensions of Union Citizenship”, in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), p.477.

¹¹ *Grzelczyk* (C-184/99) [2001] E.C.R. I-6193 at [31]; *Baumbast and R* (C-413/99) [2002] E.C.R. I-7091 at [82] [hereinafter *Baumbast*]; *Janko Rottmann v Freistaat Bayern* (C-135/08) [2010] E.C.R. I-1449 at [43] [hereinafter *Rottmann*]; *Murat Dereci v Bundesministerium für Inneres* (C-256/11) [2011] E.C.R. I-11315 at [62] [hereinafter *Dereci*].

¹² See for qualification of citizenship as status in domestic law, Laurie Fransman, *Fransman's British Nationality Law* (3rd edn, 2011).

had recourse to the status itself to shore up protection. Since *Singh*, it recognises the right to return to one's Member State of nationality.¹³ The Court includes such unwritten rights into the supporting secondary law on Union citizenship,¹⁴ by way of analogy, for citizens who return to their Member States of nationality after having exercised their free movement rights.¹⁵

Starting with *Ruiz-Zambrano*¹⁶ and continued recently in *Rendón Marín*¹⁷ and *Chavez-Vilchez* the Court has consistently concluded that citizens, who have not exercised their right of free movement and therefore do not fall under art.21 of the TFEU, still have the right to reside where they choose in the EU territory including their own Member State. In this reasoning, reference to the effectiveness of the status informs the interpretation of the relating bundle of rights, so that beyond the wording of art.21 of the TFEU a right to reside in and to return to one's own Member State is recognised.¹⁸ Thus, the reasoning that underpins this jurisprudence merits closer attention. It invokes the "effectiveness" of the fundamental status of Union citizenship and the "substance" of the relating rights that is inviolable.

The underlying logic of effectiveness is twofold. First, to prevent Union citizens from being deterred from exercising their freedom of movement rights, if on return to the home country, conditions of entry and residence are not at least equivalent to those in another Member State.¹⁹ Second, exercising free movement rights shall not entail *ex post* disadvantages for Union citizens. So, not only should Union citizens not be discouraged from leaving their home Member State, they should also not be *ex post* penalised for doing so.²⁰ To put it differently, exercising freedom of movement rights should not be a risky endeavour, which it will be if Member State nationals must consider whether they will be able to return to their home state with their family members. Even more risky is free movement if the individual citizenship is discontinued in case the EU membership of the state of destination comes to an end. Such uncertainties about continued membership of states pose the most profound threat to exercising freedom of movement rights and while they have materialised in Brexit, they are not necessarily restricted to this one case.

Going further than the Court, in *Ruiz Zambrano*, AG Sharpston had reasoned that "only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship", yet indicating that this should be decided with the support of the Member States.²¹ The Court more narrowly decided that Member States cannot refuse the right of residence to carers of EU citizens who are minors. However, it should be noted that all governments had submitted that in the given circumstances, EU law would not be applicable. Consequently, the Court answered the

¹³ *The Queen v Immigration Appeal Tribunal and Surinder Singh, Ex p. Secretary of State for Home Department* (C-370/90) [1992] E.C.R. I-04262 at [25] [hereinafter *Singh*] with regard to art.39 of the EC and Regulation (EEC) No.1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 II, p.475); also *Eind* (C-291/05), 11 December 2007 at [32].

¹⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2007] OJ L 204/28 as amended by Regulation 492/2011, [2011] OJ L 141/1 [hereinafter Citizenship Directive 2004/38].

¹⁵ *HC Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringssbank* (C-133/15), 5 May 2017 [hereinafter *Chavez-Vilchez*] uses analogy to extend the Citizenship Directive 2004/38, which concretises art.21 of the TFEU to a returner situation: "Even though Directive 2004/38 does not cover such a return, it should be applied, by analogy, in respect of the conditions that it lays down for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the reference person if it is to be possible for a derived right of residence to be granted to a third-country national who is a family member of that Union citizen"; *O v Minister voor Immigratie, Integratie en Asiel* (C-456/12), 12 March 2014 at [50]; *Secretary of State for the Home Department v Rozanne Banger* (C-89/17), 12 July 2018 at [33]. Article 21 of the TFEU has served as the basis for the application by analogy of Directive 2004/38 in *O and B* (C-456/12), 12 March 2014 at [61].

¹⁶ *Gerardo Ruiz Zambrano v Office national de l'emploi (ONem)* (C-34/09) [2011] E.C.R. I-1177 [hereinafter *Ruiz Zambrano*].

¹⁷ *Alfredo Rendón Marín v Administración del Estado* (C-165/14), 13 September 2016 [hereinafter *Rendón Marín*] (the Spanish daughter of a third-country national had a right to reside in Spain under art.20 and the Polish daughter had a right to reside under art.21 of the TFEU and the Citizenship Directive 2004/38).

¹⁸ *Chavez-Vilchez* (C-133/15), 5 May 2017 at [63]: "the effectiveness of Union citizenship would ... be undermined, if ... that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status."

¹⁹ *Secretary of State for the Home Department v Rozanne Banger* (C-89/17), Opinion of AG Bobek, 10 April 2018 at [31].

²⁰ *Secretary of State for the Home Department v Rozanne Banger* (C-89/17), Opinion of AG Bobek, 10 April 2018 at [43], [44].

²¹ *Ruiz Zambrano* (C-34/09), Opinion of AG Sharpston, 30 September 2010 at [163], see also [172] for a comparison with the "incorporation" case-law in US constitutional law.

precise question referred to it and, in so doing, further developed the law, while at the same time being cautious not to overstep the line of Union law and of its own judicial competences.

McCarthy and *Dereci* correspond to the rationale of caution, by preserving Member States competences for their purely internal situations. In both cases, the Court found that the situation was governed by national law and this did not interfere with the substance of either art.20 or art.21 of the TFEU.²² The Court cannot overcome the distribution of competences between the Member States and the EU through case-law, however, this certainly requires a very clear definition of criteria to define when such a situation involving a Union citizen can indeed be considered as purely internal. Yet the claim that Union citizenship is a fundamental right does not require a jurisprudence that would transform art.20 of the TEU into a competence provision for the EU in purely internal situations.

The reasoning underpinning the case-law indeed merges into a deeper normativity of a fundamental right quality of Union citizenship that is rooted in the protection of an established link between the individual and the Member State and the individual and the EU. It has already been pointed out that the Court's jurisprudence on Union citizenship-as-status provides the guarantee of being on the territory of the EU subject to its legal order. That comprises the right of a Union citizen to enter the Union territory (*Baumbast*),²³ the right of a Union citizen to return to one's own Member State (*Singh*)²⁴ and the right of a Union citizen to reside in one's own Member State (*Ruiz Zambrano*).²⁵ Professor Kochenov has pointed out these cases overcome the transboundary nature of a Union citizenship that applies only where a citizen has exercised his right to move to another Member State.²⁶

It is protection for Union citizens facing the threat of de facto physical exclusion from the EU territory that motivates this jurisprudence. The Court's recent jurisprudence further shores up this protection against physical exclusion through the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.²⁷ This rationale brings the fundamental right normativity to bear on protecting the family life and, in particular, the citizen-child against expulsion. To this effect are created and progressively reinforced the derived residence rights of third-country carers of children having Union citizenship. The *Metock* and *Lounes* line of cases implicitly incorporate the fundamental right of the citizen to a private and family life enshrined in art.7 of the Charter.²⁸ *Rendón Marín* now expressly activates this fundamental right in the interpretation of art.20 of the TFEU. Rendón Marín's situation must be assessed taking account of the right to respect for private and family life as laid down in art.7 of the Charter and for the rights of the citizen-child enshrined in art.24(2) of the Charter. The Court therefore narrows the public policy/security grounds for removing the carer.²⁹ In *Chavez*, the Court connects the Treaty-based right of the Union citizen-child with the fundamental right of the child guaranteed in art.24(2) of the Charter.³⁰ It also underpins

²² *McCarthy* (C-434/09), 5 May 2011 at [48], the Court made clear that as a national of a Member State, the person enjoys the status of Union Citizen under art.20(1) of the TFEU, including in relation to the Member State of origin; *Dereci* (C-256/11), 15 November 2011 at [64].

²³ *Baumbast* (C-413/99) [2002] E.C.R. I-7091.

²⁴ *Singh* (C-370/90) [1992] E.C.R. I-4265. The Court bases the extension of protection in the situation of return to a citizen's home country in a situation that is similar to a situation for which the law provides and thereby protects citizenship.

²⁵ *Ruiz Zambrano* (C-34/09) [2011] E.C.R. I-1177.

²⁶ Dimitry Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe" (2011) 18 Col. J Eur. L. 55.

²⁷ Cf. Nic Shuibhne, "Integrating Union Citizenship and the Charter of Fundamental Rights", in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017), p.209.

²⁸ *Blaise Baheten Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] E.C.R. I-6241 at [62]: "if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed"; *Toufik Lounes v Secretary of State for the Home Department* (C-165/16), 14 November 2017 at [52] [hereinafter *Lounes*]: "The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, in the host Member State."

²⁹ *Alfredo Rendón Marín v Administración del Estado* (C-165/14), 13 September 2016 at [81], "Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marín's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter."

³⁰ *Chavez-Vilchez* (C-133/15), 5 May 2017 at [63].

it with additional effective procedural safeguards. These are fundamental rights of all persons, protecting every person under the jurisdiction of the EU or its Member States. Yet activating them within the scope of application of Union citizenship turns it into a citizen right.

There is also agreement that Union citizenship protects against legal exclusion through removing a Union citizen's nationality, entailing the loss of Union citizenship. Such legal exclusion would result from a Member State removing its nationality, thereby automatically stripping the individual concerned of Union citizenship. In *Rottmann*³¹ the Court found that this is a matter of EU law. Rottmann, who had Austrian nationality, had acquired German nationality and, as a result, lost his Austrian nationality. When the German authorities discovered that Rottmann had made false representations during the naturalisation procedure, they removed his German nationality. In its preliminary ruling, the Court found that the status as a citizen of the Union conferred by art.20 of the TFEU applies to this constellation. As such, in *Rottmann* the Court makes it clear that the removal of a Member State's nationality, because of its implications for Union citizenship, becomes a matter of EU law and not only of national laws. The consequence of this is that removal of the status follows different rules than the conferral that is solely governed by national laws. In consequence, the national court must ascertain whether the principle of proportionality in the light of national and EU law is observed.³² The added value is that Union law criteria and in particular the rights in Union law that the individual will lose with its nationality provide a further standard that the national measure must comply with. How this proportionality test will be further developed, on the level of national legislation (concerning the proportionality of the law itself) and administrative measures in individual cases, remains to be seen. Interesting developments are to be expected from the pending case of *Tjebbes*.³³ The case concerns adults of Netherlands nationality and their children who had always lived in third countries. Advocate General Mengozzi accepts in his Opinion³⁴ that the proportionality review of a national law that leads to the loss of nationality under certain circumstances *ex lege* is performed *in abstracto* and without considering every possible individual circumstance, as this would replace the criteria that the national legislature has chosen. Crucially important is, however, that the individual has the option to influence the loss of citizenship. According to Netherlands law, a Netherlands national would only lose its nationality if living in a country outside the EU for more than 10 years. However, this period is interrupted if the person concerned has principal residence in the EU for a period of not less than one year or applies for the issue of a declaration regarding the possession of Netherlands nationality, a passport or a Netherlands identity card, to demonstrate that there is a link with the Netherlands and the individual wishes to continue this. The person concerned thus has the option of retaining Dutch nationality, even without taking up residence, simply by applying for a renewed passport within the 10-year period. Consequently, the AG sees the situation of minors differently: they lose nationality as a consequence of the loss of nationality of one parent. Minors do not have the opportunity to avoid that loss by applying for the relevant documents. Thus, according to the AG, the national law on losing nationality as far as minors are concerned is not compatible with the autonomy of their status of Union citizenship given its proportionality.

³¹ *Rottmann* (C-135/08) [2010] E.C.R. I-1449.

³² *Rottmann* (C-135/08) [2010] E.C.R. I-1449 at [55].

³³ Request for preliminary ruling from the Raad van State (Netherlands) of 27 April 2017, *MG Tjebbes v Minister van Buitenlandse Zaken* (C-221/17) [2017] OJ C 239/32. The referred questions read: "Must Articles 20 and 21 of the Treaty on the Functioning of the European Union, in the light of, inter alia, Article 7 of the Charter of Fundamental Rights of the European Union, be interpreted—in view of the absence of an individual assessment, based on the principle of proportionality, with regard to the consequences of the loss of nationality for the situation of the person concerned from the point of view of EU law—as precluding legislation such as that in issue in the main proceedings, which provides: (a) that an adult, who is also a national of a third country, loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, on the ground that, for an uninterrupted period of 10 years, that person had his or her principal residence abroad and outside the European Union, although there are possibilities for interrupting that 10-year period; (b) that under certain circumstances a minor loses, by operation of law, the nationality of his or her Member State, and consequently loses citizenship of the Union, as a consequence of the loss of the nationality of his or her parent, as referred to under (a) above?" (emphasis added).

³⁴ *Tjebbes* (C-221/17), Opinion of AG Mengozzi, 12 July 2018. The discussion of the Opinion above is based on the French text, with the English translation not yet available.

Since *Rottmann*, the status of Union citizenship is engaged by an individual losing *any* nationality of a Member State and *thereby* his or her Union citizenship. The AG in the *Tjebbes* case confirms that no further link with EU law other than the citizenship is required. He then signals that Union law requires proportionality between the interest of the state to set rules for the acquisition and loss of nationality and the interests of the individual concerned in maintaining links with the Member State and hence the EU. The additional protection of Union law provided by the proportionality test is tangible in the situation of loss of nationality. EU law increases the protection of the established link with the Member State because the individual has also received the promise of protection from the Union legal order in receiving Union citizenship, without replacing national law criteria for the continued existence of the link. The specific value judgment is that the loss of Union citizenship is more likely to be proportional in relation to individual circumstances, for instances in cases where the individual has deceived authorities in obtaining the nationality of a Member State or the individual has had the option to avoid the loss of nationality. Conversely, a much stricter proportionality test is applicable in cases where individuals are not in a position to avoid the loss of Union citizenship.

2. Protection of Union citizens in the state-state relationship

The case-law extends this protection of Union citizens against exclusion to non-extradition to a third state. *Petruhhin*³⁵ concerned an Estonian national resident in Latvia. The Russian Federation sought his extradition by Latvia for crimes allegedly committed by Petruhhin in Russia. Upon referral, the Court ruled that EU law constituted a bar to such extradition. Petruhhin had exercised his right to free movement under art.21 of the TFEU and hence the matter was within the scope of EU law. The Court also found that under the right to non-discrimination on the ground of nationality set forth in art.18 of the TFEU the citizen benefited from the constitutional guarantee of non-extradition for Latvian nationals under Latvian constitutional law.³⁶ Non-discrimination meant that any different treatment of Petruhhin had to be proportionate, and that extradition to Estonia was a less severe restriction than extradition to Russia. Union citizenship thus incorporates fundamental citizens rights that constitutional law enshrines. Admittedly, this constitutional law protects absolutely against any extradition to a third country. Yet the Court achieved a similar level of protection, by additionally applying art.19(2) of the Charter, obliging the national court to scrutinise whether the citizen was facing the risk of inhuman or degrading treatment in the Russian Federation.³⁷ *Schotthöfer* illustrates this absolute link with the EU legal order.³⁸ The Union citizen there, the Austrian Adelsmayr, ran a “serious risk” within the meaning of art.19(2) of the Charter of being subjected to the death penalty upon being extradited to Saudi Arabia, outlawed by art.2 of the Charter. Germany therefore had to reject the request for extradition of Adelsmayr. This ruling links Union citizenship with non-extradition from the EU territory as a whole. It demands that Member States incorporate the protection that constitutional law offers to their own citizens to Union citizens and this is underpinned by the protection standard of the Charter. The individual obtains a subjective right that is bolstered up by constitution law and Union law against the host state not to be extradited, and the legal link for this claim is Union citizenship. This case-law demonstrates how the concept of Union citizenship receives its normativity from national constitutional law and the Charter. It also illustrates that while it is a Union concept, Member States are obliged to ensure they meet the required standard of protection that their constitutions, Union law and the normativity of the fundamental right of art.19 that the Charter enshrines.

³⁵ *Aleksei Petruhhin* (C-182/15), 6 September 2016 [hereinafter *Petruhhin*].

³⁶ *Petruhhin* (C-182/15) at [32].

³⁷ *Petruhhin* (C-182/15) at [51].

³⁸ *Peter Schotthöfer & Florian Steiner GbR v Eugen Adelsmayr* (C-473/15), Order of the Court of 6 September 2017 [hereinafter *Schotthöfer*].

In *Pisciotti*,³⁹ the Court has held that these protections also apply in the context of an EU extradition treaty. The US had requested Germany to extradite an Italian national, Pisciotti, who relied on the non-discriminatory application of the guarantee of non-extradition of German nationals in art.16 of the German Constitution. The Court found that Pisciotti had exercised his free movement right under art.21 of the TFEU by stopping over in Frankfurt airport, opening the scope of application of that provision and of art.18 of the TFEU. However, the Court's further analysis is focused exclusively on the right of art.21 of the TFEU, rather than non-discrimination. The Court found that extradition is an interference that must be proportionate to the objective of effective criminal prosecution. The Member State therefore has to choose the less restrictive means. Extradition to Member States pursuant to the European Arrest Warrant⁴⁰ is in principle the less severe restriction than extradition to a third state. Only if no such request is forthcoming, as it was the case in *Pisciotti*, then extradition to a third state is possible.

In a development of *Petriuhhin*, *Pisciotti* provides protection of the citizen against extradition solely within Union citizenship law. This protection integrates the fundamental right normativity of the constitutional law of the Member States, but does no longer resort to it. The Union citizen is protected against such physical removal from the territory of the EU by virtue of Union citizenship law, autonomously and independent of incorporated constitutional law of the Member State of residence. This protection solely depends on the citizen having exercised his or her right to freedom of free movement, but that exercise may be fleeting as in an airport stopover (*Pisciotti*) or even a planned journey (*Schotthöfer*).⁴¹ For the continued exercise of that right, the citizen must then meet the conditions that secondary law lays down.⁴² Extradition of a Union citizen to a third state is unlawful, with the sole condition of a request forthcoming under the Framework Decision on the European Arrest Warrant. But art.19(2) of the Charter, prohibiting any extradition—or expulsion—to a third country where the citizen faces the risk of inhuman treatment would still constitute an absolute bar even where no such request is forthcoming.

II. Union citizenship-as-fundamental right

The above discussion of the case-law on Union citizenship has shown that status yields a right to reside as well as certain limits on the indirect loss of Union citizenship resulting from the removal of nationality. Treaty-based status, however, does not fully explain the expansive jurisprudence, nor does it allow its consistent legal reconstruction. This section therefore casts the novel perspective of Union citizenship having the normative quality of a fundamental right.

Fundamental rights own a specific normativity over other law, and the first step therefore will be to identify the specific normativity of inclusion/non-exclusion into the EU legal order. This normativity can be shown to have two functions: it is explanatory and legal-reconstructive of the case-law.

The second step is to identify the hard edge of that normativity: that no-one can be excluded against their will from the protection that citizenship entails. Union citizenship is protected against measures to remove it by the Member States or the EU. Brexit becomes a prism on the nature of Union citizenship precisely because it directly removes Union citizenship, but not nationality.

While the Court is yet to take this step, the fundamental rights law of the EU provides strong authority for it. The section first analyses the guarantees that the Charter of Fundamental Rights of the European Union sets forth for the rights of Union citizenship. While there is no express guarantee of that citizenship

³⁹ *Roamano Pisciotti v Bundesrepublik Deutschland* (C-191/16), 10 April 2018 [hereinafter *Pisciotti*].

⁴⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1, 18 July 2002.

⁴¹ *Schotthöfer* (C-473/15) at [21].

⁴² *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (C-333/13), 11 November 2014. This restrictive approach of the Court to economically inactive Union citizens has met with strong criticism, see Daniel Thym, "When Union Citizens Turn into Illegal Immigrants: The Dano Case" (2015) 40 Eur. L. Rev. 249; R. McCrea, "Forward or Back: The Future of European Integration and the Impossibility of the Status Quo" (2017) 23 Eur. L.J. 66.

itself, that is the logical consequence, compatible with the declaratory function of the Charter. The section then considers the general principles of EU law, as a complementary source of EU fundamental rights. The qualitative comparison of the constitutional traditions of the Member States supports Union citizenship-as-fundamental right, and so does European and international human rights law.

1. The normativity of Union citizenship-as-fundamental right

Whereas the fundamental status quality of Union citizenship is now well-established and accepted, the cases cannot be satisfactorily explained by way of Union citizenship as a status in the Treaty. The direction of travel of the decisions of the Court and the influence of the Charter warrant the need for those cases to be looked at from the frameset of an underlying consistent normativity, instead of simply that of a status. The decisions instantiate the normativity of a fundamental right of Union citizenship.

The normative conception of Union citizenship-as-fundamental right secures the reliable inclusion of individuals in the EU legal order *and* their effective protection from exclusion. The individual is included in this legal order designed to enable individual self-determination and human dignity.⁴³ The dichotomy of inclusion and exclusion is sometimes applied to different sets of persons. But this dichotomy really applies to a given set of people. These are included, and, as a corollary, protected against exclusion. That inclusion has strong connections with democratic self-governance. One is included in the legal order that one has had a chance to shape. Democracy in the EU is based on the inclusion of citizens. This is powerfully expressed in art. 14(1) of the TEU, which after amendment by the Lisbon Treaty provides that the European Parliament represents the citizens of the Union, rather than the peoples of the Member States. Union Citizenship embodies the promise by the EU of protection when this inclusion is threatened.⁴⁴ Non-exclusion of individuals is the other side of their inclusion, against both physical or legal exclusion from that legal order and the territory over which it applies. The life choices of individuals based on Union citizenship and the EU legal order can ultimately be protected only by the EU. This trust the EU must answer in a manner commensurate with its organisation as a union of states, providing protection through internal and external action beyond its territory under its attributed competences.

Grounded in this normativity, Union citizenship becomes the legal institution creating a direct relation between the individual and the EU and its legal order.⁴⁵ Individuals are included in that legal order and protected from being excluded from it. This holds true regardless of Union citizenship being acquired as “*ius tractum*”⁴⁶ and derived from state nationality. This is only about construction of acquisition of that citizenship. It cannot tell us anything about the substance.⁴⁷ In fact, a comparative approach reveals that such models have been tested before in federal systems where the citizenship in the larger polity was derived from those of the smaller polities.⁴⁸

This normativity is explanatory of the direction of the case-law, it is reconstructive in that it provides a novel consistent framework, and it is normative in pointing beyond the established cases.

This uniform normativity makes apparent that Union citizenship is more than a bundle of rights that citizens hold. It provides the single overarching rationale. As such, it explains the direction of the case-law in expanding the scope of Union citizenship beyond the expressly stipulated rights of citizens or its status. The Court relies on the normativity of a fundamental rights-based approach to Union citizenship to ensure

⁴³ *Van Gend en Loos* (26/62) [1963] E.C.R. 2 (the creation of individual rights is the marker of the new legal order that the Treaty of Rome establishes).

⁴⁴ Barnard, *The Substantive Law of the European Union* (2016), p.230.

⁴⁵ Reaching a similar conclusion that rights derive directly from EU citizenship and are not mediated by national law, Dora Kostakopoulou, “*Scala Civium: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens*” (2018) 56 J. Common Market Studies 854.

⁴⁶ Dimitry Kochenov, “*Ius tractum of many faces: European citizenship and the difficult relationship between status and rights*” (2009) 15 Colum. J. Eur. L. 169.

⁴⁷ See Anja Lansbergen and Jo Shaw, “*National Membership Models in a Multilevel Europe*” (2010) 8 I.J.C.L. 50.

⁴⁸ See Dieter Gosewinkel, *Schutz und Freiheit? Staatsbürgerschaft in Europa im 20. und 21. Jahrhundert* (Suhrkamp, 2016) (citizenship of the new German state was derived from citizenship of one of its constituent *Länder* from 1871 up until 1913 when a uniform federal law on citizenship entered into force).

protection of Union citizens against their exclusion, where Treaty or secondary law do not provide this. That normativity drives the evolving case-law precluding acts of exclusion through de facto expulsion and extradition to a third state, but not to another Member State. Such acts not only exclude the Union citizen from the territory of the EU. They also exclude him or her from the EU legal order and submit them to another legal order that he or she has no say in making and that may diverge considerably from the values and guarantees of the EU legal order. The rationale of these cases underpins “status” with an increasingly thick layer of general fundamental rights, ranging from the right to a family life to the right of the child, to tilt the balance towards non-exclusion.

That normativity also permits reconstructing a coherent legal framework. That framework draws on the recognised threefold dimension of fundamental rights, which require the addressees to respect, to protect and to fulfil.⁴⁹ In the dimension of respect, all limitations imposed by public authority become subject to strict controls. Fundamental rights can, of course, be limited, particularly where there is a collision of rights of others or for recognised general interests. This requires proportionality of the measure taken. But fundamental rights also indicate an absolute limit to exclusionary action that cannot be overridden. Expulsion or extradition from the Union’s territory may then conflict with the essence of the fundamental rights of the Charter. The Court in *Petruhhin* and *Pisciotti* accepts that non-exclusion can still be overridden for legitimate objectives of public policy. The limit is the absolute prohibition of expulsion or extradition to a third state where the citizen faces the threat of inhuman treatment, grounded in human dignity.⁵⁰ While the Court was not called upon on the facts of any these cases to say so, this reinforcing incorporation of art.19 of the Charter extends to the right not to be expelled by a collective measure equally repugnant to human dignity that the first paragraph enshrines.⁵¹ This essence is grounded in the master fundamental right of human dignity, art.1 of the Charter. It marks a Union citizenship as belonging to a legal order grounded in human dignity.

2. Protection against legal exclusion

Extradition or expulsion excludes the citizen from the protective EU legal order, removing him or her from the EU territory. Even more than physical exclusion, the exclusion that results from the legal removal of Union citizenship is final. The Court has yet to rule on that aspect of protection against exclusion from the EU legal order that is the consequence of a removal of Union citizenship.

Union citizenship, in this constellation, demonstrates its normative-constructive function. Such removal does away with the basis for all the citizens’ rights that the Treaty and the case-law provide, to reside, to vote, and not to be expelled or extradited. The individual finds himself or herself cut off from much of the EU legal order, and a legal vacuum replaces the certainty this citizenship seeks to establish. As such, removing Union citizenship is more than a change in status; it interferes with the promise of protection inherent in the concept of citizenship.

The protection can be relative in individual cases where the measure is backed by legitimate cause, proportionate and taken in a non-arbitrary procedure. Removal for legitimate reasons pertaining to the individual remains permissible. But protection must be absolute against collective measures that strip a group of people of their citizenship and the concomitant rights against their will. Such collective measures

⁴⁹ The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights.

⁵⁰ *Petruhhin* (C-182/15) at [56]: “In that regard, reference must be made to Article 4 of the Charter which prohibits inhuman or degrading treatment or punishment and it should be noted that that prohibition is *absolute* in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter.” (emphasis added) Also Joined Cases, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU), 5 April 2016 at [85].

⁵¹ Article 19 amalgamates two separate ECHR rights that functionally protect against exclusion: art.19(2) replicates art.3 of the ECHR that, as interpreted by the European Court of Human Rights, prohibits expulsion or extradition to a state where there is a serious risk of inhuman treatment. Article 19(1) replicates art.4 of the Fourth Additional Protocol to the ECHR. Article 19 does not replicate art.3 of that protocol, which guarantees that no one shall be expelled from the territory of the state of which he is a national or be deprived of the right to enter its territory.

infringe the consented understanding of human dignity that precludes making people the object of public policies. Collective removal of Union citizenship is impermissible, absolutely. What is the legal consequence of this fundamental right not to be deprived of Union citizenship against one's will in an arbitrary or collective manner? Interference is unlawful and does not produce legal effect, and thus the individual's citizenship continues.

Such legal removal of Union citizenship by Member States is the scenario of Brexit. Brexit is legally the decision of the UK to terminate the Treaties between it and the Member States. It is a state measure intended to remove Union citizenship directly, rather than indirectly, in the *Rottmann* scenario, as the automatic consequence of the removal of its nationality by a Member State. It is a collective measure that affects groups of people indiscriminately. It strips UK nationals of their Union citizenship, and for EU27 nationals on UK territory hollows out the substance, for many against their will or, like with minors, without them being able to assert their view.

Member States confer Union citizenship through nationality, and must respect, protect and promote it. But where there they do not fulfil the promises that come with it, the Union itself must protect its citizens. It provides that protection through judicial protection before the courts, in the citizen-state and in the state-state constellations. But, as Brexit demonstrates, it also provides protection through political and legal action. The Withdrawal Agreement with the UK is such action, serving to preserve the rights of citizens, both of EU 27 and of UK nationality in a new international law context after the departure of the UK.

3. The legal basis in the EU Charter of Fundamental Rights

This normative conception of Union citizenship-as-fundamental right has a legal basis in the EU Charter of Fundamental Rights. Article 6(1) of the TEU makes the Charter part of the binding primary law, located at the apex of the EU legal order and on par with the Treaties.⁵² In its preamble, the Charter establishes the individualist, fundamental rights-grounded normativity of citizenship of the Union.⁵³ Admittedly, on its wording, the Charter does not enshrine a fundamental right to Union citizenship, or against removal or extradition. An immediate criticism could then relate to the fact the Charter is supposed to have a declarative/declaratory nature and not to create new rights.

Yet, the principal argument is that a fundamental right is a logical consequence of Union citizenship and thus does not affect the declarative nature of the Charter. The Charter provides all the stepping stones, by making clear that rights of citizens have that quality. The precondition of having and retaining the status becomes implicitly guaranteed, as the essence of each of these rights.

Chapter V of the Charter enshrines specific fundamental rights held by Union citizens. These are *inclusive rights*. Article 39(1) of the Charter guarantees the fundamental right of citizens to vote and stand for the European Parliament. Article 45(1) of the Charter guarantees the fundamental right of all citizens, including the non-economically active, to reside in the territory of the Member States. Furthermore, in its Chapter II on Freedoms, the Charter turns the fundamental freedoms of the Treaty into fundamental rights of Union citizens. In art.15(2) of the Charter, Union citizenship is the basis for the guaranteed fundamental right to seek employment, to work, to exercise the right of establishment and to provide services in the Member State. Hence, the Charter provides a fundamental right quality to the rights that citizens hold under the Treaty that are status-based. The added normative layer can become operational. The judgment of the Court in *Delvigne* illustrates this. The Court there connects arts 20(2)(b), 22 of the TFEU with

⁵² Pilar Juarez Perez, "La inevitable extensión de la ciudadanía de la Unión: a propósito de la STJUE de 8 de Marzo de 2011 (Asunto Ruiz Zambrano)" (2011) 3/2 *Cuadernos de Derecho Transnacional* 249–266 (considering *Zambrano* as the first example of the Charter elevating Union Citizenship to the level of a fundamental right).

⁵³ Preamble, 2nd para: "it [the Union] is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union".

art.39(1) of the Charter, the right to vote for the European Parliament in another Member State. The Court also connects the institutional provision of art.14 of the TEU on European Parliament elections with the fundamental right to universal suffrage set forth in art.39(2) of the Charter.⁵⁴ The result is that there is a fundamental right to vote in one's own Member State under the Charter that goes beyond what the Treaty provides.

Article 52(2) of the Charter⁵⁵ provides the conduit between the two manifestations of the same right in the Charter and the Treaty. It re-inserts the interpretation of the Charter rights into the corresponding Treaty rights and vice versa.⁵⁶

The Charter does not enshrine citizens rights against *exclusion*. But it contains general fundamental rights such as the right to a private life and the prohibition against inhuman treatment that provide protection against physical exclusion. These are general fundamental rights for all that are under the jurisdiction of the Member States, including citizens of the Union. These general fundamental rights become functional citizens rights securing the residence that they are guaranteed.

It is true that the Charter does not enshrine a specific right of Union citizens not be stripped of their citizenship. Yet, that is not necessary either. In fact, retention of the status of Union Citizenship itself is guaranteed, inherently, in each of these above rights. It is the basis for their exercise. The Charter brings with it general provisions, Chapter VII, that are integral to each right and define the permissible limitation on the exercise. In art.52(1), the Charter sets forth two such limitations that apply in turn.⁵⁷ Removing Union citizenship is a limitation within the meaning of art.52(1) of the Charter of each right. Such limitation is subject to proportionality and "may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Yet, even such a limitation must also "respect the *essence*⁵⁸ of those [citizens'] rights".⁵⁹

The Grand Chamber of the Court in the *Polish Justice* case⁶⁰ has just activated the essence of a fundamental right enshrined in the Charter as the ultimate limit for any limitation placed on it. The Court there stated that access to an independent court is the essence of the right of judicial protection enshrined in art.47 of the Charter. A systematic concern for the independence of the judiciary in a Member State therefore precludes any extradition to that Member State pursuant to a European Arrest Warrant. Neither the requesting nor to the requested Member State nor indeed the Union legislator may limit the essence of the right of judicial protection of the accused. Such limitation cannot be justified by outweighing general objectives of public policy.

Unlawful derogation of the status of citizenship is equivalent to derogation of the essence of any fundamental right that Union citizens can hold. Even when it is argued that the status of citizenship as such is not a fundamental right in and of its own, given that the possession of Union citizenship is a constitutive element for the direct and indirect fundamental citizens' rights in the Charter, its removal interferes with those rights and their essence. For instance, if an opposition politician would lose nationality or Union citizenship to prevent him or her running for the European Parliament—this would surely breach art.39 of the Charter. Thus, removal of citizenship would qualify as a violation of the Charter. The underlying status cannot be withdrawn lawfully.

⁵⁴ *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* (C-650/13), 6 October 2015 at [42] [hereinafter *Delvigne*].

⁵⁵ It reads: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties."

⁵⁶ Explanations relating to the Charter [2007] OJ C 303/17, which must be given due regard in interpreting it (art.6(1) of the TEU and art.52(7) of the CFR).

⁵⁷ It reads: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

⁵⁸ Emphasis added.

⁵⁹ This being said, the alternative argument can be made that this is further confounding the already difficult application of the primary law, see Nic Shuibhne, "Integrating Union Citizenship and the Charter of Fundamental Rights", in D. Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart, 2017), pp.209, 294.

⁶⁰ *Minister for Justice and Equality* (C-216/18 PPU) (Défaillances du système judiciaire), 18 July 2018.

This is particularly true in a situation where the Union citizen does not have the option to exercise any influence in relation to the possibility that Union citizenship is lost, in accordance with the case-law as discussed in detail above. Furthermore, as with all fundamental rights, the essence or core of each fundamental right is protected absolutely and cannot be restricted.⁶¹ Each fundamental right has an essential content which enjoys enhanced protection. Interference with that essence cannot be justified.

The master norm of the Charter, the absolutely protected human dignity enshrined in art.1 of the Charter, reinforces the fundamental right not to lose one's Union citizenship without consent. Human dignity precludes treating people as mere objects of public authority. Ultimately, protecting human dignity by way of fundamental rights ensures that in case of conflict between law and political power, law prevails at the very least in the form of subjective protection that it has to offer in all western democracies. This human dignity manifests itself in the situation of Union citizens that have exercised their Treaty-bestowed right to move to another Member State trusting in permanency, but bear the consequences of a contrary public decision to exclude them from the protection of the Treaties having nothing to do with them or their actions. The emphasis on individual action and life choices chimes with the dominant principle of Union citizenship law. This principle is that the reasons the host state may invoke to terminate residence must be exclusively personal and must not be collective.⁶²

This Union citizenship as the essence of the citizens' fundamental right under the Charter is grounded in the European Convention on Human Rights (ECHR). Article 52(3) of the Charter determines that the ECHR constitutes the minimum threshold of any corresponding right in the Charter. This threshold includes the jurisprudence of the European Court of Human Rights that shapes the rights of the ECHR. The CJEU must follow this jurisprudence and adopt a congruent interpretation of the corresponding Charter right. The ECHR does not contain a separate fundamental right of citizenship. Yet, the European Court of Human Rights has effectively developed an equivalent protection of status within the fundamental right to a private life that art.8 of the ECHR enshrines. The European Court of Human Rights adopts this reasoning in *Kurić*.⁶³ The case concerned the policy of "erasure", under which Slovenia removed 25,671 of its residents that had not obtained Slovenian citizenship from the register of permanent residents and transferred them to the register of aliens, following the country's secession from the former Yugoslavia in 1992 and the declaration of Slovenia's independence. These individuals were left without a right to lawfully reside in the territory of Slovenia. In *Kurić*, the Grand Chamber found that Slovenia had violated art.8 of the ECHR on the right to a family life, because (i) there was an interference through the denial of residence, (ii) which had no basis in Slovenian law, (iii) and that while the creation of a corpus of Slovenian nationals was a legitimate objective, (iv) it was disproportionate to deprive the applicants of their status that had given them access to a range of rights. The *Kurić* Court thus interprets art.8 of the ECHR to protect the status of being included in the register of permanent residents against the collective measure of erasure on two levels. First, the mere fact that no procedure was put in place to settle the status for ex-SFRY citizens holding the citizenship of one of the other successor republics, but who had been lawfully residing in Slovenia prior to the independence declaration, created a legal vacuum violating art.8 of the ECHR. While that lack of a sufficient legal basis would have been sufficient to find an infringement of art.8 of the ECHR, the Court deliberately examined whether the measure pursued a legitimate aim and was proportionate to it.⁶⁴ It acknowledged that the protection of the country's circle of citizens would be legitimate, however, the measure was not necessary in a democratic society, violating art.8 of the ECHR given the radical repercussions of "erasure" that removed the basis of all other rights of the individuals

⁶¹ Article 52(1) of the Charter corresponds to art.19(2) of the German Basic Law that also separately protects the essence of each fundamental right. Further on the relation between proportionality and essence, see Manfred Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit* (Vienna: Springer, 1991).

⁶² Article 27 of Directive 2004/38/EC.

⁶³ *Kurić v Slovenia* (App. No.26828/06), judgment of 26 June 2012 [hereinafter *Kurić*].

⁶⁴ *Kurić* (App. No.26828/06) at [350].

concerned. The Court protects the status precisely because it gives access to a wide range of rights. The status is the basis of a set of rights essential for leading a private life in dignity, *specifically* under Slovenian law. Protection of fundamental rights begins at the very roots of these rights, the right to be included in a particular legal order. Removing the status through a collective measure such as erasure violates the very essence of that right to a family life. It is important to note that the Court is not concerned with the prevention of statelessness, as most applicants in *Kurić* indeed did have the nationality of another successor state.

Article 51(1) of the Charter specifies the addressees of that fundamental right. Accordingly, the EU is bound for all its institutions and in all its policies. That is important, in regard for instance to the interpretation and application of art.50 of the TEU and subsequently the Withdrawal Agreement that will become EU law. By contrast, according to art.51(1) of the Charter, the Member States are only bound by the Charter when implementing *other* EU law. Member States are implementing EU law in this sense when the Treaty's citizenship provisions are controlling. The Court has adopted an increasingly broad interpretation of the Treaty's citizens free movement right that now even covers a merely planned trip to another Member State.⁶⁵ But going even further, in the *Rottmann/Tjebbes* constellation, the interference with Union citizenship itself constitutes the sufficient nexus. In that constellation, the Member States are always implementing the Treaty and therefore bound to respect the fundamental right to Union citizenship.

4. The complementary basis in the general principles of EU law: the constitutional traditions of the Member States and international human rights law on citizenship

Post-Lisbon, the Charter, in line with the intention to enhance legal certainty, has been taking pride of place in the practical protection of fundamental rights against both the EU and its Member States. The Court applies the manifestation of a fundamental right in the written Charter over the unwritten general principles.⁶⁶ Yet, the Charter does not legally supersede or displace this other source of fundamental rights. Article 6(3) of the TEU makes clear that the general principles of Union law continue to be a valid source. These sources have a mutually reinforcing effect.⁶⁷

Under the formula developed by the Court and now laid down in art.6(3) of the TEU, the standards of constitutional law of the Member States and international human rights law form general principles of EU law. It has always been, and continues to be, the very conceptual presupposition of the general principles as source of EU fundamental rights that those fundamental rights enshrined in national constitutions can be transferred to the different normative environment of the EU because the threats faced by individuals had become similar and needed a fundamental rights limitation. The fundamental right to privacy and digital information is an example. It was hatched originally in the context of the constitutional state, but was then transferred to the EU level and has become a very salient constraint on EU action.⁶⁸ Citizenship is not different. Also hedged in that context of a nation state, it has now been transferred to the EU level and therefore the guarantees pertaining to it have been transferred to the EU level. As it is for privacy, Union citizenship needs protection against action or inaction of the EU, as well of the Member States when implementing EU law.

⁶⁵ *Schotthöfer* (C-473/15) at [21].

⁶⁶ This may also have to do with the legitimacy of having been adopted through the treaty-amending process, see Koen Lenaerts and José Antonio Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Hart, 2014), p.1560.

⁶⁷ For an understanding of the sources of fundamental rights listed in art.6 of the TEU in a non-hierarchical, complementary relationship, see Herwig C.H. Hofmann and Bucura C. Mihaescu, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test" (2013) Eur. Constitutional L. Rev. 74; B.C. Mihaescu Evans, "Gaps' in Protection Stemming From the Coexistence of Fundamental Rights' Sources in the EU Legal Order" (2016) Cahiers de Droit Européen 141. Further, Tacis Tridimas, "The General Principles of Law: Who Needs Them?" (2016) Cahiers de Droit Européen 149; S. Sever, "General Principles of Law and the Charter of Fundamental Rights" (2016) Cahiers de Droit Européen 167.

⁶⁸ *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-594/12), 8 April 2014.

Constitutional guarantees are elevated to the EU level through a bifurcated mechanism. The second mechanism is the guarantee of non-discrimination. Article 18 of the TFEU prescribes that fundamental right guarantees of a Member State for its nationals are extended, on a non-discriminatory basis, to all Union citizens. Article 18 of the TFEU, which prohibits discrimination between Union citizens on the basis of nationality, transfers to the EU level the specific guarantees against extradition to any other country and non-deprivation of nationality for its nationals that Member States constitutional law typically enshrines. As a result, Union citizens now enjoy those guarantees within the territory of the Union regardless of their nationality and even in the territory of their own Member State.

Constitutional and international human rights law give a clear matrix of citizenship. For conferral of citizenship there are several models with discretion for the state on the attribution of citizenship unquestioned. Yet, once it has been conferred, strict fundamental rights controls apply, restricting the powers of the state regarding removal of that citizenship collectively and also individually. But a second element of that matrix is the protection against extradition. National constitutional law protects citizens against both legal and physical exclusion from their legal order. Non-exclusion from a specific protective legal order is the rationale of those guarantees, and not just the prevention of statelessness. Member States constitutions that include the fundamental right of citizens not to lose their citizenship against their will also provide for the consequences of any violation. That consequence is the continued and uninterrupted citizenship.⁶⁹

National constitutional law protects against the loss of citizenship, as a fundamental right, in three situations: removal through a collective decision, removal through an individual decision, and removal through territorial changes. The first two guarantees react to the totalitarian experience and are therefore found in the family of post-totalitarian constitutions of the Member States. For example, art.16 of the 1949 German Basic Law⁷⁰ protects against deprivation of citizenship by general measures absolutely, while individual removal is subject to proportionate measures.⁷¹ It also protects against extradition. Article 26(1) and (4) of the Portuguese Constitution⁷² consider citizenship to be a fundamental right that can only be removed in a very limited set of circumstances. Article 11(2) of the 1978 Spanish Constitution⁷³ recognises the fundamental nature of citizenship and explicitly bars the possibility of non-naturalised individuals being stripped of their Spanish nationality. Section 8 of the 1992 Estonian Constitution⁷⁴ recognises the fundamental nature of citizenship and explicitly bars the possibility of non-naturalised individuals being stripped of their nationality. Article 98 of the Latvian Constitution precludes any extradition of its citizens. Article 9 of the Croatian Constitution that came into force upon its accession to the EU in 2009 provides that a citizen of the Republic of Croatia may not be forcibly exiled from the Republic of Croatia nor deprived of citizenship, nor extradited to another state, except in case of execution of a decision on extradition or surrender made in compliance with international treaty or the EU *acquis communautaire*. This constitution also guarantees the Union citizenship of Croatian nationals, arguably as a fundamental right.⁷⁵

⁶⁹ See, for instance, art.116(2)(2) of the Basic Law of Germany. It establishes that persons unlawfully stripped of their nationality are deemed not to have lost it if they took up residence again after 1945.

⁷⁰ English translation available at: <https://www.bundesregierung.de/Content/EN/StatischeSeiten/breg/basic-law-content-list.html> [Accessed 2 October 2018].

⁷¹ Federal Constitutional Court of Germany, Case 2 BvR 669/04, Judgment of 24 May 2006, 116 BVerfGE 24.

⁷² English translation available at: <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> [Accessed 2 October 2018].

⁷³ English translation available at: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> [Accessed 2 October 2018].

⁷⁴ English translation available at: <https://www.president.ee/en/republic-of-estonia/the-constitution/> [Accessed October 2018].

⁷⁵ Article 152 of the Croatian Constitution provides that: "Citizens of the Republic of Croatia shall be European Union citizens and enjoy the rights guaranteed by the European Union *acquis communautaire*, and in particular: ... In the Republic of Croatia, all rights guaranteed by the European Union *acquis communautaire* shall be enjoyed by all citizens of the European Union." *Official Journal of the Republic of Croatia*, Narodne novine (N.N.), No.85/2010, 6 July 2010. English text of the Croatian Constitution is available at: <http://www.sabor.hr/jgs.axd?id=17074> [Accessed 2 October 2018]. Further, Tina Oršolić, Constitutional provision on EU citizenship—the case of Croatia, available at: <http://ssrn.com/abstract=2030765> [Accessed 2 October 2018].

Constitutional law and practice of the Member States also demonstrate the right fundamental quality of citizenship by preserving citizenships in the instance of territorial change. Even if citizenship can be set aside on an individual basis, states are unable to deprive an entire group of their citizenships, even as a consequence of territorial changes. In particular, UK citizenship law has adopted pragmatism and flexibility to respond to situations under which political and constitutional changes would otherwise have resulted in groups of individuals being deprived of rights which they had previously enjoyed. The UK has accorded to Irish citizens and to the citizens of Commonwealth countries rights equivalent to those of UK citizens. In the case of Irish citizens the continuing rights enjoyed extend to full freedom of movement to and from the UK and a right of abode there.⁷⁶ The same is true of those Commonwealth citizens who are granted the right of abode in the UK. German constitutional law provides another precedent for continuing citizenship despite territorial changes. The Federal Republic of Germany (West Germany), considered itself the continuer of the German state albeit on a smaller territory. The Federal Republic treated Germans resident in the German Democratic Republic as its citizens under the continuing German citizenship law of 1913. This citizenship could also be passed on to descendants.⁷⁷

In fact, and importantly, the EU in its practice has adopted this pattern of preserving rights conferred by its legal order in instances of territorial changes. The EU accepts the principle, familiar from the law of international organisation, that boundaries are flexible. That means that losses of territory of a state leave its membership in the organisation unaffected. It remains the same member, but with a different territory. This rule of membership with flexible boundaries is subject to the caveat that the rights that individuals resident on this territory hold under EU law be preserved. In 1986, Greenland withdrew from the European Community after a referendum. The then European Community and Denmark concluded a treaty providing that the Treaties would cease to apply in Greenland while preserving the rights of Union citizens already resident there.⁷⁸ The explanatory memorandum of the Commission makes explicit that those Treaty-based individual rights ought to be preserved in the same manner as the acquired pension rights.⁷⁹ Finally, the practice of the EU has also been to preserve national citizenships as much as possible in the event of the break-up of the home state.⁸⁰ This practice conforms with the international law principle that territorial change should not affect existing citizenships formulated in the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.⁸¹ Article 2 recognises an individual right to a nationality.⁸² Article 6 obligates the predecessor not to withdraw its nationality even if those nationals live now in a successor state, provided that the national has not acquired the nationality of that state or would otherwise become stateless. This puts it in the hands of the individual to retain their

⁷⁶ The status of Irish citizens resident in the UK was finally fixed by the Ireland Act 1949. Under that Act there was full recognition by the UK of complete political separation between the UK and the Irish Republic. But s.2 of the 1949 Act recognised that the Republic of Ireland was not (and is not) to be regarded as a foreign country for the purposes of UK legislation. So Irish citizens born before 1922 in that part of Ireland which passed under the jurisdiction of the Irish Republic and who had not resided there throughout the intervening period were enabled to retain UK citizenship, and Irish citizens resident in the UK could acquire UK citizenship by registration. Irish citizens who resided in the UK, whilst remaining Irish citizens, were permitted to enjoy all the benefits of UK citizenship, including freedom to take up residence and employment in the UK, to vote in parliamentary elections and seek membership of the national legislature. This was described by the UK Government as “an exchange of citizenship rights” rather than common citizenship, HL Deb., 15 December 1948, vol.159 col.1101. Further feasibility, p.24–6.

⁷⁷ Federal Constitutional Court of Germany, Case 2 BvR 373/83 (Teso), Judgment of 21 October 1987, 77 BVerfGE 137.

⁷⁸ Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ L 29/1, 1 February 1985. Article 2 of the integral protocol on special arrangements reads: “The Commission shall make proposals ... for the maintenance of rights acquired by legal and natural persons during the period that Greenland was part of the Community”. Greenlanders retained the right to a Danish passport and the ensuing rights under the Treaties.

⁷⁹ European Commission, Opinion, Status of Greenland, 2 February 1983, EC Bulletin, Supplement 1/83, p.21.

⁸⁰ Danilo Turk, “Recognition of States: A Comment” (1993) 4 Eur. J. of Int’l L. 66 (1993) (Yugoslavia).

⁸¹ Council of Europe Treaty Series No.200, 19 March 2006, entered into force 1 May 2009.

⁸² It reads: “Everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to the nationality of a State concerned, in accordance with the following articles.”

previous nationality. This is also the recent paradox of Catalonia where it was argued Spain could not withdraw the citizenship *en masse* to citizens of an independent Catalonia.⁸³

International human rights law is a constitutive source of the general principles of EU law.⁸⁴ Article 15 of the Universal Declaration of Human Rights provides that no-one may be arbitrarily deprived of his nationality.⁸⁵ This has entered into customary international law. The most authoritative recognition of that customary law quality is to be found in the judgment of the African Court on Human and Peoples' Rights in *Anudo*.⁸⁶ The Court there distinguishes between the competence of each state to confer its nationality and the limits placed on its power to remove that nationality once conferred.

Admittedly, the *Anudo* case on its face is about the issue of statelessness which is not the case with the loss of Union citizenship. The Court refers to the prevention of statelessness as the rationale of art.15 of the UDHR. There is, however, space for analogy. The loss of rights it implies is not far from a partial statelessness. Statelessness is a human rights concern precisely because it signifies lack of the elementary protection of the individual that the state can and must provide. This rationale also applies to Union citizenship. Union citizenship ensures a specific protection that only the EU, because and within the sphere of its conferred competences, can provide.

III. Three counter-arguments

Attributing the normative quality of a fundamental right to Union citizenship is a novel argument that departs from the consensus. For it to be convincing, it does not suffice to make the positive case. It is also necessary to confront potential or actual counter-arguments. This section deals with and refutes three such arguments: (1) that there is a categorial difference between national and Union citizenship; (2) that nexus between EU membership of the state of nationality and Union citizenship, art.20(1) of the TFEU is indelible; and (3) that the collective democratic decision for joining and exiting the EU, guaranteed in art.50 of the TEU, means that no independent Union citizenships can be preserved. More radically, this part of the article makes the case that since citizenship rights are fundamental rights, they can survive the UK's withdrawal from the EU. It is true that the rights which the Treaties give to individuals are powerful and far-reaching, but that does not in itself tell us anything about what happens when the instrument from which they originate is removed. The article counters the proposition that citizenship rights derive from the EU Treaties, so if those Treaties cease to bind the UK then the rights must disappear as well.

1. A categorical difference between citizenship of the state and of the Union

Is there a categorical difference between citizenship of the state and that of the Union that would somehow mean that only the former but not the latter has the potential of acquiring the normativity of a fundamental right? It is unquestionably a fact that the EU at present remains an international organisation, and is not a state, and in that sense forms a different if not all easy-to-grasp category of public authority. But this does not mean that construction of membership in its legal order is impossible or categorically different. This organisation of sovereign Member States has, however, produced a legal order that is autonomous from both international law and the domestic law of the Member States and whose subjects are individuals (as well as the Member States). That creates the same need to determine the membership in it as it is the case of domestic legal orders.

⁸³ Mariona Illamola Dausa, *Nacionalitat catalana i/o nacionalitat espanyola. I l'europea?*, Revista d'estudis autonòmics i federals 25 (2018), pp.93–128 DOI: 10.2436/20.8080.01.16, where it is argued European Citizenship evolved “to a new concept” which would restrict Spain’s possibility of withdrawing the citizenship of part of its nationals, particularly if they showed a will in keeping such nationality.

⁸⁴ *Nold KG v Commission* (4/73) [1974] E.C.R. 491 at 507

⁸⁵ Mirna Adjami and Julia Harrington, “The Scope and Content of Article 15 of the Universal Declaration of Human Rights” (2008) 27 *Refugee Survey Quarterly* 93.

⁸⁶ *Anudo Ochieng, Anudo v United Republic of Tanzania* (App. No.012/2015), judgment of 22 March 2018 at [76].

In fact, art.20 of the TFEU itself denies categorical differences, and aligns the two concepts of citizenship on a functional if not ontological level. This is reflected in the wording. It distinguishes between nationality and national citizenship. In a tradition going back to Marshall and the concept of social citizenship that refers to the set of rights that citizens enjoy,⁸⁷ citizenship is the right to have rights, a right of inclusion in a specific legal order.⁸⁸ In the case of the EU, a composite polity, that legal order is autonomous.

2. Is there an inseparable link between Union citizenship and a state's EU membership in Article 20(1) of the TFEU?

The fundamental right does not curtail the right of each state to decide on its membership in the EU and to withdraw from it, as enshrined in art.50(1) of the TEU. Hence, withdrawal of the UK from the Founding Treaties entails that its nationals will become third-country nationals. The article now addresses the counter-argument against the protection of Union citizenship in a situation where a Member States withdraw from the Union. This counter-argument is based on the wording of art.20(1) of the TFEU according to which “every person holding the nationality of a Member State shall be a citizen of the Union”.⁸⁹ The provision does not explicitly address the situation of a Member State ending its membership. It has been argued that the provision sets forth two criteria which must be satisfied at any time: the individual must have the nationality of a Member State and the conferring state remains a Member. Admittedly, the provision can be interpreted in such way.

However, a different reading is not against the wording of art.20(1) and, in addition, does meet the requirements of Union citizenship as a fundamental right that protects individuals against exclusion against their will. This section first reconstructs the analytic position of art.20(1) of the TFEU. This provision is not just on the status of individuals. It represents the competence of the Member States to confer and revoke their nationality. This competence of the Member States can be limited for the benefit of individuals.

a. The competence of the Member States to confer and revoke Union citizenship

The following discussion seeks to arrive at a clearer understanding of art.20(1) of the TFEU. For that purpose, an analysis of the provision identifies two possible concepts. One interpretation of this provision would be that it enshrines the rights of each Member State. These have the right to determine the circle of their nationals and, hence, the right to determine who can be and who cannot be a Union citizen. But such an interpretation in terms of rights of states does not do justice to the structure of the Founding Treaties or to the principle of conferral.

Article 20 of the TFEU denotes a division of competences between the EU and the Member States.⁹⁰ This division follows the functional distinction between the concepts of nationality and citizenship. Nationality is the basis of membership and citizenship comprises the fullness of the rights that members holds. To the Member States is allocated the competence of nationality, under art.20(1) of the TFEU, that is to confer their nationality entailing as its automatic consequence that Union citizenship is conferred. The competences to define Union citizenship rights are assigned to the EU, which may also add to the rights listed in art.20(2) of the TFEU. Note that art.20(1) third sentence of the TFEU and art.9 of the TEU⁹¹

⁸⁷ T.H. Marshall, *Citizenship and Social Class: And Other Essays* (Cambridge: Cambridge University Press, 1950).

⁸⁸ Further Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2012), pp.129–170 (Transformations of citizenship: The European Union).

⁸⁹ Jean-Claude Piris, “Should the UK withdraw from the EU: legal aspects and effects of possible options”, Robert Schuman Foundation, European issues No.355, 5 May 2015; Gareth Davies, “Union citizenship—still Europeans’ destiny after Brexit?”, *European law blog*, 7 July 2016, <https://europeanlawblog.eu/2016/07/07/union-citizenship-still-europeans'-destiny-after-brexit/> [Accessed 2 October 2018].

⁹⁰ Niamh Nic Shuibhne, “Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain Is Privileged?”, in D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge University Press, 2017), pp.125–146.

⁹¹ Article 9 of the TEU reads: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.”

separately guarantee the institution of citizenship—not nationality—of the Member States. This confirms the distinction between nationality and citizenship. To the Member States is reserved the competence to define the fullness of rights that pertain to their citizenship.

The Member States have the competence to confer directly their nationality and thereby indirectly Union Citizenship, but the reverse is not necessarily true. It is, of course, always problematic to conclude from a given power to its reversal, the *actus contrarius* or the competence to revoke what has been granted. The fact that Member States nationality entails Union citizenship does not have to mean as a matter of pure logic the competence of Member States to take other action to revoke Union citizenship. There is no indication on art.20(1) of the TFEU that the Member States have the power or competence to revoke Union citizenship in itself at will.

b. Limits

But even if one were prepared to take this step, then this competence of the Member States to revoke Union citizenship is limited to safeguarding the Union interest over its Union citizenship. This interest in who is to be Union citizens is becoming increasingly clear and well defined. This interest first imposes limits on the competence to confer. The Court had noted already in *Micheletti* that while it is for each Member State to lay down the conditions for the acquisition of nationality, they must have “due regard to Community law” when doing so.⁹² More recently, the questions raised by the EU institutions relating to “cash for passports” schemes that allow wealthy individuals to acquire Member State nationality speak of the same principle.⁹³ *Rottmann* articulates and operationalises a limit on the competence to revoke their nationality. There the interest in the status of Union Citizenship constitutively limits the competence of that Member State to remove its nationality if this would lead to a specific case of statelessness, that is the loss of the nationality of an EU Member State. *Lounes* now formulates a further limit, if implicitly. The Court there ruled that Union citizens retain their permanent right of residence in the host Member State if they naturalise there later. The rationale of effective free movement of citizens⁹⁴ limits the competence of the Member State to confer its nationality and by the same token to remove the rights if not the status of Union citizenship. Ultimately, the rights of Union citizens limit all exclusive competences of the Member States. *Chavez* makes this clear. There, while expressly acknowledging that the Member States have the competence to determine the residence of third-country nationals on their territory, the Court made clear that the requirement in EU law to permit their continued residence to care for a Union citizen was a limitation on that competence. That limitation was a necessary consequence of the status of Union Citizenship entailing the right to reside in the territory of the Union.⁹⁵

That Union interest is even stronger in the constellation of a Member State withdrawing from the EU. The limit becomes more powerful here where the Member State does not revoke its own citizen’s nationality, but rather targets directly and exclusively the Union Citizenship. No Member State can remove Union Citizenship from all its nationals through collective action and the decision to leave the EU is not to be treated differently. As such, the departure of the Member State from the EU does not entail the loss of Union Citizenship acquired by individuals.

⁹² *Micheletti v Delegación del Gobierno en Cantabria* (C-369/90) [1992] E.C.R. I-4239 at [10].

⁹³ The Commission has formulated for 2018 a priority to “Safeguard the essence of EU citizenship and its inherent values; in 2017/2018 [it will] produce a report on national schemes granting EU citizenship to investors describing the Commission’s action in this area, current national law and practices, and providing some guidance for Member States”, *EU Citizenship Report 2017*, p.14.

⁹⁴ *Lounes* (C-165/16) at [58] (logic of gradual integration underlying art.21(1) of the TFEU).

⁹⁵ *Chavez-Vilchez* (C-133/15) at [64].

c. The removal of Citizenship through exit from the European Union

It is suggested here that Union citizens retain their Union citizenship even if the state of which they are a national ceases to be a Member State. The proposition is that, once Union citizenship has been bestowed by a Member State, EU law constrains how it can be removed. Admittedly, that interpretation of art.20 of the TFEU does not deal with the fundamental point that after a state ceases to be a Member State, the EU Treaties cannot oblige it to do anything at all, because they will no longer bind it. Two arguments support the proposed interpretation, the fundamental rights normativity of Union citizenship to which we turn first and the application of public international law which will be addressed under (3) (below).

Union citizenship and the relating rights once bestowed in fact become independent from the Treaties, because they fall into a different normative category. Fundamental rights possess an altogether different normativity in which their legal value and continued bindingness is rooted. It is the specific norm-character that protects fundamental rights as subjective rights against political power. The *Geltungsgrund* of Union citizenship lies in the specific value of a fundamental right protects the right holder. This stipulates necessarily and inherently that the right becomes independent from the reciprocity of the Treaties between the High Contracting States. The normativity is not horizontal between sovereigns, it rather is vertical between each sovereign and each individual under their jurisdiction.

The consequence of this argument is that this normativity binds not just the exiting state but also the remaining Member States. The remaining Member States are also prevented from denying that the nationals of the exiting state are Union citizens. The consequent obligations to give effect to this may differ, in detail, for the withdrawing and the remaining Member States. The withdrawing Member State must not treat its own nationals nor those of the remaining Member States as having lost their Union citizenship and the related rights. The remaining Member States must not treat the nationals of the withdrawing Member State as having lost their Union citizenship and the related rights. Any limitations can only be imposed for a legitimate reason and in a proportionate manner.

3. The collective decision to (Br)exit and the rights of individuals

A third conceivable counter-argument relates to art.50 of the TEU. Article 50(1) of the TEU now expressly recognises the sovereign right of a Member State pursuant to its internal decision-making to withdraw from the Founding Treaties and to terminate the Treaties for the future. But does this provision also empower that Member State, availing itself of this right, to terminate the Union citizenships of its nationals as well as to curtail the citizens' rights of others on its territory? On closer inspection, art.50(1) of the TEU does not provide for such a power. Citizenship rights are, as other fundamental rights, not subject to the political decision of the majority.

a. The function of Article 50(1) in its international law context

This becomes perspicuous when art.50 of the TEU is read in its public international law context, laid down in the 1969 Vienna Convention on the Law of Treaties (the Convention). Such contextual reading is indeed required. The fact that the Treaties are international law between the Member States may be surprising to those that have been advocating a constitutionalist reading. But that has always been the line of reasoning of the Court. The famous *van Gend en Loos* judgment of the Court emphasises that the Treaties apply as international law between the states, although they also create rights and obligations for individuals.⁹⁶ The much discussed recent *Achmea* judgment of the Court restates this finding: between the Member States—as

⁹⁶ *Van Gend en Loos* (6/62) [1963] E.C.R. 1, at 12.

High Contracting Parties—the Treaties are traditional public international law creating rights and obligations for states.⁹⁷

A right of states to exit from the EU was, for the first time, contained in the Constitutional Treaty.⁹⁸ The Constitutional Treaty never entered into force, but much of its substance was retained by the Lisbon Intergovernmental Conference and converted into the Lisbon Treaty. That treaty amended the TEU, enshrining in art.50 the exit clause as drafted by the European Convention. The European Convention was very clear that it had drafted the clause closely following the template of Part V of the Convention for the withdrawal of a state from any treaty, including treaties constitutive of an international organisation.⁹⁹

In its Part V, the Convention creates a template for the conditions, the procedure, and the consequences of a State Party withdrawing from a multilateral treaty. Article 56(1) of the Convention requires that the substantive treaty contains explicitly the right for States Parties to withdraw, or that such right can at least be implied.¹⁰⁰ The state must notify its intention to withdraw, and withdrawal only takes effect upon expiration of the notice period, art.56(2). Article 70(1)(a) of the Convention sets forth the first consequence of effective withdrawal that the Treaties shall cease to apply between the state and remaining parties. However, art.70(1)(b) of the Convention provides rules to ensure that such exit shall have no retroactive effect.¹⁰¹ Withdrawal “does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to [withdrawal]”.¹⁰² The withdrawing state and the remaining States Parties have to comply with the treaty after its end.¹⁰³

Against this background, art.50(1) of the TEU sets forth the right and art.50(2) the procedure of a Member State to withdraw from the Treaties.¹⁰⁴ Article 50(2) also provides the EU with an external competence to conclude an agreement with the withdrawing state on the arrangements.¹⁰⁵ Article 50(3) provides for consequence of ending the applicability of the Treaties on the international law plane between itself and the remaining Member States for the future, following the template of art.70(1)(a) of the Convention. But there is a conspicuous lacuna, in that there are no provision on the continuing rights and obligations.

It cannot be construed as an implied restriction on Union citizenship as status and Union citizenship as fundamental right. That lacuna must be filled by resorting directly to art.70(1)(b) of the Convention. The applicability of art.70(1)(b) of the Convention has attracted controversial attention in the Brexit-context,

⁹⁷ *Slovak Republic v Achmea* (C-284/16), 6 March 2018 at [41]: “Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.”

⁹⁸ Article I-59 of the Treaty establishing a Constitution for Europe [2004] OJ C 310/1, 16 December 2004.

⁹⁹ Praesidium de la Convention européenne, *Note du Praesidium à la Convention: Titre X—L'appartenance à l'Union*, CONV 648/03, 2 April 2003, at http://www.cvce.eu/content/publication/2013/8/5/2551b42a-e0ce-49d4-857a-4325e1154e2e/publishable_fr.pdf [Accessed 19 September 2019]: “Finalement, l’Art. 46 relatif au retrait volontaire d’un État membre de l’Union est une disposition nouvelle. Elle reconnaît expressément la possibilité pour chaque Etat membre de se retirer de l’Union européenne s’ils en décide ainsi. La procédure de retrait s’inspire en partie de celle prévue dans la Convention de Vienne sur le droit des traités, tout en prévoyant la possibilité pour l’Union et l’État membre concerné de conclure un accord régissant les modalités de son retrait et établissant le cadre de leurs relations futures”. The Praesidium had the role of lending impetus to the European Convention and providing it with a basis on which to work.

¹⁰⁰ Prior to the amendment of art.50 of the TEU, no right to exit was enshrined in the Treaties, and the prevailing literature denied that such a right could be implied, see Michael Akehurst, “Withdrawal from International Organisations” (1979) 32 *Current Legal Problems* 143, 151; R.J. Friel, “Secession from the European Union: Checking out of the proverbial ‘Cockroach Hotel’” (2003) 27 *Fordham International Law Journal* 590, 601–609. For a comprehensive review of the practice, see Gino Naldi and Konstantinos Magliveras, “Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations” (2013) 33 *Polish Yearbook of International Law* 95.

¹⁰¹ André Nollkaemper, “Some Observations on the Termination of Treaties and the Reach of Art. 70”, in I.T. Dekkers and H.H. Post (eds), *On the Foundation and Sources of International Law* (2003), p.187; Francesco Capotorti, “L’extinction et la suspension des traités” (1971) 134 *Receuil des Cours* 417.

¹⁰² Emphasis added. The first paragraph deals with treaty-termination, but the second paragraph extends these rules to withdrawal.

¹⁰³ H. Ascencio, “Article 70”, in Corten and Klein (eds), *Commentary on the VCLT* (Oxford University Press, 2009), para.4. The ILC Commentary leaves open as a merely doctrinal question whether the source of that obligation is the Convention or the substantive treaty.

¹⁰⁴ See Martin Waibel, “The Brexit Bill and the Law of Treaties”, *EJIL Talk!*, 4 May 2017, available at: <https://www.ejiltalk.org/the-brexit-bill-and-the-law-of-treaties/> [Accessed 2 October 2018].

¹⁰⁵ Further, Christophe Hillion, “Withdrawal under Article 50 TEU: An integration-friendly process” (2018) 55 *C.M.L Rev.* 29.

either because art.50 of the TEU is said to derogate from art.70,¹⁰⁶ or because art.70 of the Convention is considered not to cover individual rights.¹⁰⁷ However, a closer analysis of the work of the International Law Commission reveals that “legal situation” was to be the default clause for rights of individuals created under the substantive treaty during its currency to survive. This also applies to the Founding Treaties of the EU. In other words, art.50(1) inserts the door, art.50(2) explains how to find the way to the door, art.50(3) tells us what happens when the door closes and art.70 of the Convention explains what the state can take with it on its way out—and what not.

b. The lacuna in Article 50(3) on the consequences of withdrawal

Article 70(1) of the Convention distinguishes the consequences that the withdrawal has for the future relationship between the withdrawing state and the remaining states (art.70(1)(a)) and the consequences that the withdrawal decision has for rights, obligations and legal situations that were created during the time of membership of the withdrawing state (art.70(1)(b)). The article now turns to the content of art.70(1)(b), determining the positions surviving the end of a state’s membership in the international organisation.

Article 70(1)(b) of the Convention contains two concepts defining its scope. The first is that certain positions—rights, obligations and legal situations—become concrete legal positions capable of surviving the end of the treaty. The second concept is that such position must have been created through the application, or execution, of the treaty by the Parties prior to the withdrawal taking effect.¹⁰⁸ It is generally accepted that obligations of the state continue, if these obligations were accrued during membership but fall due after the end of membership, particularly to make contribution to the budget of an international organisation.¹⁰⁹ By contrast, whether the status quo of *individuals* continues has been doubtful.¹¹⁰ A canonical interpretation of art.70 supports that it addresses the status of individuals through the default concept of “legal situations” that have been created by states through their administrative acts.¹¹¹ The “rights” of individuals can correspond to these legal positions in objective law.

The “legal situations” and corresponding “rights” of citizens created during their currency survive Brexit, and must be respected by the UK and the remaining Member States as a matter of international law, *unless* the Withdrawal Agreement to be concluded pursuant to art.50(2) of the TEU provides otherwise.¹¹² As consequence, the extant positions of EU27 nationals in the UK and UK nationals in the EU are preserved, and these can exercise their Union citizenship rights for a lifetime. The sovereign decision of a state to withdraw does not absolve it from the responsibility to still protect Union citizens who are living there, and neither are the remaining Member States absolved from their responsibility to protect nationals of that state remaining on their territory.

Article 50 of the TEU must be interpreted in the light of the international law of treaties. The explicit right to withdraw extends to the treaties, as binding international law, creating rights and obligations

¹⁰⁶ UK House of Lords, European Union Committee, HL Paper 125, “Brexit and the EU budget”, March 2017, p.33 (arguing that financial obligations of the UK do not continue, nor, by implication, rights of individuals). Article 70(1)(b) of the Convention is dispositive and indeed permits that a “treaty may provide otherwise”. Yet, this wording puts the burden of argumentation on the Party wishing to avail itself of a derogation that it was the intention of the Parties to derogate and effectively make the withdrawal have retroactive effect. But art.50 of the TEU does not indicate such intention.

¹⁰⁷ See UK House of Lords, European Union Committee, 10th Report of Session 2016–17, HL Paper 82, Brexit: acquired rights, December 2016, p.25, referring to the evidence from Professor Vaughan Lowe QC (AQR0002 and AQR0003); European Parliament, DG Internal Policies, Study, “The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27”, PE 583.135.

¹⁰⁸ Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), vol.I, pp.403–404.

¹⁰⁹ MIGA Secretariat, *Commentary on the MIGA Convention at [73]*, available at: https://www.miga.org/documents/commentary_convention_november_2010.pdf [Accessed 2 October 2018].

¹¹⁰ See UK House of Lords, European Union Committee, 10th Report of Session 2016–17, HL Paper 82, Brexit: acquired rights, December 2016, p.25, referring to the evidence from Professor Vaughan Lowe QC (AQR0002 and AQR0003); European Parliament, DG Internal Policies, Study, “The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27”, PE 583.135.

¹¹¹ For detailed analysis and argumentation, see Petra Minnerop and Volker Roeben, “Continuity as the Rule, not the Exception”, in this issue of E.H.R.L.R.

¹¹² Article 70(1) accepts that its provisions apply “unless … the parties otherwise agree”.

between states, but it does not extend to fundamental rights. The right to exit can also be expressed as a power. The Treaty in this sense confers a power on the Member State to terminate the Treaty as between itself and the other states.¹¹³ But this express right to withdraw and the empowerment of each Member State has clear limits. It cannot terminate or otherwise affect the Treaties' bindingness as between the remaining Member States in regard to all Union citizens, including those from an exiting Member State. The state's power does not reach the fundamental rights of individuals. The express right to withdraw does not comprise this element of the Treaties. These therefore continue. The interpretation of human rights treaties points in the same direction of rights being vested in each individual, that once conferred, cannot be taken away by a sovereign's decision. Hence, there is no implied right to withdraw from the ICCPR.¹¹⁴ Nor must state succession affect those international human rights.¹¹⁵ The involvement of fundamental or human rights narrows the door through which treaty exit of a state can proceed.

c. The role of withdrawal arrangements

In the event of a withdrawal, the Convention contains an implicit obligation for States Parties to conclude new treaty-making practical arrangements. These arrangements are to create legal certainty by clarifying the concrete positions that continue and by establishing enforcement mechanisms; they may also address all further matters that the concrete withdrawal may raise.¹¹⁶ It is a consequence of the principle of consent that these arrangements may derogate from the rule of continuity.¹¹⁷ The Convention rules on continuity apply, *unless* the substantive treaty itself or the later agreement of the Parties derogate from them. The introductory clause of art.70 of the Convention expressly permits such derogation. However, the wording makes clear that this will be the exception. The burden is on the state relying thereon to demonstrate that it was the intention of the Parties for the withdrawal to have such retroactive effect. In practice, derogation from art.70, in the treaty itself or in a later agreement, is exceedingly rare.¹¹⁸

Article 50(3) of the TEU indeed must be seen in this light. The Withdrawal Agreement envisaged there is primarily to create the legal certainty for the surviving rights of citizens, within the then governing international law environment after withdrawal, in which all the structural safeguards of the supranational EU legal order will no longer be available. The March 2018 draft of the Withdrawal Agreement seeks to reflect this standard.¹¹⁹

Still, any rights protected by art.70 of the Convention in conjunction with art.20 of the TFEU will be superseded by a Withdrawal Agreement adopted under art.50(2) of the TEU. The provisions on citizens' rights in the Draft Agreement, which have already been agreed between the EU and the UK, in particular fall short of protecting the citizenship rights of all UK nationals: they only preserve specified rights of particular categories of people that have exercised their rights. Possibly the Withdrawal Agreement removes certain rights, rather than preserves them.

¹¹³ For a deeper discussion of rights as powers in an institutional theory of law, see Neil MacCormick, *Institutions of Law* (Oxford University Press, 2009).

¹¹⁴ General Comment No.26, *Continuity of Obligations*, UN Doc.CCPR/C/21/Rev. 1/Add 8/Rev. 1 (1997) (no implied right to withdraw from the UN Covenant on Civil and Political Rights).

¹¹⁵ See *Opinion No.9 of the Badinter Commission in regard to the succession to the Former Yugoslavia*, para.2: "The chief concern is that the solution [to the succession] should lead to an equitable outcome for ... the fundamental rights of the individual", reprinted in D. Turk, "Recognition of States: A Comment" (1993) 4 *European Journal of International Law* 66 at 89. China as the successor state to the UK became bound by the CCPR in regard to Hong Kong, P.M. Eisemann and M. Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (The Hague: Martinus Nijhoff, 2000).

¹¹⁶ Second Report on the Law of Treaties by Mr G.G. Fitzmaurice, Special Rapporteur, UN Doc.A/CN.4/107 (ILC Yearbook 1957, vol. II), p.35, para.6: "The termination of ... the participation of a particular party, may give rise to a number of consequential issues. These will ... be governed by the treaty itself if it provides for them, and if not, must be the subject of a separate agreement between the parties".

¹¹⁷ ILC Commentary, p.265.

¹¹⁸ R. Wolfrum, *Völkerrecht*, Vol I-3 (2nd edn, Berlin: de Gruyter, 2002), p.730.

¹¹⁹ European Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 15 March 2018, Doc.TF50 (2018) 33/2. For discussion of the implications of the UK withdrawal for Northern Ireland, see Colin Harvey, "Brexit, Human Rights and the Constitutional Future of these Islands" [2018] 1 E.H.R.L.R. 10.

This may seem a startling proposition. It is true that international law would not erect a bar to the parties negotiating such an agreement. The bar arises, however, from the normativity of Union citizenship as a fundamental right. That normativity implies that Union citizenship survives independently. If the Withdrawal Agreement curtails, then it constitutes a limitation arising in secondary EU law that needs to pursue a legitimate objective and be proportionate to this objective.

Conclusions

This article takes up the debate on Union citizenship at a juncture and takes it to a new, normative level. It chooses not to accept that Union citizenship is merely a status that is conferred on individuals and remains at the discretion of states. Instead, the article has argued that Union citizenship has the normativity of a fundamental right. As such, it institutionalises individual membership in the EU legal order. This article has spelled out that for individuals with Union citizenship the consequence is that they are included directly in the EU legal order and the once established link must be protected against exclusion from this legal order, be it through expulsion, extradition or legal deprivation of citizenship. The case-law of the Court, the Charter, and the constitutional traditions of the Member States and international law, support this analysis that Union citizenship is more than a bundle of rights. Claims to protection against such exclusion are directly addressed to the EU, and not mediated by the respective Member State of nationality. The home and host Member States are also obliged to protect the Union citizen, and this remains true for a former Member State. The Union as a polity assumes the role of protector against threats that its citizens face, and which the Member States cannot alleviate.

Union citizenship being not just a status but a fundamental right, which once conferred can only be taken away subject to strict proportionality, and not at all by collective measures, implies that existing Union citizenships survive the collective decision of a state to end its membership in the Union, even if the rights contained therein may change. It is the withdrawal situation that pinpoints the coherent conception of Union Citizenship in a situation where the collective decision of a state contravenes the rights that have been conferred on individuals. Thus, Brexit becomes the prism through which to see more perspicuously the individual conception of a citizenship above the state. This individual membership is not conditional on continued membership of a state in the Union. Hence, it is independent from the collective decision of a Member State to remain a member of the Union and, consequently, the contribution that the people of a Member State are making. While not strictly necessary, clarificatory action by the EU (and the UK) in the Withdrawal Agreement provides legal certainty and thus effective protection against the final exclusion from the EU legal order that would result from the legal removal of Union citizenship. But those citizenships will also continue in the event that no such agreement is reached, operationalised through the international law of treaties that art.50 of the TEU references.

This normative conception of Union citizenship has consequences and not all of them can be explored in detail in one article. One is that such inclusion of individuals into the EU legal order generates loyalty. As enshrined in art.20(1)(3) of the TFEU, the primary loyalty—allegiance—is to remain with the respective Member State. But a secondary loyalty comes to lie with the EU that protects citizens. As a possible corollary of that role, the Union ultimately may have to determine the circle of those that it protects.

Continuity as the Rule, Not the Exception: How the Vienna Convention on the Law of Treaties Protects Against Retroactivity of “Brexit”

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✉ Brexit; EU law; Retrospective legislation; Treaty interpretation; Withdrawal

Abstract

The 1969 Vienna Convention on the Law of Treaties (the Convention) is the international legal framework within which the exit of the UK from the EU takes place. Brexit is not an exception to the rule that the Convention enshrines: termination of or withdrawal from a treaty have prospective effects only and any retroactive effect on ongoing positions is to be prevented. The article makes three arguments. First, art.70(1)(b) of the Convention reflects customary international law. Second, art.70 of the Convention protects rights, obligations and legal situations, and the interpretation of the provision in the context of its drafting history underlines that this includes the rights of individuals that were created in the execution of the treaty. Third, art.70 of the Convention governs next to art.50 of the Treaty on European Union (TEU) the exit of a state from the EU. Financial obligations and citizenship rights within the meaning of art.70(1)(b) of the Convention were created in the execution of the Treaties by all Member States, and these continue after Brexit. A related argument concerns the judicial enforceability of the Convention. The conclusions outline the implications for a holistic conceptualisation of an EU legal order within international law and for the law of complex international organisations.

Introduction

In March 2017, the UK notified its intention to withdraw from the Founding Treaties of the European Union.¹ States changing their minds may be the reality of international relations. However, in international law, conditions and consequences of termination, denunciation and withdrawal from a treaty are subject to legal parameters. While much attention has been devoted to art.50 of the TEU and its application in accordance with EU law² and UK constitutional law,³ this article sets out the international legal framework of the 1969 Vienna Convention on the Law of Treaties.⁴ The Convention protects the sovereign decision

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¹ See <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> [Accessed 2 October 2018].

² See C. Hillion, “Accession and Withdrawal in the Law of the European Union”, in D. Chalmers and A. Arnulf (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2016), p.126; C. Hillion, “Withdrawal under Article 50 TEU: An Integration-Friendly Process” (2018) 55 C.M.L. Rev. 29; M. Waibel, The Brexit Bill and the Law of Treaties, *EJIL talk!*, 4 May 2017, available at: <https://www.ejiltalk.org/the-brexit-bill-and-the-law-of-treaties/> [Accessed 2 October 2018] (procedure of withdrawal), and contributions in *European Law Review* 4/40 (2016).

³ *R. (on the application of Miller) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 82, 24 January 2017.

⁴ Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, 116 Parties as of 6 September 2018.

of a state to withdraw from a multilateral treaty, while preventing such withdrawal from having any retro-active effect. To that end, the article makes three arguments. Each of these will refute counterarguments based on the opposite reading of the relevant law.

First, art.70(1)(b) of the Convention⁵ on the continuity of certain positions post the withdrawal of a state from a treaty reflects a rule of customary international law. Second, art.70(1)(b) and art.70(2) of the Convention continue certain legal situations and rights of individuals that were created through the execution of the treaty during the time of membership of the withdrawing state. Third, the provision is applicable to the withdrawal of a Member State from the EU, next to art.50 of the TEU. The article specifies this consequence for the Union citizenships of individuals. They are protected and continued as created legal situations under international law.

In concluding, the article advances a holistic conceptualisation of the UK's withdrawal from the Founding Treaties within EU and international law, which allows for a lawful and orderly exit pursuant to the referendum outcome while preventing that withdrawal from having retroactive effect and creating legal uncertainty.

I. The applicability of Article 70(1)(b) of the Convention as treaty and customary international law

The Vienna Convention on the Law of Treaties was drafted by the International Law Commission (ILC), the UN body with the mandate to codify and develop international law.⁶ The Convention is the treaty-on-treaties, and was adopted by States Parties to "establish conditions under which justice and respect for the obligations arising from treaties can be maintained".⁷ It also applies to treaties constituting international organisations, art.5 of the Convention. The Convention sets forth the international law on the treaty life-cycle, from conclusion and application, to potential termination, denunciation and withdrawal. The Convention, in its Part V, develops a regime for such withdrawal: a State Party must have a right do so, it must notify its intention, and it must respect a notice period. The critical art.70(1) provides that, upon the withdrawal becoming effective, the treaty ceases to apply to that state, yet certain positions continue past the currency of the treaty.

The Convention is binding international law, as treaty, for those states that have ratified it or acceded to it.⁸ The Convention binds those states regarding all substantive treaties to which they subsequently become parties. In addition, the entire Convention is widely applied as customary international law. Anthony Aust has noted, that for most practical purposes, "treaty questions are simply resolved by applying the rules of the Convention. To attempt to determine whether a particular substantive provision of the Convention represents customary international law is now a rather futile task".⁹ There is a strong trend in international authority to treat the Convention as a whole as customary international law, unless it is proven that states disagree as to the law-quality of a certain provision.¹⁰ The International Court of Justice (ICJ) has held in many instances that the Convention reflects rules that also exist in customary international

⁵ Article 70 of the Convention reads: "Consequences of the termination of a treaty—1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

⁶ Article 13(1)(a) of the UN Charter.

⁷ Preamble, para.5.

⁸ Of the EU Member States, only France and Romania have not become parties to the Convention.

⁹ A. Aust, "Vienna Convention on the Law of Treaties (1969)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, available at: opil.ouplaw.com [Accessed 2 October 2018].

¹⁰ J. Crawford, *Principles of Public International Law* (8th edn, Oxford: Oxford University Press, 2015), pp.367–368 (where the Convention does not reflect customary law, there it has started the process for customary law formation).

law.¹¹ A notable exception is art.66 of the Convention.¹² That particular provision provides for compulsory judicial settlement of disputes by the ICJ. It does not state a rule of customary international law given the high number or reservations that were made by states to this provision.¹³ It is worth noting in this context that such jurisdictional clauses in a treaty generally do not become customary international law.

An in-depth examination of whether or not art.70 of the Convention reflects customary international law is nevertheless called for, given the critical role of that provision in the present context. The starting point is the ICJ case-law on the way that treaty rules acquire the status of customary law. In *Nicaragua v Colombia*, the ICJ found that several treaty rules together may form an indivisible regime.¹⁴ The regime and all the rules comprised therein as a whole become customary international law. The implication is that if one of the rules that form part of such an indivisible regime demonstrably qualifies as customary law, then the further rules of the regime necessarily also constitute customary international law. *Nicaragua v Colombia* concerned the rules on islands of art.121 of the 1982 UN Convention on the Law of the Sea (UNCLOS). The Court considered these to form an indivisible regime. The Court was then satisfied to demonstrate the customary international law quality for certain rules in order to conclude that the entire regime had entered into customary international law.

The rationale of *Nicaragua v Colombia* is that at if a set of rules within a treaty form the indivisible regime over a given matter, and at least one of them demonstrably qualifies as customary international law, then all qualify as such.

Article 70(1)(b) of the Convention can be qualified as such an indivisible regime on the continuity of certain positions after the end of a state's membership in a multilateral treaty. Against the background that the state is released from the obligation to further perform the treaty, the provision spells out that this does not affect "any right, obligation or legal situation". These rights, obligations and legal situations comprehensively determine the scope of continuity: if obligations continue, so will legal situations and rights accordingly. The question remains whether or not one of the rules on the continuity regime that art.70(1)(b) outlines does, in fact, represent customary international law. In what follows, this will be demonstrated for the continuity of the obligations that the state has accrued during the currency of the treaty.

According to art.38(1)(b) of the ICJ Statute, customary international law arises from consistent and representative state practice, borne by the conviction of being legally required (*opinio iuris*). The ILC has recently clarified the means of evidencing such state practice, and stated that the action states adopt in relation to treaties serve as such means.¹⁵ The founding treaties of all principal international financial institutions contain a rule that a withdrawal shall not affect accrued obligations of that state. They provide for the continuing obligation to honour financial commitments accrued before the end of membership.¹⁶ The major multilateral treaties in other areas of law incorporate such a rule as well. Article 27 of the 1998 Rome Statute of the International Criminal Court provides that withdrawal should not have retroactive effect in relation to financial obligations and criminal investigations and proceedings in relation to which the withdrawing state has a duty to cooperate.¹⁷ Article 317(2) of UNCLOS provides that denunciation

¹¹ *Military Activities (Congo v Rwanda), Preliminary Objections* [2006] ICJ Rep. at [46]; Aust, "Vienna Convention on the Law of Treaties (1969)" at [15]–[17], with references to the case-law of the ICJ.

¹² *Military Activities* [2006] ICJ Rep. at [125].

¹³ O. Dörr, "Article 66. Procedures for judicial settlement, arbitration and conciliation", in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2nd edn, Berlin: Springer, 2018), para.2.

¹⁴ *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep. at [137]–[139].

¹⁵ ILC, *Identification of Customary International Law, Draft Conclusions*, 30 May 2016, UN Doc.A/CN.4/L.872, Conclusions 4 and 6.

¹⁶ The model for the World Bank Group is the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention), 11 October 1985, entered into force 12 April 1988, 1508 UNTS 99 (181 Member States as at 24 May 2018). See also African Development Bank, Asian Development Bank, Council of Europe Development Bank, Development Bank of Latin America (CAF), Eurasian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, Inter-American Development Bank, International Fund for Agricultural Development and Islamic Development Bank.

¹⁷ Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2010, 2187 UNTS 3 (123 Parties as at 6 September 2018).

shall not “affect any right, obligation or legal situation of that State created through the execution of this Convention prior to its termination of that State”.¹⁸ International human rights treaties also provide for non-retroactivity of withdrawal, for instance art.58 of the European Convention on Human Rights¹⁹ and art.31(2) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁰ Where a multilateral law-making treaty²¹ does not include a provision on continuity, there the practice of the bodies established under these treaties indicates that the existing obligations of the state continue after effective withdrawal. Significant is the recent practice under the Kyoto Protocol, where the Compliance Committee applied art.70 of the Convention to determine Canada’s ongoing reporting obligations after that state had withdrawn from the Kyoto Protocol.²²

State practice and *opinio iuris* thus underpin that the continuity of obligations of a state after withdrawal is a rule of customary international law. This rule is part of the indivisible regime of art.70(1)(b) of the Convention. Thus, if obligations continue as a matter of customary international law, so do rights and legal situations. The next question is whose rights are to continue and how to distinguish rights and legal situations.

II. The scope and the effect of Article 70 of the Convention

Article 70(1) of the Convention sets forth two consequences of effective withdrawal. Under art.70(1)(a) the treaty ceases to bind the withdrawing state and the remaining states for the future. Article 70(1)(b) then sets out the second consequence that the withdrawal shall not affect “any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. The provision applies to bilateral treaties, but art.70(2) makes clear that the rule also applies to multilateral treaties.²³

In the following, the article examines art.70(1)(b) of the Convention to determine exactly what positions are to survive withdrawal of a state from a treaty. It will proceed in two steps. The first is to clarify the scope of art.70(1)(b), and the second step is to analyse the legal effects on the substantive treaty from which the state withdraws.

1. Concepts of Article 70(1)(b) of the Convention

Article 70(1)(b) of the Convention contains two main concepts defining its scope. The first is that certain positions—rights, obligations and legal situations—become concrete legal positions capable of surviving the end of treaty or withdrawal from treaty. The second concept is that such position must have been created through the application, or execution, of the treaty by the Parties prior to the termination or withdrawal taking effect.²⁴ These positions have commenced during the currency of the treaty and have not finished but rather are ongoing after its end. They must continuously be respected to prevent the withdrawal from having retroactive effect. It is generally accepted, as demonstrated above, that obligations

¹⁸ United Nations Convention on the Law of the Sea, 10 December 1982, entered into force on 15 November 1994, 1833 UNTS3 (158 Parties as at 6 September 2018).

¹⁹ Originally: European Convention for the Protection of Fundamental Rights and Freedoms, 4 November 1950, entered into force on 3 September 1053, ETS No.005 (47 Parties as at 6 September 2018).

²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85 (163 Parties as at 6 September 2018). For a comprehensive list, see Gino Naldi and Konstantinos Magliveras, “Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations” (2013) 33 *Polish Yearbook of International Law* 95, 107–110.

²¹ The term law-making treaty is used here in the sense defined by Crawford, *Principles of Public International Law* (2015), pp.31–32: “Law-making treaties create general norms, framed as legal propositions, to govern the conduct of the parties, not necessarily limited to their conduct *inter-se*”.

²² See Compliance Committee of the Kyoto Protocol, Enforcement Branch, CC/EB/25/2014/2, 20 August 2014 at [21] (“Compliance Committee”). Canada withdrew from the Kyoto Protocol under art.27, Depository Notification, C.N. 796.20121 Treaties-1, 16 December 2011.

²³ Note that art.70(2) uses the terms “denunciation” and “withdrawal” as synonyms. Paragraph 1 speaks of “termination” as the denunciation of a bilateral treaty by one Party will bring the treaty to an end.

²⁴ Sir G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), vol.I, pp.403–404.

of the state continue, if these obligations were accrued during membership but fall due after the end of membership, particularly to make contribution to the budget of an international organisation.²⁵

By contrast, whether the status quo of *individuals* continues has been doubtful.²⁶ The House of Lords' report on "Brexit: acquired rights", correctly distinguishes between acquired rights under the Vienna Convention on the Law of Treaties and acquired rights under customary international law.²⁷ The latter refers to a concept which at its heart concerns property rights, acquired under municipal law, and the report correctly concludes that the concept is to be interpreted narrowly.²⁸ This is the traditional understanding of "acquired rights" in international law. However, we claim that certain rights, obligations and legal situations continue as a matter of a treaty rule, art.70(1)(b) of the Convention, which is a rule of customary international law, and that the substantive treaty determines the rights that will continue. That this rule includes individual rights will be demonstrated below. It might be possible to bring these also under the concept of obligations of states regarding individuals. Yet a canonical interpretation of art.70 supports that it addresses the status of individuals through the default concept of "legal situations" that have been created by states in the execution of the EU Treaties.²⁹

a. Created legal situations

"Legal situation" is the residual clause to ensure that withdrawal of a state from an international organisation has prospective effects. States Parties create such legal situations through the acts they perform to comply with the treaty. Once created, these situations continue beyond the currency of a treaty. This rationale is reflected in the commentary of the ILC.³⁰ The commentary cites certain treaties to illustrate what it means by legal situation.³¹ It cites art.XIX of the Convention on the Liability of Operators of Nuclear Ships. Liability for a nuclear incident with respect to ships that have been licensed during the currency of the Convention continues after termination of that Convention for a certain period. The ILC also points to art.58(2) of the European Convention on Human Rights, on the continuing responsibility of the state for all its acts capable of violating that convention. The ILC noted in its commentary that different opinions had been expressed concerning the exact legal basis, "after a treaty has been terminated, of rights, obligations or situations resulting from executed provisions of the treaty, but did not find it necessary to take a position on this theoretical point for the purpose of formulating the rule in paragraph 1(a)".³²

The references the ILC gives in its commentary for treaties that include a provision of non-retroactivity of withdrawal from treaty for already created legal situations can be buttressed across international law. Thus, the Geneva Conventions stipulate on legal situations of persons after withdrawal. If the withdrawing state is involved in an armed conflict, then withdrawal "shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present

²⁵ MIGA Secretariat, *Commentary on the MIGA Convention*, para.73, available at: https://www.miga.org/documents/commentary_convention_november_2010.pdf [Accessed 2 October 2018].

²⁶ See UK House of Lords, European Union Committee, *10th Report of Session 2016–17*, "Brexit: acquired rights", HL Paper 82 (December 2016), p.25, referring to the evidence from Professor Vaughan Lowe QC (AQR0002 and AQR0003) ("House of Lords report on Brexit and acquired rights"); European Parliament, DG Internal Policies, Study, The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27, PE 583.135. M. Waibel "Brexit and Acquired Rights", (2018) 111 Am. J. Int'l L. 440, 443 (art.70 is immaterial to citizen's rights).

²⁷ House of Lords report on Brexit and acquired rights, paras 57 and 61 respectively.

²⁸ House of Lords report on Brexit and acquired rights, para.63; J. Barde, *La nation de droit acquis en droit international public* (Paris: Les Publications Universitaires de Paris, 1981).

²⁹ These canons of treaty interpretation are set forth in arts 31 and 32 of the Vienna Convention, with emphasis on the "object and purpose" of the treaty, see C. Brölmann, "Specialized Rules of Treaty Interpretation: International Organizations", in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), p.507.

³⁰ ILC, Final report, Draft Articles on the Law of Treaties with commentaries, Yearbook of the ILC, 1966, vol.II, p.265 ("ILC commentary"). Draft art.66 later became art.70 of the Convention. For the summary records and documents of the intergovernmental conference that finalised and adopted the Convention see S. Rosenne, *The Law of Treaties. A Guide to the Legislative History of the Vienna Convention* (Oceana: Dobbs Ferry NY, 1970).

³¹ ILC commentary, p.265, para.2

³² ILC commentary, p.265, para.3.

Convention have been terminated".³³ Under treaties on cross-border investment, the withdrawing party has, even after withdrawal, to accord to foreign investors continuous protection for the typical lifetime of such investments.³⁴ Some multilateral environmental agreements provide similarly.³⁵ Finally, the arbitral tribunal in *Rainbow Warrior*³⁶ has confirmed that the responsibility for acts in the (non-) execution of a treaty survives its end. The case concerned the agreement between France and New Zealand concerning French agents being held on a French military facility. The tribunal emphasised that the termination of the agreement after three years left the claims of New Zealand arising out of the breach of this agreement during its currency unaffected.

b. Are rights of individuals included?

The next question is whether legal situations can include individual rights. On its wording, art.70(1)(b) of the Convention continues the rights of the *parties* created through the execution of the treaty. The ILC added this clause to address the concern of states that their continuing rights might be denied after the end of a treaty.³⁷ Treaty-based rights of states will thus continue, and this includes rights of states regarding the treatment of their nationals by another state. The state of nationality has the right to protect its nationals under that other state's jurisdiction. In the *Diallo* case,³⁸ for instance, the ICJ found so for the International Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights. Ghana, Mr Diallo's state of nationality, was entitled to respect for his rights vis-à-vis the host state Senegal to which Mr Diallo had moved.³⁹

Admittedly, the ILC commentary that the provision is not concerned with "vested interests of individuals", is often quoted to support the conclusion that individual rights are excluded and hence it would be against the objective of the provision to introduce those individual rights via the concept of legal situations.⁴⁰ Article 43 of the Convention is also cited to support this view, however, that provision prescribes that if a state withdraws from a treaty, this does not affect its obligations under customary international law.⁴¹ However, a careful examination of the entire drafting history of the Vienna Convention and the discussion of the various drafts in the ILC reveals the specific, and limited, purpose of that commentary on "vested interests".⁴² Sir Humphrey Waldock, the ILC special rapporteur, had produced a draft article providing that withdrawal "shall not affect the validity of any act performed or any right acquired under the provisions of the treaty prior to its termination".⁴³ When discussed in the ILC plenary,

³³ Articles 63/62/142/158 of the four 1949 Geneva Conventions respectively.

³⁴ *Pars pro toto*, the 1994 Energy Charter Treaty, entered into force April 1998, 2080 UNTS 95 (53 Parties as at 6 September 2018), provides for the continued protection of investments for 20 years after withdrawal of the signature ending the provisional application of the treaty (art.45(3)(b)). Further T. Voon and A. Mitchell "Ending International Investment Agreements" (2018) 111 Am. J. Int'l L. 461; art.72 of the ICSID Convention provides that denunciation shall not affect the rights of any national.

³⁵ For instance, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force 10 September 1997, 1089 UNTS 309 (43 Parties as at 6 September 2018). Article 19 prescribes: "Any such withdrawal shall not affect the application of Articles 3 to 6 of this Convention to a proposed activity in respect of which a notification has been made pursuant to Article 3(1)".

³⁶ *Case concerning the difference between New Zealand and France concerning the interpretation and application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, XX RIAA, 215 at [106].

³⁷ The UK government comment on the earlier ILC draft art.53 had regretted that there was no mention of the obligations accrued by states at the time of withdrawal, UN Doc.A/CN.4/182 and Corr.1&2 and Add.1, 2/Rev.1&3, 343. The background is *Northern Cameroons* [1963] ICJ Rep. 15, 34, where the ICJ had denied that obligations/rights of states continued after the termination of a trusteeship agreement.

³⁸ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections* [2007] ICJ Rep. 582 at [39]; *Merits* [2010] ICJ Rep. 639 at [63].

³⁹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Compensation* [2012] ICJ Rep. 324 at [11]; see also *Jadhav Case (India v Pakistan)*, Order of 18 May 2017 at [39].

⁴⁰ ILC commentary, p.265, para.3; House of Lords report on Brexit and acquired rights, para.58.

⁴¹ House of Lords report on Brexit and acquired rights, para.59. The provision of art.43 of the Convention reads: "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

⁴² H. Ascencio, Art. 70, in: O. Corten and P. Klein (eds), *Commentary on the VCLT* (Oxford: Oxford University Press, 2011), para.24.

⁴³ Revised draft art.53(1)(b), A/CN.4/L.117 and Add.1 (emphasis added).

this formulation encountered the criticism that it included the concept of acquired right already controversial in national law and even more in international law.⁴⁴ Waldock responded that it had not been his intention to introduce the “concept of vested rights, in the special sense that it possessed in one branch of law”. He then promised a new draft to make clear that the provision covered rights “*by virtue of being vested directly under the treaty*, but not as a result of acts performed under the treaty regime”.⁴⁵ Read in this context, the purpose of the commentary is narrow: excluded are private contractual or property rights/interests under the *national* law of a party. It is not clear from the ILC commentary whether “vested interests” referred to acquired rights under customary international law. Even if it did, Professor Douglas-Scott, in the report on Brexit and acquired rights, rightly pointed out that this concept is narrow.⁴⁶ Thus, only certain rights that were created on the basis of municipal law are excluded. However, this does not exclude that the *treaty* (from which the state withdraws) itself may also create rights of individuals.

This close scrutiny of the discussions in the ILC clarifies two points which are essential. First, it defines a specific category of individual rights (“vested interests”) that are excluded from the scope of the Convention. Even more important is the logical conclusion that follows: a specific rule on what is to be excluded is only necessary if potentially individual rights are included in the first place. To put it differently, inclusion is the rule to which certain exemptions apply. Hence, the second point that becomes clear is that individual rights can be included in the concept of legal situations under of the Convention. Only then does the selection of examples of treaties by the ILC become a coherent picture.

Such inclusion of individual rights is consistent with the wording of art.70, its object and purpose and a dynamic interpretation in light of the evolution of international treaty law post-1969.

It is true that the wording of art.70(1)(b) of the Convention speaks of “any right, obligation or legal situation of the parties”. Yet that does not exclude that rights of States Parties under a treaty can *at the same time* be rights of individuals.⁴⁷ Furthermore, the object and purpose of art.70(1)(b) is to provide legal certainty and to secure non-retroactivity of withdrawal; that demands that where the substantive treaty provides for the creation of individual rights, rights actually created in the execution of the treaty continue.⁴⁸ The dynamic interpretation of the provision over time also supports including individual rights. For the concept of individual rights in international law has indeed evolved much beyond the traditional acquired rights doctrine. It now recognises law-making treaties conferring direct rights on individuals against the state of nationality or against other states. These rights are also rights of the state of nationality, as a State Party. Thus, in *LaGrand*, the ICJ found that art.36 of the Vienna Convention on Consular Protection confers an individual right to receive consular protection by the state of nationality when facing prosecution in another state.⁴⁹ In the view of the Court, that individual right was *interconnected* with the right of the state of nationality; any violation of the individual right at the same time entails a violation of the right of that state.⁵⁰ A close precedent showing that individual rights created in the execution of such treaties are not affected by withdrawal is the treaty on Netherlands-Indonesian Union.⁵¹ That treaty exempted Indonesian citizens from the general requirement of a labour permit in the Netherlands. After Indonesia denounced the treaty in 1956, the Netherlands ceased to grant that exemption to Indonesian citizens while maintaining the rights of those who were already residing. More recently, the denunciation of the East Timor Sea

⁴⁴ ILC member Jimenez de Arechaga, Summary record of the 846th meeting, A/CN.4/SR.846, in ILC Yearbook 1966 vol. I(2), para.63. According to M. Villiger, *Commentary on the VCLT* (The Hague: Brill, 2009), pp.865, 868, this was to exclude acquired or vested rights in international investment law.

⁴⁵ Sir Humphrey Waldock, Special Rapporteur, Summary record of the 846th meeting, A/CN.4/SR.848, in ILC Yearbook 1966 vol. I (2), para.8 (emphasis added). “Vested interest” defined as “possession, ownership right” is a concept of English land law (Blackstone law dictionary) with which Waldock presumably was familiar. See Rosenne, *The Law of Treaties. A Guide to the Legislative History of the Vienna Convention* (1970), p.25 (pointing out as a former member that the ILC intended to provide on the effect of treaties in international law, in line with art.2(1)(a) of the VCLT).

⁴⁶ House of Lords report on Brexit and acquired rights, para.63.

⁴⁷ Further Asencio, art.70 (2011), paras 23/24; Villiger, *Commentary on the VCLT* (2009), pp.865–75.

⁴⁸ Nollkaemper, Observations, p.187.

⁴⁹ *LaGrand* (Germany v United States of America) [2001] ICJ Rep. 466 at [77].

⁵⁰ *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep. 4 at [40].

⁵¹ K.S. Sik, “The Concept of Acquired Rights in International Law” [1977] N.I.L. Rev. 120, 137–138.

Treaty by Timor-Leste leaves created rights of individuals unaffected⁵² and investor's rights under the 1994 Energy Charter Treaty have been protected after the Russian Federation's withdrawal. The strengthening of human rights treaties against withdrawal points in the same direction.⁵³ In a similar vein, state succession must not affect such rights.⁵⁴

Article 70(1)(b) stipulates that certain legal situations, if these were created in the execution of the treaty, continue after withdrawal. In other words, the substantive treaty from which the party withdraws defines the concrete legal situations that are to survive. The next section explains the relation between the categories the Convention sets forth and the substantive treaty.

2. The effects of Article 70 of the Convention on the substantive treaty

The ILC saw the rules of art.70(1)(b) of the Convention as a matter of legal logic, flowing from the premise that withdrawal must not have retroactive effect. These rules then ensure that ongoing situations that commenced but have not ended during the currency of the treaty acquire an existence independent of the treaty. Regarding such positions, the withdrawing state and the remaining States Parties are obliged to observe the treaty in the same manner as during its currency.

Article 70 of the Convention as the template withdrawal provision assumes a twofold effect regarding any substantive treaty. First of all, it defines a template. The report of the Working Group of the ILC on the Fragmentation of International Law⁵⁵ articulates the rationale of this template-setting quality: the Convention, by governing *all* treaties, embodies the unity of contemporary international law on treaties. Substantive treaties will usually conform to its template.⁵⁶ The second effect is constructive. Article 70 of the Convention provides default rules for all substantive treaties.⁵⁷ These become supplementary rules filling gaps that the substantive treaty leaves. The practice of the treaty bodies under the Kyoto Protocol in the instance of Canada's withdrawal from the Kyoto Protocol confirms this supplementary quality. The Compliance Committee explicitly states that, in the absence of any provision in the Protocol, art.70(1)(b) of the Convention determines the ongoing reporting obligations for Canada for past periods after its withdrawal.⁵⁸

Article 70(1)(b) of the Convention defines categories of positions that shall continue post-withdrawal. It is the *substantive treaty* that then determines the specific legal situations, rights and obligations that are to continue after withdrawal. The judgment of the ICJ in *Nicaragua v Colombia* concerning the Pact of Bogotá illustrates this.⁵⁹ That treaty includes a specific provision for the procedure of denunciation, in art.LVI. It also stipulates a specific legal situation to which the non-retroactivity of the denunciation applies: "It shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". The Court then interpreted the provision on withdrawal and its effects on the

⁵² Permanent Court of Arbitration, *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Trilateral Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission pursuant to Annex V of UNCLOS, 9 January 2017.

⁵³ Committee of the UN Covenant of Civil and Political Rights, General Comment No.26, Continuity of Obligations, UN Doc.CCPR/C/21/Rev.1/Add 8/Rev.1 (1997); A/53/40 annex VII (no implied right to withdraw from the UN Covenant on Civil and Political Rights given the nature of human rights treaties).

⁵⁴ See *Opinion No.9 of the Badinter Commission in regard to the succession to the former Yugoslavia*, para.2: "The chief concern is that the solution [to the succession] should lead to an equitable outcome for ... the fundamental rights of the individual", reprinted in D. Türk, "Recognition of States: A Comment" (1993) 4 European Journal of International Law 66 at 89. China as the successor state to the UK became bound by the ICCPR in regard to Hong Kong, P.M. Eisemann and M. Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (The Hague: Martinus Nijhoff, 2000).

⁵⁵ Report of the Study Group of the International Law Commission on Fragmentation of International Law: difficulties arising from the diversification and expansion of international law, Finalised by M. Koskenniemi, UN Doc.A/CN.4/L.682.

⁵⁶ M. Villiger, "The 1969 Vienna Convention on the Law of Treaties: 40 Years After" (2011) 344 *Recueil des Cours* 9; Aust, "Vienna Convention on the Law of Treaties (1969)" at [15].

⁵⁷ See R. Ago, "Droit des traités à la lumière de la Convention de Vienne" (1971) 134/III *Recueil des Cours* 297.

⁵⁸ Kyoto Protocol, Compliance Committee (note 23).

⁵⁹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, judgment of 17 March 2016.

substantive treaty in close relation to important substantive treaty parts. The Court stated that in accordance with the rule of interpretation enshrined in art.31(1) of the Convention, the relevant provision had to be examined in light of its object and context. The Court found that the purpose of this provision was to secure the continuity of pending procedures that were initiated before effective withdrawal of a party from the Pact. By contrast, the alternative interpretation that would exempt most of the important provision of the Pact during the one-year period following the notification would be difficult to reconcile with the express terms that the treaty shall remain in force during that period.⁶⁰

III. A systemic perspective: complying with Article 70 of the VCLT and Article 50 of the TEU when exiting the EU

The Convention applies to treaties constitutive of international organisations pursuant to its art.5,⁶¹ with the caveat that these treaties may contain specific rules for instance on membership or on further treaty-making under the auspices of that organisation.⁶² The Convention thus applies, *ratione materiae*, to the Founding Treaties of the European Union, which is an international organisation. *Ratione temporis*, the Convention applies to the 2007 Lisbon Treaty that amended the TEU to include an express withdrawal right for each state.⁶³ *Ratione personae*, while most EU Member States have ratified the Convention, France and Romania have not. Yet the Convention as customary international law is binding on all Member States in their relations *inter-se* in regard to the treaties.

This external international law perspective corresponds to the EU internal perspective. The Court of Justice of the European Union (CJEU) has always been consistent in its view that the Founding Treaties are international law between the Member States. Already the foundational judgment of the European Court of Justice in *van Gend en Loos* acknowledges that the “Community constitutes a new legal order of international law”. The Court of course went on to explain that these Treaties also create rights and obligations for individuals.⁶⁴ The recent judgment of the CJEU in *Achmea* forcefully restates this international law quality of the Treaties as between the High Contracting Parties.⁶⁵ It also draws concrete conclusions from it, finding that arbitral tribunals must apply the Treaties, including its rules on primacy, alongside other international law, under the rules of the Convention. The *Achmea*-judgment is a prominent extension of a broader trend in the recent case-law, referring to international law in interpreting primary EU law in international situations.⁶⁶ Thus, in *Somali Pirates I*⁶⁷ and *II*,⁶⁸ the CJEU referred to the UN Charter and the UNCLOS to interpret the EU competence for a Common Foreign and Security Policy. In *French Guiana Fisheries*, it referred to UNCLOS to interpret the EU competence for fisheries policy.⁶⁹ For its part, the European Council, which assembles the heads of state and government of the Member States, has had no hesitation in acknowledging that the Treaties are international law to which the Convention applies. It has acted on this view, reaching agreements for the authoritative interpretation of

⁶⁰ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* at [39], [40].

⁶¹ Article 5 of the VCLT reads: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”.

⁶² Article 19 of the ILO Constitution on “Conventions and Recommendations” is an example.

⁶³ Article 4 provides that the Convention only applies to treaties concluded after its entry into force.

⁶⁴ *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (6/62) [1963] E.C.R. 1, 12.

⁶⁵ *Slowakische Republik (Slovak Republic) v Achmea BV* (C-284/16), 6 March 2018 at [41]: “Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States” (emphasis added).

⁶⁶ Further on the integration between international law and EU law, R. Wessel, “Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?”, in E. Cannizano, P. Palcherri and R. Wessel (eds), *International Law as Law of the European Union* (The Hague: Martinus Nijhoff, 2012), pp.7–34; V. Roeben, *Towards a European Energy Union—European Strategy in International Law* (Cambridge: Cambridge University Press, 2018); J. Klabbers, “The Status and Effects of International Norms”, in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law Volume 1: The European Union Legal Order* (Oxford: Oxford University Press, 2018).

⁶⁷ *Parliament v Council* (C-658/11), 24 June 2014 at [86].

⁶⁸ *Parliament v Council* (C-263/14), 24 June 2016 at [49].

⁶⁹ *Parliament and Commission v Council* (C-103/12 and C-165/12), 26 November 2014.

the Treaties within the meaning of art.31(3)(a) of the Convention.⁷⁰ The CJEU has also confirmed that the Convention is binding on the EU to the extent it reflects customary international law.⁷¹ Thus, legislation adopted and treaties concluded by the EU must be consistent with it.⁷²

This section analyses the function that art.70 of the Convention has next to art.50 of the TEU. (1) It first demonstrates that art.70 provides the template for and fills the gaps that remain in the provision of art.50(3) of the TEU. (2) Article 70(1)(b) becomes a supplementary rule, determining the positions that survive a state's exit from the EU. (3) The discussion then turns to the relation between art.70 of the Convention and a withdrawal agreement between the EU and the state that art.50(2) of the TEU envisages. (4) The final part of this section addresses how disputes could be settled.

1. Article 70 of the Convention and Article 50 of the TEU

The Founding Treaties of the European Union dating back to 1957 did not include an express right for a state to withdraw. Only the 2007 Lisbon Treaty has amended the Treaty on the European Union to this effect, enabling a Member State to withdraw from the Founding Treaties. The genesis of art.50 of the TEU demonstrates that it was indeed intended to concord with the template of art.70 of the Convention, including its clause in para.1 lit.b on continuity. The new withdrawal clause was already contained in the first draft of the , as art.46 in Title X on membership.⁷³ The accompanying memorandum of the Praesidium of the European Convention that had prepared the draft states that the clause was modelled on the Convention.⁷⁴ The Contracting Parties of the Lisbon Treaty which inserted that clause, as a new art.50, into the Treaty on European Union, have thus complied with the provision of art.42 of the Convention, which states that “the ... withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention”.

Article 50 of the TEU regulates the withdrawal from the Treaties following the template of the Convention. Article 50(1) of the TEU now confers on each state the requisite express right to withdraw.⁷⁵ Article 50(2) of the TEU requires notification of the intention to withdraw.⁷⁶ Article 50(3) of the TEU also defines a notice period for the withdrawal to become effective, of two years that may be extended by decision of the European Council.⁷⁷ Article 50(4) of the TEU governs EU-internal decision-making. Article 50 of the TEU innovates over the Convention only its fifth and last paragraph. It provides that the state must be formally re-admitted to full membership after its withdrawal has become

⁷⁰ The “new settlement for the UK” of February 2016 stated that the decision reached by the Heads of State and Government was legally binding and that it was compatible with the Treaties, EU CO 1/16 para.3.

⁷¹ *Racke GmbH and Co v Hauptzollamt Mainz* (C-162/96) [1998] E.C.R. I-3688 at [45]; *Council v Front Polisario* (C-104/16 P), 26 December 2016 at [86].

⁷² *Racke* (C-162/96) [1998] E.C.R. I-3688 at [46].

⁷³ Treaty establishing a Constitution for Europe [2004] OJ C 310. The European Convention, in much the same composition that art.48 of the TEU now prescribes for the ordinary revision of the Treaties, was tasked with drafting the treaty.

⁷⁴ “Finalement, l’article 46 relatif au retrait volontaire d’un État membre de l’Union est une disposition nouvelle. Elle reconnaît expressément la possibilité pour chaque Etat membre de se retirer de l’Union européenne s’il en décide ainsi. La procédure de retrait s’inspire en partie de celle prévue dans la Convention de Vienne sur le droit des traités, tout en prévoyant la possibilité pour l’Union et l’État membre concerné de conclure un accord régissant les modalités de son retrait et établissant le cadre de leurs relations futures”. Praesidium de la Convention européenne, *Note du Praesidium à la Convention: Titre X—L’appartenance à l’Union*, CONV 648/03, 2 April 2003, at http://www.cvce.eu/content/publication/2013/8/5/2551b42a-e0ce-49d4-857a-4325e1154e2e/publishable_fr.pdf [Accessed 2 October 2018] (emphasis added). J. Dammann, “Revoking Brexit” (2018) 23 Col. J. Eur. L. 265.

⁷⁵ Article 56(1) of the Convention reads: “A treaty which ... does not provide for ... withdrawal is not subject to withdrawal unless ...”

⁷⁶ Article 50(2) of the TEU does not specify whether a notification can or cannot be revoked until the end of the notice period. This gap is to be filled through recourse to art.68 of the Convention. It provides clearly that both notification and the instrument of withdrawals may be freely revoked before it takes effect. The commentary of the ILC confirms that this was the considered position. The Commission appreciated that complete liberty to revoke might raise concerns as it was the purpose of the notice period to give the other parties the chance to prepare, but that encouraging revocations was the overwhelming consideration, ILC commentary, p.264 (art.64 of the draft became art.68 in unchanged wording).

⁷⁷ Note that the Convention does not set a default notice period where the substantive treaty provides for an express right to withdraw. The default notice period of one year of art.56(2) only applies to implied rights of withdrawal.

effective.⁷⁸ This innovation is in line with the proviso in art.5 of the Convention that the law of an international organisation may have special rules regarding membership.

In its third paragraph, art.50 of the TEU provides on the consequences of effective withdrawal. In line with art.70(1)(a) of the Convention, the Treaties shall cease to apply between the withdrawing state and the remaining Member States from the time of the effective withdrawal.

By contrast, there is no provision corresponding to art.70(1)(b) of the Convention on continuing positions. Could this be the derogation from art.70 that the introductory clause expressly allows?⁷⁹ One would have to argue that the omission in relation to consequences of withdrawal *implies* that the Contracting States intended that all rights, obligations and legal situations should come to an end in the event of a state withdrawing. However, it could be well argued that an implied derogation is not permissible at all. Article 70 of the Convention states that “unless the treaty otherwise *provides*”, and the ILC required that the application of the art.70(1) would be “subject to any conditions *contained* in the treaty...”. Thus, the explicit rule of art.70(1) can only be derogated by another explicit rule; an implied derogation does not suffice. In addition, there is no indication that the Contracting Parties of the Lisbon Treaties intended to derogate from art.70(1)(b) by way of an omission to provide. Quite the contrary. In all instances, they adhered to the template of the Convention, from the inclusion of an express withdrawal right to the withdrawal procedure.

Article 50(2) of the TEU, by prescribing that arrangements be made for the withdrawal of a state, also does not derogate the continuity that art.70(1)(b) of the Convention secures.⁸⁰ The introductory phrase of art.70 specifies that it continues the positions by default, *unless* a separate and specific agreement on them is actually later concluded between the remaining and the withdrawing state. Aligned with this, art.50(2) obliges the EU to come to an agreement with the withdrawing state: “the Union shall negotiate and conclude an agreement with that State”. Thus, the provision envisages that an additional new agreement be concluded for the consequences of the concrete withdrawal. Paragraph 3 operates on the basis that such a withdrawal agreement would be concluded and enter into force within the notice period to ensure that coveted legal certainty. With that, EU Member States expressed their intention to avoid a legal vacuum. Again, this is what the ILC had in mind, if nothing was agreed in the treaty, then the subsequent agreement of states would indicate the legal consequences.⁸¹ It would contradict this intention to conclude that because art.50(2) demands a new agreement, failure to conclude such an agreement extinguishes all rights, obligations and legal situations.

2. The positions created in EU law surviving exit

Article 70(1)(b) of the Convention becomes a supplementary rule, filling the gap in art.50(3) of the TEU. It provides rules for certain obligations, legal situations and rights created during membership to survive the state’s exit.

Which positions created under the EU Founding Treaties fall under this rule and continue? An investigation into all possible positions that qualify in the sense of art.70(1)(b) of the Convention would go beyond the scope of this article. It also is fair to state that in particular the continuing financial obligations of the UK towards the EU have been accepted by all sides early.

⁷⁸ Article 50(5) of the TEU serves to exclude, for the EU, the practice of the United Nations to allow a state back in by tacit agreement after withdrawal, see M. Akehurst, “Withdrawal from International Organisations” (1979) 32 C.L.P. 143, 146–149.

⁷⁹ To this effect, House of Lords, European Union Committee 15th Report of Session 2016–17, HL Paper 125 Brexit and the EU budget (art.50 as *lex specialis*) (“House of Lords budget report”).

⁸⁰ For the reverse relation House of Lords budget report, para.135.

⁸¹ This will be discussed below in relation to the withdrawal agreement. The full ILC commentary reads: “(3) Subject to any conditions contained in the treaty of agreed between the parties, paragraph 1 provides that, first, that the termination of a treaty releases the parties from any obligation further to perform it. Secondly, it provides that the treaty’s termination does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.”

Here, the focus therefore is on the rights of individuals, encompassed in the concept of Union citizenship that have proved more controversial. Union citizenship marks both the objective-law situation and the rights of individuals within the meaning of art.70 of the Convention. EU Member States create Union citizenships for individuals.⁸² This Union citizenship becomes the fundamental status of the individual. This protects the link that the Union citizen has with the Union. Further legal situations are created by Member States in admitting Union citizens to their territories pursuant to the free movement provisions of the Treaty.⁸³ Those provisions generate instantaneous obligations in the sense that Member States must fulfil them at that point in time. But that host Member State has to continuously respect the Treaty and the concretising EU legislation in relation to the admitted Union citizen in order to continue the once created legal situation. These are the legal situations that shall not be “affected” by withdrawal; they continue per art.70(1)(b) of the Convention.

The previous practice of the EU in similar situations indicates full adherence to the rule of continuing created legal situations and rights of individuals. In the context of Algerian independence from France, the European Court of Justice had established a general principle that individuals retain their pension rights acquired in that territory.⁸⁴ In the case of Greenland’s withdrawal from the Treaties following the 1986 referendum in that part of the Kingdom of Denmark, the then Community and its Member States, including the UK, and the Kingdom of Denmark concluded a treaty which preserved the rights of individuals who had exercised their free movement right to work and reside in Greenland.⁸⁵ The memorandum of the Commission on that treaty explains that these individual rights created during the currency of the Treaty must be protected, in addition to continuing pension rights.⁸⁶

3. Is continuity subject to any conditions agreed between the UK and the EU?

The Convention contains the expectation that if the treaty from which the state withdraws does not provide a provision relating to the future of created rights, obligations and legal situations, a new agreement will be concluded. These arrangements must create legal certainty by clarifying the concrete positions that continue and by establishing enforcement mechanisms; they may also address all further matters that the concrete withdrawal may raise.⁸⁷ The ILC commentary makes clear that any new agreement of Parties may prevail.

Article 50(2) of the TEU turns this into an obligation for the EU to negotiate and conclude a new agreement on the arrangements for each concrete withdrawal.⁸⁸ In so doing, the Treaty follows a widespread international practice. Treaties constitutive of complex international organisations typically mandate such arrangements. For instance, the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (the MIGA Convention) is representative of international financial institutions. Article 35 of the MIGA Convention on the “rights and duties of States ceasing to be members” provides that “the Agency shall enter into an arrangement with such State for the settlement of their respective claims and obligations. Any such arrangement shall be approved by the Board”. This clause requires a treaty on continuing

⁸² Article 20(1) of the TFEU construes the conferral of Union Citizenship as a “*ius tractum*”. An individual acquires Union citizenship by the fact that a Member State confers its nationality on him or her.

⁸³ Article 21, art.45 of the TFEU.

⁸⁴ In *Horst v Bundesknappschaft* (C-6/75) [1975] E.C.R. 823 the European Court of Justice found Regulation 109/65/EEC retroactively deleted the reference to Algeria but explicitly excepted any acquired rights of individuals.

⁸⁵ Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, [1985] OJ L.29/1. Article 2 of the Protocol on special arrangements for Greenland reads: “The Commission shall make proposals ... for the maintenance of rights acquired by legal and natural persons during the period that Greenland was part of the Community”. Greenlanders retained their rights through their Danish citizenships.

⁸⁶ Commission, *Opinion on the Status of Greenland*, 2 February 1983, EC Bulletin, Supplement 1/83, p.21.

⁸⁷ Second Report on the Law of Treaties by Mr G.G. Fitzmaurice, Special Rapporteur, UN Doc.A/CN.4/107 (ILC Yearbook 1957, vol.II), p.35, para.6: “The termination of ... the participation of a particular party, may give rise to a number of consequential issues. These will ... be governed by the treaty itself if it provides for them, and if not, must be the subject of a separate agreement between the parties”.

⁸⁸ “Withdrawal Agreement” or WA.

financial obligations, concluded by the organisation.⁸⁹ However, the withdrawing state remains fully liable for its continuing obligations per art. 70 of the Convention, unless other arrangements have been made.⁹⁰ The MIGA Convention also deals with the division of the assets of the organisation in the case of its dissolution, a matter art. 70 does not cover. This provision may be applied by analogy to the division of assets in the withdrawal of a state.⁹¹

In light also of this international practice, the principal purpose of the Withdrawal Agreement under art. 50(2) of the TEU is to place the surviving positions created in the execution of the Treaties on as secure legal basis as possible, for the time after their currency ends. The withdrawal agreement that art. 50 of the TEU envisages will have to provide legal certainty for the relationship between the EU, the withdrawing state, and the individuals concerned, in the new international law environment. The point then becomes to replicate there as much as possible of the supranational environment in which the citizens' rights were originally created.

The reverse question then arises, whether as a matter of substantive law, the Withdrawal Agreement can be less beneficial for the created legal situations, in particular, the individual rights of Union citizens? The introductory clause of art. 70 of the Convention expressly permits this. Thus, the Convention's rules on continuity apply, unless the later agreement of the parties specifies new substantial rules. It is indeed the consequence of the principles of state sovereignty and state consent that the newly agreed arrangements will prevail.

However, in the case of the EU, such international rule-making has to comply with the higher-ranking principles of EU law. Crucially, the normative character of Union citizenship and the related citizenship rights as fundamental rights set a standard that the Union, the remaining Member States and the leaving state must respect.⁹² Any limitations to existing and continuing Union citizenships must concord with their normative quality as fundamental rights. Even if one were not to follow the argument that Union citizenship as such is a fundamental right, then standards set by the rule of law in EU law apply to such international rule-making, comprising in particular the principle of proportionality, equal treatment and non-discrimination.

The drafting of the Withdrawal Agreement so far seems to be aligned with the presumption that legal situations of Union citizens will continue. However, a careful analysis of its provisions would exceed the purpose of this article and might be premature. The drafting has progressed from the outline of the Joint Report of EU and UK negotiators⁹³ through several revisions of the text of a Withdrawal Agreement. The current March 2018 draft⁹⁴ enshrines, in application of art. 70(1)(b) of the Convention, that the rights of citizens created by the UK and the remaining Member States continue after withdrawal. It effectively copies the extensive body of primary and secondary law on Union citizenship, applying it to those having exercised their rights by the end of the transition period, and providing the maximum sunset clause of a lifetime. Also, following the template of art. 70 of the Convention, the draft sets forth the continuing financial obligations of the UK created under the current EU budget.

⁸⁹ Such treaty will be concluded pursuant to customary law; the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations is not yet in force. Further C. Brölmann, "International organizations and treaties: contractual freedom and institutional constraint", in J. Klubbers and Å. Wallendahl (eds), *Research Handbook on the law of International Organizations* (Cheltenham: Edward Elgar Publishing, 2011), pp.285–312.

⁹⁰ MIGA Secretariat, *Commentary on the MIGA Convention*, para.73, available at https://www.miga.org/documents/commentary_convention_november_2010.pdf [Accessed 2 October 2018].

⁹¹ *Commentary on the MIGA Convention*, para.74.

⁹² For a detailed analysis see Volker Roeben, Petra Minnerop, Pedro Telles, Jukka Snell, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit" [2018] E.H.R.L.R. 450.

⁹³ European Commission, Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, Doc.TF50 (2017) 19.

⁹⁴ European Commission, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 15 March 2018, Doc.TF50 (2018) 33/2.

The external competence under art.50(2) of the TEU for the EU to make “arrangements for withdrawal” comprises providing for a transition period beyond the exit date. During this period, new rights will be created on the same terms as those created during the currency of the Treaties. Arrangements may also provide for the permanent validity of the Treaties in parts of the withdrawing state, as the current backstop in the draft does regarding Northern Ireland.

Finally, any Withdrawal Agreement has to be ratified by the European Parliament, under art.50(2) of the TEU and art.218 of the TFEU, and by the UK parliament, under UK constitutional law.⁹⁵ That confers on each parliament the responsibility to assess the Agreement for citizens’ rights. Should either reject the Agreement, then the UK would still exit at the end of the notice period, unless the European Council granted an extension, but individual rights would continue directly based on art.70(1)(b) of the Convention.

4. Settling disputes concerning Article 70 of the Convention

The rules of art.70(1)(b) of the Convention on continuity are justiciable and subject to adjudication. The following discusses the several avenues open for states and individuals to judicially enforce compliance with the Convention. For the remaining Member States and the exiting state to settle disputes there are two courts that have jurisdiction—the CJEU and the ICJ. Their jurisdiction is delineated by the timeline of the Brexit process. For private parties, and in addition to this inter-state dispute settlement, art.70 will be enforceable before domestic courts of the remaining Member States and of the exiting state.

a. The jurisdiction of the CJEU over Article 70 of the Convention

The CJEU has substantive jurisdiction—*ratione materiae*—over art.70 of the Convention. In its *Mox Plant* judgment, the Court asserted and since then has maintained its exclusive jurisdiction over all disputes between Member States governed by EU law, based on art.344 of the TFEU.⁹⁶ The Court has also ruled that customary international law is part of the EU legal order, binding both on the EU and its Member States. As pointed out, art.70 of the Convention reflects customary international law. Consequently, the Court has exclusive jurisdiction over all disputes between the Member States concerning the continuity in the sense of the above-discussed provision. This *ratione materiae* jurisdiction of the Court over disputes to which the Convention applies corresponds with the personal scope of the Court’s jurisdiction. *Ratione personae*, it covers disputes between EU Member States. The Court’s exclusive jurisdiction under art.344 of the TFEU will end, though, with the UK’s exit becoming effective. In the process of a Member State exiting the EU, the critical parameter then becomes the timeline, the jurisdiction *ratione temporis*. Under a general principle of international procedural law that is applicable in EU law,⁹⁷ the Court will continue to have jurisdiction over all cases initiated before the withdrawal from the Treaties becomes effective, which is by default on 29 March 2019.

b. The jurisdiction of the ICJ

Disputes between the remaining Member States and the UK over art.70(1)(b) of the Convention arising after the effective withdrawal in March 2019 could be brought before the ICJ.⁹⁸ Only states have standing

⁹⁵ European Union (Withdrawal) Act 2018, 26 June 2018, s.13, Parliamentary approval of the outcome of negotiations with the EU.

⁹⁶ *Commission v Ireland (Mox Plant)* (C-459/03) [2006] E.C.R. I-4635 at [80]–[84].

⁹⁷ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia), Preliminary Objections*, Judgment of 17 March 2016 at [31] (relating to a case brought by Nicaragua under the Pact of Bogota after Colombia had notified withdrawal but before the expiry of the notice period). Also art.127(2) of the Rome Statute for the International Criminal Court: “... nor shall it [the withdrawal] prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective”.

⁹⁸ Article 66 of the Convention subjects disputes concerning the withdrawal provisions only to conciliation, i.e. non-binding settlement by a third party.

before that court, and hence not the European Commission or individuals. There are two possible bases of jurisdiction of the ICJ. Member States and former Member States who are parties to the European Convention for the Pacific Settlement of Disputes⁹⁹ could agree to submit to the ICJ all international legal disputes which may arise between them and concern any question of international law, the existence of any fact constituting a breach of an international obligation, and, importantly, also the nature or extent of the reparation to be made for the breach of an international obligation (art.1). A separate basis for the ICJ jurisdiction are the unilateral and reciprocal declarations that the Member States have made pursuant to art.36(2) of the ICJ Statute for all future disputes.¹⁰⁰ The jurisdiction of the ICJ under both the European Convention and its Statute is subsidiary to specific dispute settlement that the parties may agree to.¹⁰¹

Both heads of jurisdiction confer the competence on the ICJ to apply all international law in force between the States Parties to the dispute, including art.70 of the Convention, but not the Withdrawal Agreement, which will be concluded exclusively by the EU and the UK. The ICJ could refer to it for the purposes of interpreting art.70 of the Convention, the Agreement being “relevant international law” between them within the meaning of art.31(3)(c) of the Convention.

c. Litigation

The situation of individuals depends on the jurisdiction they are under. As long as the dispute arises within the jurisdiction of the CJEU, they will be able to enforce their continuing rights under art.70 of the Convention post-withdrawal. The European Court of Justice in *Racke* has already used the Convention qua its quality as customary international law as a yardstick for EU secondary acts that would have denounced a substantive treaty, protecting the individual rights created by the treaty.¹⁰² Article 70 of the Convention is sufficiently precise to be directly applicable in the EU legal order, first by Member States courts which could then refer any questions of interpretation to the CJEU pursuant to art.267 of the TFEU. Within the jurisdiction of the UK, rights derived from the Convention, as customary law, would also be enforceable under the constitutional law of the UK.¹⁰³

Individual rights arising under the Withdrawal Agreement which will be binding as a treaty on the EU will be enforceable directly without further implementation measures in the territory of the EU, and the CJEU will have interpretative jurisdiction under art.267 of the TFEU. In the UK, they will only be enforceable based on the legislation that the UK adopts to incorporate the Agreement under its dualist approach to international law. So far, the Withdrawal Agreement confers on the CJEU the jurisdiction to rule on preliminary references from the UK courts relating to the Agreement during the transition and then for eight years after withdrawal.¹⁰⁴

⁹⁹ European Convention for the Pacific Settlement of Disputes, 29 April 1957, entered into force 30 April 1958, 320 UNTS 243, ETS No.023. The Convention has currently 14 Parties, including the UK, and Austria, Belgium, Germany, Denmark, Italy, Luxembourg, Malta, Netherlands, Slovakia and Sweden. In accordance with art.35, the UK applies the same reservations as to its acceptance of the compulsory jurisdiction of the ICJ, which exclude disputes relating to nuclear weapons.

¹⁰⁰ All EU Member States including the UK, except the Czech Republic, Croatia, France, Latvia and Slovenia, have made such declarations, see the list at <http://www.icj-cij.org/en/declarations> [Accessed 2 October 2018].

¹⁰¹ Article 28(1) of the European Convention for the Pacific Settlement of Disputes and art.36(2) of the ICJ Statute. Of course, arbitration under the WA does not count as it will only be open to the EU, but not the remaining Member States.

¹⁰² *Racke* (C-162/96) [1998] E.C.R. I-3688 at [51].

¹⁰³ The editors of *Oppenheim's International Law*, vol.I (9th edn, Longman, 1996), state, p.35: “The application of international law as part of the law of the land means that subject to the overriding effect of statute law, rights and duties flowing from rules of customary international law will be recognised and given effect by English courts without the need for any specific act adopting those rules into English law.” The authority is *Chung Chi Cheung v The King* [1939] A.C. 160. More circumspect J.G. Collier, “Is International Law Really Part of the Law of England?” (1989) 38 International and Comparative Law Quarterly 924.

¹⁰⁴ Article 126 of the draft WA reads: “During the transition period ... the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties. The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement.”

Conclusions

The 1969 Vienna Convention on the Law of Treaties sets forth the rule of non-retroactivity in law if states change their minds, a fundamental demand of the (international) Rule of Law. Article 70(1)(b) provides for continuity of Union citizenship and the related rights of Union citizens, as these represent legal situations that were created in the execution of the EU Treaties. The provision is binding customary international law, and it applies to a treaty constitutive of an international organisation. This rule provides essential legal certainty, in the absence of any other agreement of states.

This international law provides the normativity for the voluntarist process of a state leaving the EU. Article 70 fills the gap that art.50(3) of the TEU leaves on the consequences of an effective withdrawal from the EU, by continuing financial obligations of the state towards the EU and the rights of EU citizens. Rights to move and reside will remain part of the law applicable in the EU long after the UK's departure, and so will the financing of common interests.

The Withdrawal Agreement between the EU and the UK, in its draft form of March 2018, purports to manage the exit of the UK from the EU by closely following the Convention precept of continuity, as applied next to art.50 of the TEU. If the Withdrawal Agreement fails to enter into force, then art.70 of the Convention will provide the essential, directly applicable backstop to prevent the legal vacuum of a "cliff edge".

On Brexit, the EU, its remaining Member States and the UK are forming international practice that stabilises the international law of international organisations and treaties in the critical matter of a Member State deciding to exit. This practice underpins the confidence that international organisations can be made competent to discharge complex tasks, including the movement of persons, and, under international law, provide stability for those trusting in a legal certainty that was created in the execution of the treaty.

Media Responsibility, Public Interest Broadcasting and the Judgment in *Richard v BBC*

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✉ Broadcasters; Freedom of expression; Legitimate expectation; Privacy; Proportionality; Public figures; Public interest

Abstract

The recent decision in Sir Cliff Richard's privacy action against the BBC and South Yorkshire Police has excited a good deal of moral and legal debate concerning the legitimate expectations of well-known individuals and the limits of media freedom. This article analyses the decision in the context of existing domestic and European case-law concerning the balance between privacy on the one hand and freedom of expression and the public right to receive information on the other. It argues that given the level of intrusion into the claimant's private life, and the tactics employed by the BBC in gathering and broadcasting the story, the case was probably decided correctly on the facts. However, it is argued that the judgment, and its potential impact on the future of case-law in this area, may be damaging to media freedom and the public right to receive information, specifically with reference to media reporting of police investigations

Introduction

The recent judgment in *Richard v BBC*¹ has excited fears of a new dawn of over-protection of the privacy rights of high profile individuals, and a corresponding diminution in media freedom and the right of the public to receive information.² The BBC has been refused permission to appeal the decision,³ and then announced that it will not be appealing the decision.⁴ This raises concerns that the decision as it stands might impact negatively on freedom of the media, and deny the higher courts an opportunity to restate that interest in the balance between privacy and freedom of expression, particularly in cases involving the privacy rights of high-profile public figures.

The decision of Mann J raises a number of pertinent issues relating to the balance between individual privacy (especially of high-profile figures) and media freedom and the gathering and publication of news, including the level of legitimate expectations of privacy of high-profile individuals and the role and the limits of the public interest defence in cases of this sort. More specifically, it raises questions about the legitimacy of gathering and disclosing details about police investigations, both before arrest and before trial.⁵ These issues are, of course, underpinned by a constant dilemma: the media have an undoubted public

* Steve Foster would like to thank the anonymous reviewer for several constructive and helpful observations and suggestions. All errors remain those of the author.

¹ *Sir Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch).

² R. Greenslade "The Cliff Richard Ruling is a chilling blow to press freedom", *The Guardian*, 18 July 2018.

³ See "BBC is refused leave to appeal against Cliff Richard privacy ruling", *The Guardian*, 26 July 2017.

⁴ See "BBC drops appeal against Cliff Richard privacy case but urges press freedom review", *The Times*, 15 August 2018.

⁵ The BBC has suggested that the government initiate new laws allowing the media to disclose such details: "BBC call for review of law to ensure media can name suspects after Cliff Richard case", *The Daily Telegraph*, 15 August 2018

role to play as public watchdog and as a conduit between news items and the public,⁶ but at the same time they are private bodies with private interests. The dilemma is neatly summed up by Lord Donaldson MR:

“The ‘Media’... are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the *Daily Mirror*.⁷

It is, of course, the reaction to that dilemma that will dictate the judiciary’s response to media freedom and the balance between freedom of expression and privacy.⁸ In *Francome*, Lord Donaldson MR sees the press as collaborators, with a duty to report its investigations (on the extent of corruption and illegal betting in the horse racing world) to the police, rather than disseminate them to the public. Such a view, it is suggested, is wholly unrealistic and indeed inconsistent with the role of the media, which is to report on matters of public interest, however they are defined, and to disseminate that information to the public. Obviously, in doing so the media must follow the rules of professional broadcasting, but if we start from the premise that the media are no different than other public bodies—to serve the general public interest and principally to comply with strict standards on how they collate and disseminate information to the public—then the basic tenets of media freedom will be lost.

In UK law, whether public figures, however defined, are successful in claims brought to defend their privacy and private and confidential information is largely dependent on whether there is an overriding public interest in favour of publication.⁹ *Richard* raises issues other than the application of the public interest defence, yet the general tenor of the judgment is formed by the judge’s approach to the desirability of the public dissemination of this information. Thus, whilst the author concedes that “celebrity” privacy is important, and should inform responsible and ethical journalism and broadcasting, it will be argued that this decision—and other decisions from the domestic courts¹⁰—have unjustifiably rejected case-law representing a justifiable and sensible widening of the defence in cases involving high-profile individuals.¹¹ In particular, it will be argued that the judgment is out of line with the inevitable exposure of privacy interests in today’s technology and social media.

The facts and decision in *Richard v BBC*

The claimant, Sir Cliff Richard, claimed damages for breach of his right to privacy against the first defendant BBC and the second defendant police force. The facts were that a BBC journalist had discovered from a confidential source—believed to be someone from the police force who was aware of the police investigation—that the police force was investigating the claimant in respect of an allegation of historical sex abuse.¹² Subsequently, the police had agreed to give the journalist advance notice of a search of the claimant’s English property and the BBC then revealed that the claimant was being investigated and produced numerous broadcasts of the search, including the use of helicopters to catch images of the

⁶ See, in particular, the decision of the House of Lords in *Turkington v Times Newspapers* [2001] 2 A.C. 277.

⁷ *Francome v Daily Mirror Group Newspapers* [1984] 1 W.L.R. 892 at 898.

⁸ See M. Tugendhat, “Privacy, Judicial Activism and Democracy” (2018) 23(2) *Communications Law* 63.

⁹ See S. Foster, *Human Rights and Civil Liberties* (3rd edn, Pearson, 2011), pp.619–632. See also H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006), chs 13–15.

¹⁰ Most notably, *Mosley v News Group Newspapers* [2008] EWHC 687 (QB) and *PJS v Newsgroup Newspapers* [2016] UKSC 26.

¹¹ See *Axel Springer v Germany* (2012) 55 E.H.R.R. 6 and *Ferdinand v MGN Ltd* [2011] EWHC 2524 (QB), discussed below.

¹² The full facts and analysis of the witness statement are detailed in [1]–[148] of the transcript. The investigation was part of “Operation Yewtree” into historical sex abuse.

claimant's property.¹³ The police investigation continued for two years, but the claimant was never arrested or charged; eventually the police admitted liability and agreed to pay £400,000 in damages to the claimant.¹⁴ The High Court had to determine whether there was a legitimate expectation of privacy, whether any interference was justified by the BBC's right to freedom of expression, and any damages payable by it (including the apportionment of damages between both defendants).¹⁵

The claimant's legitimate expectation of privacy

Giving judgment, Mann J considered whether the claimant had a reasonable expectation of privacy in respect of the police investigation; the BBC having argued that this was a public event and not deserving of protection. The judge referred to Sir Anthony Clarke's dicta in *Murray v Express Newspapers plc*,¹⁶ where he formulated the matters that should be taken into account in deciding whether the claimant had a reasonable expectation of privacy:

“... the question ... is a broad one, which takes account of all the circumstances of the case ... the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent ... the effect on the claimant and the circumstances in which, and the purposes for which the information came into the hands of the publisher.”¹⁷

In the judge's view, the last two criteria were capable of being very relevant to the present case.¹⁸ The judge found that whether there was a reasonable expectation of privacy in a police investigation was a fact-sensitive question and was not capable of a universal answer.¹⁹ The judge noted that previous judicial authority was not particularly helpful on this issue,²⁰ although he stated that the starting point was that a suspect had a reasonable expectation of privacy in relation to a police investigation. Thus, it was not, as a general rule, necessary for anyone outside the investigating force to know that information, there being potentially damaging consequences of wider knowledge that an accusation had been made against an individual.²¹ The fact of an investigation would thus of itself generally carry some stigma,²² the judge being unconvinced that the general public was universally capable of adopting a completely open and broad-minded view of the fact of an investigation so that there was no risk of taint either during the

¹³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch), at [224]. Mann J concluded that that the journalist had misled the police force and the media personnel into believing that the journalist knew more of the operation and had impliedly threatened the force that if they did not confirm the allegation and proffer further information he would reveal the story before the planned arrest.

¹⁴ It also agreed to pay his costs and paid £30,000 on account of that costs' liability.

¹⁵ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [225].

¹⁶ *Murray v Express Newspapers Plc* [2008] EWCA Civ 446; [2009] Ch. 481.

¹⁷ *Murray v Express Newspapers Plc* [2009] Ch. 481 at [36].

¹⁸ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [231]. It will be argued that the attributes of the claimant, the nature of the activity in which the claimant was (allegedly) engaged, and the nature and purpose of the intrusion were equally important to the BBC's claim.

¹⁹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [237]; applying *ZXC v Bloomberg LP* [2017] EWHC 328 (QB). In ZXC the High Court restrained the publication of the fact that the claimant was under investigation by a law enforcement agency after taking into account the confidentiality of the document and that it came into the hands of the defendant via an unauthorised leak.

²⁰ *Axel Springer v Germany* (2012) 55 E.H.R.R. 6 and *PNM v Times Newspapers Ltd* [2014] W.L.R.(D) 371; [2014] EWCA Civ 1132.

²¹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [251]. The judge came to this conclusion having quoted the extra-judicial opinions from the Brian Leveson Inquiry into the Culture, Practices and Ethics of the Press, para.2.39 and the College of Police's Guidance on Relationship with the Media (May 2013), para.3.5.2, that save in exceptional cases the details of arrests and the names of those suspected of offences should not be disclosed to the public. For a discussion on these enhanced privacy rights, see H. Fenwick and D. Fenwick, “The Changing Face of Protection of Privacy Rights: Leveson, the Royal Charter and Tort Liability” (2013) 27(3) I.R.L.C.T. 241.

²² *Khuja v Times Newspapers Ltd* [2017] UKSC 49.

investigation or otherwise.²³ Further, the fact that there was a search by a public authority that had been authorised by the court did not, without more, remove that legitimate expectation of privacy.²⁴

Having stated the general position, the judge firstly dealt with the argument that the claimant was a public figure who had promoted his Christian beliefs in public, and that those facts affected his expectation of privacy. The judge dismissed this on the basis that although a public figure might waive at least a degree of privacy by courting publicity, or adopting a public stance at odds with the privacy rights being claimed, nothing like that applied in this case.²⁵ The judge also rejected the claim that it was important to consider that this information had fallen into the hands of the media. Here the judge stated that the quality of the information as being private could not, as a matter of principle, be affected by the nature of the recipient, and that there was no basis for saying that a reasonable expectation of privacy was removed simply because the information had reached the hands of the media. In the judge's view, Sir Cliff's rights were not based on a reasonable expectation of privacy as long as the information did not fall into the hands of the media; he had a reasonable expectation of privacy full stop.²⁶

The balance between privacy and media freedom

The judge then considered the balancing exercise between the claimant's rights and those of the BBC under art.10 of the Convention. The judge first considered the supposed "duty" of the media to report on matters of public interest, a duty which had been stressed consistently by the European Court of Human Rights.²⁷ Thus in *Axel Springer v Germany*²⁸ the Court stated that:

"Although the press must not overstep certain bounds, regarding in particular protection of the rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideals on all matters of public interest."²⁹

However, Mann J considered the Court's use of the word duty as unhelpful in assisting the present court's debate at this stage, reminding us that the duty of the court was to balance art.10 against the right to privacy.³⁰ Mann J then proceeds to consider the criteria set out in *Springer* without taking into account this overall duty of the press to report. In assessing the relevant criteria, the judge began with the contribution of the expression to a matter of general interest; the BBC's plea being that the sexual abuse of children and the BBC's investigation into it constituted a clear public interest, which was the subject of an ongoing public debate. However, the judge dismissed that argument, stressing that any public interest has to be objectively determined, and believing that the BBC was far more impressed by the size of the story and that it had the opportunity to scoop their rivals.³¹ This observation is made before the judge considers the claim from two angles: the reporting of the matter as a matter of public interest, and the identification of the individual concerned. However, when he does address these issues, the judge decided that although the information about the inquiry did contribute to a debate of general public interest,³² it could not be accepted that it was necessary to reveal the claimant's identity. In his view, knowing that Sir

²³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [248]. The judge referred to the opinion of Lord Sumption in *Khuja*, where he had doubted the trial judge's confidence that in general the public would know the difference between suspicion and guilt: *Khuja v Times Newspapers Ltd* [2017] UKSC 49 at [32]. The judge did not refer to *Re Guardian News and Media* [2010] 2 W.L.R. 325, where the decision was based on the Court's acceptance that the public would understand the distinction.

²⁴ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [255].

²⁵ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [255]. The judge referred to *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) to support that finding, although that case was concerned with the protection of more intimate private details and did not involve the public investigation of criminal behaviour.

²⁶ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [258].

²⁷ *Sunday Times v United Kingdom* (1978) 2 E.H.R.R. 245 at [280].

²⁸ *Axel Springer v Germany* (2012) 56 E.H.R.R. 6.

²⁹ *Axel Springer v Germany* (2012) 56 E.H.R.R. 6 at [79].

³⁰ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [276].

³¹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [280].

³² *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [281].

Cliff was under investigation might be of interest to the gossip-mongers, but it did not contribute materially to the genuine public interest in the existence of the police investigations in this area.³³

The judge then considered the public status of the claimant and his prior conduct, stressing that in certain circumstances a person who has placed himself into public life has a diminished expectation of privacy.³⁴ However, it did not follow that there was some sort of across the board diminution of the effect of privacy rights.³⁵ Specifically, the judge referred to *Axel Springer*,³⁶ where the European Court acknowledged that that there were areas of the life of a public person which could appropriately remain private, where for example the material is published merely to satisfy public curiosity.³⁷ The judge agreed that Sir Cliff's oft-stated and well-known position as a Christian, promoted by him, might make disclosures of actual conduct which might be regarded as unchristian something to which he has rendered himself vulnerable by virtue of his public position. However, that did not mean that unsubstantiated allegations, or investigations into unproved conduct, fell into the same category.³⁸ Accepting that the publication of the fact of a criminal investigation search warrant might be thought to be of particular interest because of the contrast between the allegations and Sir Cliff's public position, the judge also stressed that it was precisely because of that contrast that the publication of the material is capable of being intrusive and so damaging to his reputation.³⁹ Thus, the criteria of public status and previous conduct were not particularly weighty in this case and that they did not diminish the weight of his privacy rights in respect of the allegations disclosed by the BBC.⁴⁰ On the question of the method by which the information was obtained, the judge was critical of the way in which the BBC had acquired it and this clearly weakened the BBC's position.⁴¹ The judge was also critical of the BBC's failure to provide the claimant with a right to reply, together with providing the subject with some sort of opportunity to challenge the publication, whether by persuasion or injunction.⁴²

The judge thus concluded that the claimant's privacy rights were not outweighed by the BBC's rights, stressing that the consequences of a disclosure for a person such as the claimant were capable of being very serious and required an equally serious justification.⁴³ Although the judge recognised that here was a very significant public interest in the fact of police investigations into historic sex abuse, including the fact that they involved public figures,⁴⁴ no public interest in identifying those persons existed in the instant case. Knowing Sir Cliff was under investigation might be of interest to gossip-mongers, but that revelation of his identity did not contribute materially to the genuine public interest in the investigation of police investigations in this area.⁴⁵ The judge also accepted that to a degree a person who placed himself into the public life had a diminished expectation of privacy, but that depended on the degree of voluntary surrender of privacy, the area of private life and the degree of intrusion.⁴⁶ In the present case, the claimant's

³³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [282].

³⁴ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [284].

³⁵ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [284], citing *Rocknroll v Newsgroup Newspapers* [2013] EWHC 24 (Ch).

³⁶ *Axel Springer v Germany* (2012) 56 E.H.R.R. 6.

³⁷ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [284], citing *Axel Springer v Germany* (2012) 56 E.H.R.R. 6.

³⁸ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [285]. Again, the judge stressed that Sir Cliff's position might make the allegations more interesting in a general sense, and appeal to the curious or prurient, but that did not justify an invasion into his privacy.

³⁹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [286].

⁴⁰ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [287].

⁴¹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [292].

⁴² *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [293]. Although the judge denied that this was not an influencing factor in his judgment, and without doubt an opportunity for reply is a relevant factor in judging proportionality, the mention of providing opportunities for subjects to bring injunctions comes close to bestowing a right on the subject of impending publication to be pre-warned of publication. This was denied by the European Court in *Mosley v United Kingdom* (48009/08) (2012) 53 E.H.R.R. 30.

⁴³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [279].

⁴⁴ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [281].

⁴⁵ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [282].

⁴⁶ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [284], referring to the European Court's judgment in *Axel Springer AG v Germany* (2012) 56 E.H.R.R. 6.

well-known position as a Christian might make disclosures of actual unchristian conduct something to which he had rendered himself vulnerable by virtue of his public position. However, unsubstantiated allegations or investigations were not in the same category. Thus, although Sir Cliff's stance on religious issues might appeal to the "curious" or the prurient, or might provide material for the opinionated, that did not justify an invasion of his privacy.⁴⁷

The judge then referred to a number of other factors in the balancing exercise, considering firstly that the impact of the invasion had been very materially increased by the nature of the BBC's coverage, which had added drama and a degree of sensationalism.⁴⁸ Thus, the BBC went in for an invasion of Sir Cliff's privacy in a big way.⁴⁹ It was also very significant that the publication started with obviously private and sensitive information, obtained from someone who, to the BBC journalist's knowledge, ought not to have revealed it, and confirmed or bolstered with a ploy in the form of a perceived threat by the journalist to the police that he would publish the story before the police search.⁵⁰ Although in his view of less weight, the judge noted that the claimant had not been given a fair opportunity to challenge publication before it happened, whether that be by persuasion or by injunction.⁵¹

In considering the severity of the sanction on the BBC, the judge rejected the idea that *any* sanction would have a chilling effect, stating that if Sir Cliff's art.8 rights were of greater weight, then imposing *any* sanction on the BBC would not tilt the balance back in favour of the BBC.⁵² More significantly, he considered s.7 of the BBC's own editorial guidelines, paying particular attention to the need to balance privacy and the right to broadcast information in the public interest, and, specifically that people in the public eye, in some circumstances, may have a lower expectation of privacy.⁵³ In examining the Code's reference to the "public interest" in the context of justifying private information being brought into the public domain, he believed that the BBC had failed to convincingly relate its broadcast to aspects such as the detection or exposing of crime and the protection of people's health and safety. In any case the BBC's motives were not relevant, as the question whether the broadcast was in the public interest was one for the judge to decide objectively.⁵⁴

Importantly, the judge rejected the BBC's claim that it would be criticised if it did *not* report on the search at the time and if it came out in due course that it had known about it. This was not a good reason for reporting, although it was understandable that the BBC would have been sensitive about not reporting—given the Jimmy Savile scandal⁵⁵—that should not have led it to report matters which should otherwise have not been reported, and in respect of matters not related to activities involving the BBC itself. There was no positive obligation on the BBC to report; and there would have to be one if any criticism was to be justified.⁵⁶

Assessment of damages

In considering damages, the judge stressed that the claimant's life had been hugely affected for almost two years by loss of public status and reputation, embarrassment, stress, upset and hurt, with some consequential health effects.⁵⁷ Further, the protection of reputation was part of the function of privacy law as well as defamation law, and in this case the disclosed information was extremely serious, and disclosure

⁴⁷ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [284]–[285].

⁴⁸ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [300].

⁴⁹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [301].

⁵⁰ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [293].

⁵¹ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [293].

⁵² *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [303]. In any case the judge felt that that matter would be considered at the damages stage.

⁵³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [308].

⁵⁴ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [312].

⁵⁵ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [308].

⁵⁶ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [313].

⁵⁷ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [326]–[333].

had been made more serious, not more justifiable, by the claimant's prominence.⁵⁸ This ruling was made despite arguments made on behalf of the BBC that damages for reputation should be the sole province of defamation actions.⁵⁹

The judge assessed damages at £190,000, which in his view did not require modification so to avoid having a "chilling effect" on the BBC's right to freedom of expression.⁶⁰ Such a sum is far in excess to that awarded by the domestic courts in *Mosley*⁶¹ and *Campbell*,⁶² but the judge justified the sum on the basis of the damage to his health, dignity and reputation, the adverse effect on his lifestyle, the nature and content of the private information that was revealed and the scope and sensationalist presentation of the story.⁶³

The judgment in *Richard*, legitimate expectations and public interest defence

The success of a privacy claim depends not simply on the issue of public interest, but, initially, on whether the claimant has a legitimate expectation of privacy.⁶⁴ It should also be stressed that unless the claimant can prove a legitimate expectation of privacy, the court will dismiss the action and will not conduct the relevant balancing exercise between privacy and free speech.⁶⁵ Further, even in the case where art.8 is engaged, the possibility that such rights are reduced because of public status will strengthen the free speech claim when the court conducts its ultimate balancing exercise. Both these aspects were very relevant in the *Richard* case and the judge decided both issues clearly in favour of the claimant. What needs to be considered at this stage, therefore, is the impact of these findings on the availability of the public interest defence and, more generally, on the right (or duty) of the media to report on current news items.

Before criticising the judgment of Mann J, and other domestic judgments, it is clear that in an attempt to distinguish between what is in the public interest and what the public are interested in, the public interest defence has been limited to matters which appear to have some genuine political, legal, constitutional, social or economic relevance and thus whether the publication is capable of contributing to a debate in a democratic society. That question is almost inevitably tied to the question of whether the individual is a public figure, in other words one who carries out public functions. Thus in *Van Hannover v Germany*⁶⁶ the European Court stated that:

"... a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their public functions, for example, and reporting details of the private life of an individual who ... does not exercise official functions."⁶⁷

Secondly, that Court stated that the decisive factor in the balance between the protection of private life and freedom of expression should lie in the contribution that [the published photos and articles] make to

⁵⁸ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [345].

⁵⁹ It is submitted that although reputation is certainly part of a person's private life under art.8, it is unfair to award substantial damages in cases such as the present, where the information was clearly true, and the media are denied the opportunity to rely on the various defences under defamation law; see ss.2–4 of the Defamation Act 2013.

⁶⁰ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [359].

⁶¹ *Mosley v News Group Newspapers* [2012] EWHC 687 (QB), where the court awarded the claimant £60,000 damages for breach of his privacy rights when the defendant had published details of a private sex orgy he had been involved in, together with photographs.

⁶² *Campbell v MGN Ltd* [2004] 2 A.C. 457 where damages of £3,500 were awarded for hurt feelings.

⁶³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [350].

⁶⁴ See *Campbell v MGN* [2004] 2 A.C. 457. For an analysis of the balancing exercise and the case-law of the European Court of Human Rights, see P. Korpisaari "Balancing Freedom of Expression and the Right to Private Life in the European Court of Human Rights: Application and Interpretation of the Key Criteria" (2016) 22(3) *Communications Law* 39.

⁶⁵ See *A v B plc* [2002] 3 W.L.R. 542, discussed below.

⁶⁶ *Van Hannover v Germany* (2005) 40 E.H.R.R. 1.

⁶⁷ At [63] of the judgment. Thus, the Parliamentary Assembly of the Council of Europe accepts that public figures must recognise that the special position they occupy in society automatically entails increased pressure on their privacy: *Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right of Privacy*, para.6.

a debate of general interest.⁶⁸ Thus, as the Joint Committee on Human Rights has noted,⁶⁹ the courts have attempted to place political and other public interest matters in the public interest category, whilst excluding information, perhaps relating to a person's private life, which the public may be merely curious about.

In *A v B plc*,⁷⁰ Lord Woolf CJ found that a professional footballer who was seeking an injunction to keep an extra-marital affair out of the public domain was a public figure and must expect and accept that even trivial facts could be of great interest to readers and other observers of the media. In such circumstances, in his Lordship's view, the public had an *understandable and so a legitimate interest* in being told the information.⁷¹ This view was, however, overturned by subsequent case-law which denied a general public interest in the publication of information relating to the private lives of well-known individuals. In *Campbell v MGN Ltd*,⁷² the House of Lords found that it was not enough to deprive an international model of her right to privacy that she was a celebrity and that her private life was newsworthy.⁷³ Further, the decision in *Von Hannover v Germany*⁷⁴ had an instant impact on the jurisprudence of the domestic courts, and in *McKennitt v Ash*,⁷⁵ Eady J stressed that there was a significant shift taking place between freedom of expression for the media and the corresponding interest of the public to receive information and the legitimate expectation of citizens to have their private lives protected. Thus, post-*Von Hannover*, the public had no right to be informed of the misdemeanours and activities of celebrities on the basis that such people were role models and that the public had a genuine, thus legitimate interest in receiving such information.⁷⁶ In *Von Hannover* the European Court restricted the public interest defence to matters of genuine, and more formal, political and public concern; in most cases, therefore, excluding information relating to the private lives of celebrities.

This distinction, however, is considerably more difficult to apply in practice, and subsequent cases have applied the public interest defence to the publication of details relating to the private lives of many well-known figures in the world of entertainment and sport, and thus have extended the defence to matters that are of *interest to the public*. This has covered revelations relating to the private lives of, for example, footballers, who although not fulfilling as vital a role in public life as politicians and public officials, nevertheless excite public interest in activities beyond their central roles because of their public status. This might, perhaps, in appropriate cases, justify publication of limited material relating to their private lives,⁷⁷ accepting that their behaviour was a matter of some public interest because of their additional roles, aside from their status as footballers.

Further, some decisions of the Grand Chamber of the European Court have extended the public interest defence in cases where the individual in question is simply well-known to the public. In *Von Hannover v Germany (No.2)*,⁷⁸ the Grand Chamber accepted that the applicants, particularly Princess Caroline, were public figures because of their fame. This was because, *irrespective of the question to what extent the applicants assumed official functions on behalf of the Principality of Monaco*, it could not be claimed that

⁶⁸ At [76] of the judgment.

⁶⁹ *Joint Committee on Privacy and Injunctions, Session 2010–12*, HL 273; HC 1443.

⁷⁰ *A v B plc* [2002] 3 W.L.R. 542.

⁷¹ *A v B plc* [2002] 3 W.L.R. 542 at [11] of the judgment.

⁷² *Campbell v MGN Ltd* [2004] 2 A.C. 457.

⁷³ This approach appears to be consistent with Convention case-law, and in *MGN v United Kingdom* (2011) 53 E.H.R.R. 5, the European Court found there was no public interest in the publication of photographs and the story, as publication was purely to satisfy public curiosity and was not necessary to ensure the credibility of the original revelation—that she had lied to the press concerning her use of drugs.

⁷⁴ *Van Hannover v Germany* (2005) 40 E.H.R.R. 1. For contrasting views on the decision, see Sanderson, M, "Is Von Hannover v Germany a Step Backward for the Substantive Analysis of Speech and Privacy Interests?" [2004] 6 E.H.R.L.R. 631 and Hatzis, M, "Giving Privacy its Due: Privacy Activities of Public Figures" (2005) 16 K.C.L.J. 143.

⁷⁵ *McKennitt v Ash* [2006] E.M.L.R. 10, upheld on appeal: [2008] Q.B. 73.

⁷⁶ Contrast *Woodward v Hutchins* [1977] 1 W.L.R. 760; *A v B plc* [2002] 3 W.L.R. 542; and *Theakston v MGN Ltd* [2002] E.M.L.R. 22.

⁷⁷ In particular *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) and *McClaren v News Group Newspapers* [2012] E.M.L.R. 33. See also *LNS v Persons Unknown* [2010] E.M.L.R. 16. See S. Foster, "The Public Interest in Press Intrusion into the Private Lives of Celebrities: The Decision in Ferdinand v MGN Ltd" (2011) 16(4) *Communications Law* 129.

⁷⁸ *Von Hannover v Germany (No.2)* (2012) 55 E.H.R.R. 15.

the applicants, who were undeniably well known, were ordinary private individuals.⁷⁹ Equally, in *Axel Springer v Germany*⁸⁰—a case concerned with the publication of certain details about a well-known television actor’s arrest and conviction—it considered that the actor was sufficiently well-known to qualify as a public figure, and this reinforced the public’s interest in being informed of his arrest and the proceedings against him.⁸¹ Further, whilst accepting that the newspaper’s interest in publishing the articles was solely due precisely to the fact that it was a well-known actor who had committed the offence—which would not have been reported on if committed by a person unknown to the public—the actor had been arrested in public at the Munich Beer festival.⁸²

The Grand Chamber appears firstly to apply the accepted distinction between pure public figures and private individuals and the distinction between public interest and what the public are interested in, or curious about; the latter being where the published photos and accompanying commentaries relate exclusively to details of the person’s private life and have the *sole aim* of satisfying the curiosity of a particular readership in that respect.⁸³ However, when applying those principles to the present facts, the Grand Chamber took exception to the domestic courts’ rejection of the newspapers’ argument that the actor was a public figure and appears to accept the legitimacy of public interest in such figures:

“...whilst it can be said that the public does not generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character ... That fact was such as to increase the public’s interest in being informed of [X’s] arrest for a criminal offence. Having regard to those factors and to the terms employed by the domestic courts in assessing the degree to which X was known to the public, the Court considers that he was sufficiently well known to qualify as a public figure. That consideration thus reinforces the public’s interest in being informed of X’s arrest and of the criminal proceedings against him.”⁸⁴

Thus, following *Springer*, whilst it seems clear that discussions relating to political figures will attract a *greater* public interest than in respect of other public figures, the Court is prepared to make a clear distinction between well-known public figures—whether or not they are politicians or public officials—and the private individual. Further, having made that distinction it is then prepared to accept that there may be a legitimate level of public interest in that person’s actions.⁸⁵ In that sense *Springer* represents a pragmatic and legally moral acceptance of a general public interest in the activities of persons who cannot be regarded as private individuals, and who cannot expect the media or the public to refrain from investigating and reading material relating to what otherwise would be regarded as their private lives.⁸⁶ These decisions appear to establish that although matters relating to these public figures and certain aspects of their private lives may not be of vital importance and public interest, it is sufficiently so to warrant the application of a public interest test provided the intrusion into private life is not too great.⁸⁷

The distinction between public officials and public celebrities, and information of genuine public concern can cause some unfairness where the claimant has a high public profile and where the “private” activity

⁷⁹ *Von Hannover v Germany* (No.2) (2012) 55 E.H.R.R. 15 at [120].

⁸⁰ *Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6.

⁸¹ *Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6 at [99].

⁸² *Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6 at [100]. Furthermore the actor’s expectation that his privacy would be effectively protected had been reduced by the fact that he had previously revealed details about his private life in a number of interviews (at [101]).

⁸³ *Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6 at [91], italics added.

⁸⁴ *Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6 at [99].

⁸⁵ It is not asserted that *Springer* establishes a general (albeit qualified) public interest in the private lives of well-known individuals, as the Court took into account a variety of other factors, including that the articles about the actor’s arrest and conviction concerned public judicial facts, of which the public had an interest in being informed.

⁸⁶ See also *Coudert and Hachette Filipacchi v France* (App. No.4054/07), judgment of 10 November 2015.

⁸⁷ See also the domestic decision in *AAA v Associated Newspapers* [2013] EWCA Civ 554, where it was held that there existed an exceptional public interest in the professional and private life of an elected politician so as to justify the publication of a newspaper article claiming that a child had been born as a result of an extra-marital affair.

in question may well be considered unconscionable, if not unlawful.⁸⁸ However, there is a danger that the domestic courts can be overly influenced by the tactics employed by the defendants, and give too little weight to the legitimate exposure of unconscionable conduct. This in turn has further weakened the strength of the public interest defence, with the courts labelling the public's interest in the information as mere inquisitiveness, and denying any public interest defence.⁸⁹ This is particularly the case where the private information in question relates to the sexual activities of public figures,⁹⁰ where in the absence of a strong and genuine public interest going beyond public curiosity or personal malice, there will be no public interest in publication.⁹¹ Thus in *PJS v News Group Newspapers Ltd*,⁹² the Supreme Court held that disclosure or publication of purely private sexual encounters would, on the face of it, constitute the tort of invasion of privacy, and that repetition of such disclosure or publication on further occasions was capable of constituting a further invasion of privacy; there being no general public interest in the revelation of those details.⁹³ The decision thus reaffirms the approach that in the absence of a strong and genuine public interest going beyond public curiosity or personal malice, there will be no public interest in publication. This approach may be acceptable where the information in question relates to sexual behaviour, but in cases such as *Richard*, where the details relate to the investigation of matters of great public interest and where the claimant's public profile will cause an inevitable increase in public interest, it is unrealistic to treat the claimant as a private individual simply because their activities are not affiliated with any public function.⁹⁴

It is submitted, therefore, that in cases which affect public figures, a strict demarcation between the public interest and what the public are interested in, provides too little protection of the public's right to know. In *Mosley*,⁹⁵ the domestic courts ruled that the newspapers' tactics and publication were disproportionate despite the status of the claimant and the potential public interest issues which the articles referred to. It is submitted that although the Court was entitled to come to that conclusion on the facts, given the possible unconscionable and disproportionate nature of those revelations, the Court should not have ignored the public profile of that individual. This would allow the courts to take into consideration the inevitable public interest in that person and their activities and grant the press a greater, although not unlimited, discretion in the manner in which they research and publish those details. It would also allow the courts to give *greater* recognition to the public right to know where they have found that, despite the existence of a genuine public interest in publication, such an interest did not outweigh the privacy rights of the public figure.⁹⁶

Turning to the judgment in *Richard*, the main criticisms of the judgment stem from the judge's refusal to give due consideration to the fundamental importance of the public interest in the investigation and reporting of this matter, and the resulting dilution of the essential principles of press freedom. The author

⁸⁸ Of course it must be stressed that in *Richard* the private activity in question concerned an allegation rather than a fact; a factor which the judge in *Richard* makes constant reference to.

⁸⁹ See also *Mosley v News Group Newspapers* [2008] E.M.L.R. 20, concerning the publication of details of a sado-masochistic "orgy". The Court found that despite the claimant having a high public profile, and the sexual activities being unusual, in the absence of evidence to suggest that the events had a Nazi theme or that the participants had mocked victims of the Holocaust, there was no public interest or other justification for the recording and publication of these private events (at [20]); see S. Foster, "Balancing Privacy With Freedom of Speech: Press Censorship, the European Convention and the Decision in *Mosley v United Kingdom*" (2011) 3 *Communications Law* 100.

⁹⁰ See *PJS v News Group Newspapers* [2016] UKSC 26. Relevant to *Richard*, the Supreme Court found that the repetition of such disclosure or publication on further occasions was capable of constituting a further invasion of privacy; there being no general public interest in the revelation of those details: [2016] UKSC 26 at [34].

⁹¹ *McKennitt v Ash* [2008] Q.B. 73. See also *AMC and KLJ v News Group Newspapers* [2015] EWHC 2361 (QB) and *CHS v NHS* [2015] EWHC 1214 (Ch).

⁹² *PJS v News Group Newspapers* [2016] UKSC 26.

⁹³ *PJS v News Group Newspapers* [2016] UKSC 26 at [34].

⁹⁴ Again, it must be stressed that this must be, and was, balanced with the fact that the published information was based on allegations of misconduct.

⁹⁵ *Mosley v News Group Newspapers* [2008] E.M.L.R. 20.

⁹⁶ Thus, in *HRH Prince of Wales v Associated Newspapers* [2007] 2 All E.R. 139, the domestic courts found for the claimant when his private diaries were stolen and subsequently published, the courts refusing to accept that the public interest in discovering the Prince's political thoughts justified a wholesale breach of confidence. This was despite the fact that the Prince was a pure public figure and the content of the diaries revealed possible breaches of constitutional and political convention.

concedes that the BBC might, in all the circumstances, have crossed the line between media freedom and respect for individual privacy, particularly as the information in question was based on unsubstantiated allegations. However, it is suggested that the judge's approach towards broadcasting freedom led to a decision which was arguably both unbalanced and damaging to media freedom and the public's right to be informed of matters of public interest.

The criticisms of the judgment on the balancing exercise can be summarised broadly as follows. First, the judge rejects the idea that the information in question, and the claimant's privacy, were unaffected by the fact that the media had acquired the information. Thus, in his view, Sir Cliff's rights were not based on a reasonable expectation of privacy as long as the information did not fall into the hands of the media; he had a reasonable expectation of privacy full stop.⁹⁷ This, it is submitted, fails to appreciate the difference between the roles, and duties of the police and the media. Those roles are fundamentally different and it is the duty of the media to have regard to freedom of expression and the public right to know as prime factors in deciding whether to disseminate that information. Thus, in *Jersild v Denmark*⁹⁸ the European Court stressed that although certain speech (in this case of a racist nature) was not protected generally, the media fulfilled an essential function in identifying to the public that certain people exist and were thus protected in broadcasting such views.⁹⁹ To deny that an individual's expectation of privacy is unaffected by the fact that the media have acquired the information is surely erroneous; whilst the police might have a duty to keep those details out of the public domain, it is surely not expected—as a basic premise—that the media will keep that information secret, or indeed share it with other public authorities.

Secondly, the judge rejects the notion that the BBC and the media generally had a duty to investigate and broadcast the material, considering that the European Court's use of the word was unhelpful in assisting the present court's duty to balance art.10 against the right to privacy.¹⁰⁰ Accordingly, Mann J proceeds to consider the balancing criteria without taking into account this overall duty of the press to report. Although this appears to follow the domestic case-law concerning the balance between the respective rights,¹⁰¹ it is argued that ignoring the argument that the claim of the press in the exercise is not only a right, but a duty, fails to give sufficient weight to the importance of the art.10 right when it is being exercised by the media. Further, it appears unfair that, having accepted that the claimant's expectation of privacy has been damaged further by its interference by the media, that the countervailing argument on behalf of the media is not given appropriate recognition. Further, the judge found that there was no positive obligation on the BBC to report; thereby rejecting the BBC's claim that it would have been criticised for not broadcasting the matter.¹⁰² This finding reveals a fundamental confusion with the BBC's argument. It is not suggested that the BBC would be accused of breaching any legal duty in not reporting the story, or that the BBC would only be concerned if it was accused of such. The BBC, as part of the media, felt that it had a moral and ethical duty to broadcast the story. That is not part of their legal or other duties as yet another public body; it is its duty as a public watchdog, and the BBC is right in suggesting that the public would be very critical of its failure to report, particularly given the media and others' failure or inability to reveal even the existence of the Savile scandal. It is without question the duty of the media to make decisions on what should be broadcast in the public interest, and the fact that they may get the balance wrong and be corrected by the courts, should not deny them that special status in the balancing exercise.

Fourthly, the judge found that on the facts neither the public status of the claimant nor his previous conduct and views were particularly weighty in this case so as to diminish the weight of his privacy rights

⁹⁷ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [258].

⁹⁸ *Jersild v Denmark* (1995) 19 E.H.R.R. 1.

⁹⁹ *Jersild v Denmark* (1995) 19 E.H.R.R. 1 at [43].

¹⁰⁰ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [276].

¹⁰¹ *Re S (Publicity)* [2005] 1 A.C. 593. However, see *Venables and Thompson v MGN Ltd* [2001] 2 W.L.R. 1038, where it was accepted that the courts may start from the position that any interference with freedom of expression is *prima facie* invalid and must be justified within the strict parameters of art.10(2).

¹⁰² *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [313].

in respect of the allegations disclosed by the BBC.¹⁰³ It is argued that this gives too little weight to both Sir Cliff's public status (and the European Court's assessment of that factor in its case-law) and the fact that his position on Christianity would create a natural increase in the public interest in the story. In both respects, and in respect of the public interest factor, the judge accuses the media, and the public, of curiosity and prurience, and thus denies—as opposed to qualifies—the availability of the public interest defence. Such a finding is difficult to reason once it has been accepted that the investigations into sexual abuse involving high-profile public individuals was a matter of undoubted public interest.

Fifthly, and more specifically, the judge noted that the claimant had not been given a fair opportunity to challenge publication before it happened, whether that be by persuasion or by injunction.¹⁰⁴ This aspect of the judgment, it is argued, is contrary to the decision in *Mosley v United Kingdom*,¹⁰⁵ where the European Court clearly states that the media are not under a general duty to give such notification, and that UK law is not in breach of art.8 by not providing the claimant with such a right.¹⁰⁶ It is also argued that the judge's reaction to the tactics employed by the BBC has led to him ignoring the public interest element of the broadcast and the finding that the investigation concerned matters which were part of an undoubted and serious public debate. Although it is valid to consider press tactics and motives in assessing the proportionality of the media's invasion into individual privacy, the courts should not be allowed to reject the public interest element of the broadcast for that reason alone.

Finally, with respect to damages, although the level of the award might not be clearly in breach of the case-law of the European Court of Human Rights,¹⁰⁷ it is submitted that it takes too little notice of the public interest nature of the investigation, and too much weight to the BBC's inevitable desire to broadcast the story as a scoop. This last factor is clearly evident when, in considering the claim for aggravated damages, the judge held that the fact that the BBC had submitted the broadcast for a television award—promoting its own infringing activity in a way that demonstrated that it was extremely proud of it—had caused additional distress to the claimant, and awarding aggravated damages of £20,000 to the claimant.¹⁰⁸ Again, it is submitted that the judge's findings are inconsistent with the reality of broadcasting ground-breaking stories on matters of undoubted public interest and debate, and thus represent an unfair skewering of the balance between privacy and media freedom.¹⁰⁹

Media tactics, irresponsible broadcasting and the loss of the public interest defence

Without question, Mann J's judgment in *Richard* relies heavily on the tactics employed by the BBC in the gathering and dissemination of the story. This begs the question to what extent such a factor is relevant in the balancing exercise, and whether a public interest story and defence should be tainted by what the court regards as irresponsible broadcasting. That such factors are relevant in the balancing exercise is without question, and the recent decision in *Ali v Channel 5 Broadcast Ltd*,¹¹⁰ has reminded broadcasting companies that they need to be careful to balance individual privacy with their desire to inform the public on matters of public interest. The case is an interesting one with respect to the application of broadcasters' duties to report matters responsibly and in line with privacy rights, and to contrast with *Richard*.

¹⁰³ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [287].

¹⁰⁴ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [293].

¹⁰⁵ *Mosley v United Kingdom* (48009/08) (2012) 53 E.H.R.R. 30.

¹⁰⁶ The duty to give advanced notice can, it appears, be relevant in deciding the balancing exercise, but it is argued that it was wrong for the judge to place so much emphasis on the BBC's refusal to give advanced notice.

¹⁰⁷ *Tolstoy v United Kingdom* (1995) 20 E.H.R.R. 442.

¹⁰⁸ *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [361]–[366]. The judge then dealt with the claim for special damages and found that the claimant had been exposed to the risk of further scurrilous publication or adverse publicity which had built on the original infringement (at [370]–[375]). This claim will be finalised in the settlement that the BBC will negotiate with the claimant.

¹⁰⁹ With respect to contribution, the judge found that the BBC was the more potent cause of the claimant's damage, and that its breach was more significant. Accordingly, the damages for which both the BBC and the police were liable should be apportioned 65:35 as between the BBC and the police: *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [446]–[447].

¹¹⁰ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch).

In *Ali*, as a result of rent arrears, the claimants' landlord had obtained a possession order for the property they occupied. When enforcement officers attended the property to evict the claimants they were accompanied by the defendant's film crew, who then broadcast edited footage as part of a series of programmes called "Can't Pay? We'll take it away". The programme was seen by 9.65 million viewers and as a consequence the claimants' daughter suffered bullying at school. The High Court found that the claimants had a reasonable expectation of privacy in respect of the information in question, and that the principle of open justice did not justify the broadcasting of information beyond the bare fact of the eviction.¹¹¹ Thus, what happened when the warrant was executed was not part of the court proceedings and thus could not be regarded as a public process or event.¹¹² Nor, in the Court's view, could the impact on the claimants' children be justified by reference to open justice. The broadcasting of the information was not a foreseeable consequence of the claimants' failure to comply with the possession order.¹¹³

Although the Court accepted that the programme contributed to a debate of general interest, it found that the inclusion of the claimant's private information went beyond what was justified for that purpose. The programme's focus was not on the matters of public interest, but on the drama of the conflict between the claimants and the landlord's father.¹¹⁴ Moreover, that conflict had been encouraged by one of the enforcement officers to "make good television". The defendant had editorial discretion as to the way in which it told the story, but that discretion did not extend to its decision to include the private information of which the claimants' complained unless it was justified as contributing to a debate of general interest.¹¹⁵ On the facts the balance came down in favour of protecting the claimants' art.8 rights and the defendant had failed to convince the court that this intrusion was justified and proportionate.¹¹⁶

This finding, almost without question correct on the facts, should be clearly distinguished from *Richard*. In *Ali* the claimant was a private individual and the matter being broadcast was nowhere near in the same public interest category as the investigation of sexual abuse.¹¹⁷ In privacy versus media freedom cases, a key factor in determining whether the interference is proportionate and necessary is the extent to which the broadcast or other public dissemination serves the public interest. In this sense, the Court's finding in *Ali* that the programme, albeit made for public interest purposes (an investigation into debt), was not focused was on those matters of public interest—but rather on the drama of the conflict between the claimants and the landlord's father—is of potential concern to broadcasters. The Court accepted that the conflict between the tenants and the landlord had been encouraged by one of the enforcement officers to "make good television"—thus reducing the genuine public interest in making and broadcasting the programme. This distinction, it is submitted, will be very difficult to maintain in practice, as many public interest stories are presented with mixed motives—to inform the public and to score political or personal points—and provided the media or other publisher has not lost sight of their duty to inform the public the law should offer a defence. In the context of television programmes such as the one in *Ali*, it is inevitable that the programme is being made for both informative and entertainment purposes, and for the courts to try and ascertain which of those purposes dominated in a particular case will be both difficult and potentially unfair.

¹¹¹ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [162].

¹¹² *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [169].

¹¹³ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [163]. It will be argued that this finding should be distinguished between *Richard* for various reasons, detailed below.

¹¹⁴ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [195].

¹¹⁵ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [206].

¹¹⁶ *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [195], [203]–[206] and [210].

¹¹⁷ See also *Peck v United Kingdom* (2003) 36 E.H.R.R. 41, where the applicant complained that images of him taken by local council CCTV and distributed to various news agencies who had published and broadcast the images violated his right to private life. The European Court found that the disclosure of the footage had resulted in a serious interference with the applicant's right to respect for private life, and that the reasons for the interference were not necessary. In the Court's view, particular scrutiny and care was needed given the crime prevention objective and the context of the disclosures. Again, it is argued that this case can be distinguished from *Richard* in terms of the status of the claimant and the public interest of the story.

In attempting to impose standards of responsible broadcasting on programme makers the decision in *Ali*, and in *Richard*, are unobjectionable. Such standards are imposed on and by broadcasting authorities; and by the courts in areas such as defamation, contempt of court and indeed in privacy actions generally.¹¹⁸ These recent cases take into account that the purpose of the programme is to entertain in reducing the public interest nature of the broadcast. Further, certain programmes made by certain companies (and broadcast on certain channels) will be assumed to have been made for purely financial or prurient reasons. This might lead to decisions being made on unfair or unprincipled purposes, and the decisions in *Ali* and indeed *Richard* will be of concern to programme makers who seek to combine public education and entertainment.

Specifically, in *Richard*, the public interest argument of the BBC in respect of the broadcast is lost, not simply diminished, because of the tactics that it employed in gathering and disseminating the information. This is relevant to the decision on the overall proportionality of the media's interference with the claimant's privacy rights; but, it is suggested, it should not be allowed to dominate the balancing exercise if, as was clear in *Richard*, the investigation and broadcast concerned a matter of great public interest and debate. As was made clear by the House of Lords in *Jameel*,¹¹⁹ the ultimate question must be whether publication was in the public interest, and not whether the media have broken the rules of professional journalism or broadcasting. Thus, in that case their Lordships stressed that the standard of conduct to be applied by a newspaper needed to be applied in a practical and flexible manner.¹²⁰ Equally, to berate the media for revelling in its own investigative activities, and guarding the exclusivity of such stories, is, it is submitted, unrealistic and damaging where such investigations concern such high matters of public interest.

Conclusions

In many respects, the *Richard* case is not an ideal one to discuss the delicate balance between public figure privacy and media freedom, and to promote the fundamental principles of free speech and the public's right to receive information in that balance. Given the tactics employed by the BBC and the depth of intrusion into the claimant's private and home life the case is perhaps not one where the benefits of media freedom can be most robustly argued. Indeed, the case warns us of the potential for abuse by the media and the need to protect individual privacy from the media's tendency to confuse its duty to inform with its own private, and occasionally personal, intentions. Yet, given the unequivocal nature of the ruling, and the robust attack on the tactics and motives employed by the BBC, the judgment can be criticised for giving insufficient regard to some fundamental principles of media freedom and skewing the balance between freedom of expression and privacy. If that is the case then the judgment may truly have a "chilling effect" on media freedom and the public right to receive information.

It has been argued principally that the judgment gives too little weight to the public interest of the matter under investigation and the BBC's investigation and reporting of it. To *ignore*—rather than *qualify*—the importance of that element because the BBC was seen to have acted hastily, irresponsibly and for their own purposes, led to an unfair balancing exercise between the two conflicting interests. More specifically, it is submitted that the courts often err in placing too much emphasis on the tactics that the media employ in reporting stories on high-profile individuals, together with the media's motives for doing so. "Sensationalist" reporting, it is argued, is inevitable in such stories and should not be used to deny that the media are pursuing, and the public gaining, a legitimate public interest in its reporting of such stories. This is particularly so when the distinction between providing the public with information on the one hand, and reporting for purposes of entertainment and sensationalism on the other, are difficult to maintain in practice.

¹¹⁸ *Campbell v MGN Ltd* [2004] 2 A.C. 457.

¹¹⁹ *Jameel v Wall Street Journal Europe* [2007] 1 A.C. 359.

¹²⁰ *Jameel v Wall Street Journal Europe* [2007] 1 A.C. 359, Lord Hope at [111].

With respect to damages, although the level of the award might not be clearly in breach of the case-law of the European Court of Human Rights,¹²¹ it is submitted that the award takes too little notice of the public interest nature of the investigation, and gives too much weight to the BBC's inevitable desire to broadcast the story as a scoop. This last factor is clearly evident when, in considering the claim for aggravated damages, the judge held that the fact that the BBC had submitted the broadcast for a television award—promoting its own infringing activity in a way that demonstrated that it was extremely proud of it—had caused additional distress to the claimant, and awarding aggravated damages of £20,000 to the claimant.¹²² Again, it is submitted that the judge's findings are inconsistent with the reality of broadcasting ground-breaking stories on matters of undoubted public interest and debate, and thus represent an unfair skewering of the balance between privacy and media freedom.

More generally, it has been argued that the domestic courts give too little weight to the public profile of the claimant when that person is not a public official as such, but nevertheless is well-known to the public. In these cases, whilst a distinction should be drawn between matters of traditional public interest and what the public are interested and curious about, there is ample judicial authority to support the argument that celebrities and the like should not be treated as private individuals, and that the public have a natural and legitimate interest in their activities. In such cases, it is argued that this fact should diminish—but not extinguish—the expectations of the claimant, and that this should be truly reflected in the case-law of the domestic courts, as it is to a sufficient degree in the jurisprudence of the European Court of Human Rights. Without that qualification, *Richard* may have a chilling effect on media freedom.

¹²¹ *Tolstoy v United Kingdom* (1995) 20 E.H.R.R. 442.

¹²² *Cliff Richard v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) at [361]–[366]. The judge then dealt with the claim for special damages and found that the claimant had been exposed to the risk of further scurrilous publication or adverse publicity which had built on the original infringement (at [370]–[375]). This claim will be finalised in the settlement that the BBC will negotiate with the claimant.

Families of Disappeared Persons in the Jurisprudence of the European Court of Human Rights

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✉ Children; European Court of Human Rights; Families; Inhuman or degrading treatment or punishment; Missing persons

Abstract

Disappearances have long-lasting effects on families, who have to deal with the uncertainty surrounding the fate of their relatives. The European Court of Human Rights has recognised the difficult situation of families of disappeared persons and acknowledges that, under certain circumstances, they may themselves be victims of a violation of art.3 of the European Convention on Human Rights. The aim of this article is to present an analysis of the development of the case-law with regard to the relatives of disappeared persons and to show the current practice of the Court.

I. Introduction

Disappearances have long-lasting effects on families, who have to deal with the uncertainty surrounding the fate of their relatives. Family members experience what has been termed as an “ambiguous loss”, defined as “a situation of unclear loss resulting from not knowing whether a loved one is dead or alive, absent or present”.¹ The family of a disappeared person may maintain hope for a very long time that the victim may return, and in this sense the disappeared person becomes “psychologically present but physically absent”.² People, whose disappearance is attributable to the state, find themselves in a particularly difficult situation. The authorities are not interested in investigating such disappearances and often treat the relatives who are trying to find them in a disrespectful manner, exacerbating their suffering.

The European Court of Human Rights recognises this difficult situation of the families of disappeared persons and acknowledges that, under certain circumstances, they may themselves be victims of a violation of art.3 of the European Convention on Human Rights (ECHR), which states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.³ The Courts stated in 2009 that: “The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court’s case-law recognised from very early on that the situation of the relatives may disclose inhuman and

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¹ P. Boss, “Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11” (2004) 66 *Journal of Marriage and Family* 551, 554.

² S. Robins, *Families of the Missing. A Test for Contemporary Approaches to Transitional Justice* (New York: Routledge, 2014), p.45.

³ While art.3 is predominantly applied to persons who have been directly affected by human rights violations the Court has found in a few cases that the families of victims of human rights violations may also be victims of violations of art.3 of the Convention, one of them being cases of enforced disappearances. Other examples include family members who have directly witnessed the suffering or death of their relative (see, e.g. *Salakhov and Islyamova v Ukraine* (App. No.28005/08), judgment of 14 March 2013), were unable to bury their dismembered and decapitated bodies in a proper manner (see, e.g. *Khadzhialihev v Russia* (App. No.3013/04), judgment of 6 November 2008), and a mother who witnessed the detention of her five-year-old (*Mayeka v Belgium* (2008) 46 E.H.R.R. 23, see W. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford: Oxford University Press, 2015), p.170).

degrading treatment contrary to Article 3".⁴ Not every relative of a disappeared person is considered a victim of a breach of art.3 of the ECHR. The Court established a number of conditions in 1999, which subsequently evolved considerably in the Court's practice. The aim of this article is to present an analysis of the development of the case-law of the Court with regard to the relatives of disappeared persons and to show the current practice of the Court.

II. Enforced disappearances and the European Court of Human Rights

The term "enforced disappearance" was first used to describe serious human rights violations occurring in the 1960s and 1970s in South American countries.⁵ In accordance with the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), which entered into force in 2010, enforced disappearance is any form of deprivation of the person's liberty committed by the state's representatives or by persons or groups of persons acting with at least its acquiescence, followed by a refusal to admit to the deprivation of liberty or by concealment of the fate or whereabouts of the person.⁶ The ICPPED recognises as victims of enforced disappearances both the disappeared person and all those who have suffered as a direct result of the enforced disappearance (art.24.1).

Although the Court uses the term "enforced disappearance" in its judgments,⁷ it has not adopted its own definition of enforced disappearances⁸ and has rarely invoked the definition from the ICPPED.⁹ This article includes Court judgments where the facts indicate a possible enforced disappearance. In the proceedings before the Court, it is often a challenge for the applicants to prove the involvement of national authorities in disappearance,¹⁰ and therefore the article also includes cases in which the Court did not attribute responsibility to the state. This is often due to the fact that the state authorities did not carry out an effective investigation and did not provide the Court with the necessary documents. It is worth emphasising that the Court itself has sometimes argued that the non-attribution of responsibility to the state is directly linked to inefficient investigation by the state authorities.¹¹ Moreover, in some cases, due to the passage of time and its *ratione temporis* competences, the Court did not examine the state's responsibility for disappearance, but only analysed the effectiveness of the investigation into the

⁴ *Varnava v Turkey* (2010) 50 E.H.R.R. 21 at [200].

⁵ Report submitted by Mr Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to para.11 of Commission Resolution 2001/46, E/CN.4/2002/71, 8 January 2002, para.8.

⁶ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 (entered into force 23 December 2010), United Nations Treaty Series, Vol.2716, p.3.

⁷ See, e.g. *Akhmadova and Akhmadov v Russia* (App. No.20755/04), judgment of 25 September 2008 at [54]; *Khumaydov and Khumaydov v Russia* (App. No.13862/05), judgment of 28 May 2009 at [110]; *Umarov v Russia* (App. No.2546/08) judgment of 12 June 2012 at [141]; *Kushtova v Russia* (No.2) (App. No.21885/07), judgment of 16 January 2014 at [90].

⁸ For more on the lack of a definition of enforced disappearance in the jurisprudence of the European Court of Human Rights, see M.F. Perez Solla, *Enforced Disappearances in International Human Rights* (London: McFarland & Co, 2006), pp.31–32; M.L. Vermeulen, *Enforced Disappearance, Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Utrecht: Intersentia, 2012), pp.164–169.

⁹ The exceptions in which the conventional definition was mentioned being: *Varnava v Turkey* (2010) 50 E.H.R.R. 21 at [91]; *Palić v Bosnia and Herzegovina* (App. No.4704/04), judgment of 15 February 2011 at [33]; *Aslakhanova v Russia* (App. Nos 2944/06, 8300/07, 50184/07, 332/08 and 42509/10), judgment of 18 December 2012 at [61]; *El-Masri v Macedonia* (2013) 57 E.H.R.R. 25 at [240]. The reference to the Convention was of importance to the case only in *El-Masri v Macedonia*, in which the Court stated that "the applicant's abduction and detention amounted to an 'enforced disappearance' as defined in the ICPPED and in a resolution of the Parliamentary Assembly of the Council of Europe" (at [240]).

¹⁰ More on that, see e.g. S. Jötten, *Enforced Disappearances und EMRK* (Berlin: Duncker & Humblot, 2012), pp.132–274; Vermeulen, *Enforced Disappearance, Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (2012), pp.235–247; H. Keller and C. Heri, "Enforced Disappearances and the European Court of Human Rights. A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors'" (2014) 12 *Journal of International Criminal Justice* 735.

¹¹ *Osmanoğlu v Turkey* (App No.48804/99), judgment of 24 January 2008 at [53]; on the case law of the Court in cases where the state is not held responsible, see also M.L. Vermeulen, "The duty to take preventive operational measures. An adequate tool to hold states responsible in enforced disappearance cases?" in A. Buyse (ed.), *Margins of Conflict: the ECHR and Transitions to and from Armed Conflict* (Utrecht: Intersentia, 2010). For more information on the different types of disappearances and the different legal regimes that apply to them, see J. Sarkin, "The need to deal with all missing persons including those missing as a result of armed conflict, disaster, migration, human trafficking and human rights violations (including enforced disappearances) in international and domestic law and processes" (2015) 1 *Inter-American and European Human Rights Journal* 112.

disappearance.¹² Therefore, in the case of enforced disappearances, the examination of case-law should also include cases in which the Court has not clearly attributed responsibility for the disappearance to the state.

The European Court of Human Rights issued its first judgments in cases of enforced disappearances in cases against Turkey in the 1990s.¹³ In subsequent years, the Court received applications relating to this phenomenon from various European countries—Spain,¹⁴ Cyprus,¹⁵ Italy,¹⁶ Bosnia and Herzegovina¹⁷—with the vast majority of which concerning Russia.¹⁸ The Court has so far issued more than 200 judgments in individual cases and one inter-state case related to enforced disappearances.¹⁹ In the majority of those cases the next-of-kin of the disappeared persons invoked a violation of art.3 of the ECHR with regard to themselves.

III. Criteria adopted by the European Court of Human Rights in 1999

The Court found a violation of art.3 of the ECHR in respect of the relative of a disappeared person for the first time in 1998 in the judgment *Kurt v Turkey*, which was the Court's first judgment on enforced disappearances. The Court referred in particular to the fact that the mother witnessed the arrest of her son and contacted the prosecutor shortly after his disappearance, who, however, gave no serious consideration to her complaint.²⁰ In its judgment delivered one year later, *Çakıcı v Turkey*, the Court held that, in order for there to be a violation of art.3 of the ECHR in respect of the relatives of a disappeared person, there must be specific factors which make the scale and nature of the suffering different from that which may be considered unavoidable for the relatives of the victims of serious human rights violations. The essence of such a violation does not lie in the very fact of the “disappearance” of a loved one, but in the reaction and attitude of the authorities when they are informed.²¹ Relevant elements that make those close to a disappeared person victims of a violation of art.3 of the ECHR will include: (1) the proximity of the family tie—in that context, a certain weight will attach to the parent-child bond; (2) the particular circumstances of the relationship; (3) the extent to which the family member witnessed the disappearance; (4) the involvement of the family member in the attempts to obtain information about the disappeared person; and (5) the way in which the authorities responded to those enquiries.²² In the initial period, the Court analysed the applicants' detailed compliance with the criteria²³; with time the Court devoted less and less attention to it and, from 2014 onwards,²⁴ the Court no longer mentions all the elements but it still recalls the paragraph of the judgment in which those criteria were discussed in detail.²⁵ The Court's jurisprudence

¹² See, e.g. *Varnava v Turkey* (2010) 50 E.H.R.R. 21 (a complaint concerning the events of 1974 was lodged in 1990); *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 (a complaint concerning the events of 1974 was lodged in 1994); *Janowiec v Russia* (2014) 58 E.H.R.R. 30 (complaints concerning the events of 1940 were lodged in 2007 and 2009).

¹³ First judgments concerning enforced disappearance against Turkey: *Kurt v Turkey* (1999) 27 E.H.R.R. 373; *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5; *Mahmut Kaya v Turkey* (App. No.22535/93), judgment of 28 March 2000.

¹⁴ See, e.g. *Dorado v Spain* (App. No.30141/09), decision of 27 March 2012.

¹⁵ See, e.g. *Emin v Cyprus* (App. No.59623/08), decision of 3 April 2012. For a detailed analysis on the Court's jurisprudence on disappearances in Cyprus, see N. Kyriakou “Enforced disappearances in Cyprus: problems and prospects of the case law of the European Court of Human Rights” [2011] 2 *European Human Rights Law Review* 190.

¹⁶ See, e.g. *Nasr v Italy* (App. No.44883/09), judgment of 23 February 2016.

¹⁷ See, e.g. *Palić v Bosnia and Herzegovina* (App. No.4704/04).

¹⁸ First judgments concerning enforced disappearance against Russia: *Bazorkina v Russia* (App. No.69481/01), judgment of 27 July 2006; *Luluyev v Russia* (2009) 48 E.H.R.R. 45; *Imakayeva v Russia* (App. No.7615/02), judgment of 9 November 2006.

¹⁹ The Court's jurisprudence on enforced disappearance has also been applied by the Human Rights Advisory Panel in Kosovo. See M. Nowak, “Enforced Disappearances in Kosovo: Human Rights Advisory Panel holds UNMIK accountable” [2013] 3 *European Human Rights Law Review* 275.

²⁰ *Kurt v Turkey* (1999) 27 E.H.R.R. 373 at [133]–[134].

²¹ *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5 at [98].

²² *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5 at [98].

²³ See, e.g. *Timurtaş v Turkey* (2001) 33 E.H.R.R. 6 at [95]–[97]; *Bazorkina v Russia* (App. No.69481/01) at [139]–[141]; *Makharbiyeva v Russia* (App. No.26595/08), judgment of 21 June 2011 at [101]–[102].

²⁴ The last judgment in which the Tribunal cited the criteria was *Sulytgov v Russia* (App. Nos 42575/07, 53679/07, 311/08, 424/08, 3375/08, 4560/08, 35569/08, 62220/10, 3222/11, 22257/11, 24744/11 and 36897/11), judgment of 9 October 2014 at [450].

²⁵ See, e.g. *Turluyeva v Russia* (App. No.63638/09), judgment of 20 June 2013 at [116]; *Pitsayeva v Russia* (App. Nos 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10,

has not been affected by non-reference to these criteria: it has evolved earlier and the criteria adopted in 1999 still have an impact on its current case-law.

It is clear from the first judgments that it is not necessary to fulfil all the above-mentioned special factors and that the attitude and reaction of the authorities is a particularly important feature. Some of the factors have a greater impact on the finding of a violation of art.3 of the ECHR and some are less significant in this context. Examination of the judgments leads to the conclusion that the degree to which the applicants have witnessed disappearance (third element) is not relevant. Although the Court referred in many judgments to the fact that the applicant witnessed the disappearance, it is clear from the first judgments that there is no need to be present during the disappearance.²⁶ Circumstances pointing to overly loose links or relations between the disappeared person and the applicant (second element) have also never been the sole ground to preclude a violation of art.3 of the ECHR.²⁷ The other criteria have evolved and there are a number of questions as to how they have been interpreted by the Court. The involvement of family members in obtaining information on the disappeared persons (fourth element) will be presented in the next section—Part IV. Part V is dedicated to the underage children of disappeared persons. This is a controversial issue in the context of proximity (first element), since in some cases they are considered as victims of a violation of art.3 of the ECHR and in others not. The attitude and reaction of the authorities (fifth element), which the Court itself considers to be a particularly important factor, will be analysed in Part VI.

IV. Involvement of family members in obtaining information

In the first years when applying the special criteria established in *Çakıcı*, the Court attached great importance to the applicants' active participation in the search for the disappeared and personal contact with the authorities²⁸ and stated that only the rights of those applicants who demonstrated such involvement were violated.²⁹ The Tribunal did not note that the family of a disappeared person can share tasks and somebody can be responsible for contacting the authorities, somebody for caring for children and someone else for earnings. This has nothing to do with the suffering of the applicants. Moreover, in the patriarchal model of the family, it may be natural for a man to represent women before state authorities, which does not mean that the wife or mother of the disappeared person suffers less.³⁰

There has been an important evolution of case-law in this area. Over time, the Court has become more flexible when it comes to assessing the extent of close involvement in searches. In a 2006 judgment, the Court found that although one of the applicants most frequently contacted the authorities, he did so because of his legal training, and all the applicants—irrespective of their degree of involvement in the investigation—were considered victims of a violation of art.3 of the ECHR.³¹ Subsequent complaints were often made by many members of a family of a disappeared person and the Court, investigating the violation of art.3 of the ECHR, by a large majority, did not differentiate the situation of the applicants even though

52446/10, 62244/10 and 66420/10), judgment of 9 January 2014 at [477]; *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10), judgment of 22 November 2016 at [100]; *Kushtova v Russia* (No.2) (App. No.21885/07) at [90]. In those judgments the Court relied on the relevant paragraphs from the judgment *Orhan v Turkey* (App. No.25656/94), judgment of 18 June 2002.

²⁶ *Timurtaş v Turkey* (2001) 33 E.H.R.R. 6 at [96].

²⁷ In the rare cases where the Court referred to the fact that links were too loose it also mentioned the failure to meet other criteria, see e.g. *Meshayeva v Russia* (App. No.27248/03), judgment of 12 February 2009 at [123]–[135] (the nephews and sister-in-law of the disappeared persons, in the Court's view, unlike other applicants, have not demonstrated that the requisite criteria have been met); *Dzhambekova v Russia* (App. Nos 27238/03 and 35078/04), judgment of 12 March 2009 at [107] (the uncle and cousin of the disappeared person were not a close family, and they did not show any commitment to the search for the disappeared person).

²⁸ See, e.g. *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5 at [98]; *Orhan v Turkey* (App. No.25656/94) at [359]; *İpek v Turkey* (App. No.25760/94), judgment of 17 February 2004 at [182].

²⁹ See, e.g. *Nenkayev v Russia* (App. No.13737/03), judgment of 29 May 2009 at [168]; *Malsagova v Russia* (App. No.27244/03), judgment of 9 April 2009 at [133]–[136].

³⁰ T. Feldman, "Indirect Victims, Direct Injury: Recognizing Relatives as Victims Under the European Human Rights System" [2009] 1 *European Human Rights Law Review* 50; on the impact of disappearances on women see also Polly Dewhurst and Amrita Kapur, *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearances on Women* (International Center for Transitional Justice, 2015), pp.24–25.

³¹ *Luluyev v Russia* (2009) 48 E.H.R.R. 45 at [112]–[118].

some persons were clearly more involved in the obtaining information about the disappeared person.³² At the outset, however, it did not do so consistently, and sometimes the Court continued to analyse in detail the actions taken by each individual individually, differentiating between the various applicants.³³ After 2009 the Court did not take the involvement of individual family members into account.³⁴ It can therefore be concluded that this criterion is not currently taken into account by the Court. At the same time, this evolution in the Court's practice has not altered the special criteria, which have been evoked in the same form.³⁵

V. Children of disappeared persons as victims of a violation of Article 3 of the ECHR

The first applications concerning enforced disappearances were submitted to the Court by parents of disappeared persons, and the criteria set out above were also established in relation to them. Subsequently, the applicants were whole families, which often included children. Two elements of the criteria outlined above do not apply to young children: the involvement in an attempt to obtain information on disappeared persons, and the attitude and response of the state to these enquiries. It is therefore not surprising that the application of the special criteria to the children of disappeared persons is a challenge for the Court.

The analysis of the Court's case-law leads to the conclusion that the Court considers children born *before* the disappearance rather and not those born *after* the disappearance to be victims of a violation of art.3 of the ECHR.³⁶ However, the Court does not apply this in full consistency—sometimes it recognises that the rights of children born after the disappearance have been violated,³⁷ or vice versa, that the rights of any young child, regardless of when they were born, were not violated.³⁸ The Court most often does not comment on why it makes such a decision,³⁹ only in a small number of cases this was related to the

³² See, e.g. *Gekhayeva v Russia* (App. No.1755/04), judgment of 29 May 2008 at [118]–[121]; *Pitsayeva v Russia* (App. Nos 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10) at [479]–[482].

³³ See, e.g. *Saydaliyeva v Russia* (App. No.41498/04), judgment of 2 April 2009 at [124]; *Nenkayev v Russia* (App. No.13737/03) at [168]; *Malsagova v Russia* (App. No.27244/03) at [133]–[136].

³⁴ See, e.g. *Er v Turkey* (2013) 56 E.H.R.R. 13 at [95]; *Meryem Çelik v Turkey* (App. No.3598/03), judgment of 16 April 2013 at [90]–[92]; *Aslakhanova v Russia* (App. Nos 2944/06, 8300/07, 50184/07, 332/08 and 42509/10) at [133]; *Pitsayeva v Russia* (App. Nos 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10) at [479]; *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [102]. The only exception is in a number of cases where the Court distinguished between the children of disappeared persons, see the next section.

³⁵ See, e.g. *Sultygov v Russia* (App. Nos 42575/07, 53679/07, 311/08, 424/08, 3375/08, 4560/08, 35569/08, 62220/10, 3222/11, 22257/11, 24744/11 and 36897/11) at [420]; *Er v Turkey* (2013) 56 E.H.R.R. 13 at [94].

³⁶ See, e.g. *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [103] (all 43 relatives of 17 disappeared men whose complaints have been declared admissible, including young children, were considered as victims of an infringement of art.3 of the ECHR—except for the two children born after their father's disappearance); *Dokayev v Russia* (App. No.16629/05), judgment of 9 April 2009 at [105] (all applying family members were considered victims of an infringement of art.3 of the ECHR, including a daughter and a son of the disappeared man, who were seven and three years old respectively at the time of their father's disappearance—except for the daughter born five months after her father disappeared); *Khachukayev v Russia* (App. No.34576/08), judgment of 9 February 2016 at [74] (a daughter who was two years old at the time of disappearance and not the daughter who was born two months after the disappearance was found to be a victim of an infringement of art.3 of the ECHR); *Khava Aziyeva v Russia* (App. No.30237/10), judgment of 23 April 2015 at [97] (the daughter who was two years old when her father disappeared, but not the son who was born four months after the disappearance, was found to be a victim of an infringement of art.3 of the ECHR).

³⁷ See, e.g. *Khakiyeva, Temergeriyeva v Russia* (App. Nos 45081/06 and 7820/07), judgment of 17 February 2011; the Court found that there had been a violation of art.3 of the ECHR of a daughter, born in the year in which the disappearance took place and who was nine years old when the ECHR judgment was handed down, without reference to her date of birth in the judgment (at [24], [232]–[233]). Other cases where children born in the same year of disappearance were identified as victims of an infringement of art.3 of the ECHR, without reference to whether they were born before or after the disappearance include, e.g. the case of *Pitsayeva v Russia* (App. Nos 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10) (daughters of Isa Eskiyev, Aslambek Adiyev, Albert Midayev, Syal-Mirzy Murdalov; son of Aptu Dombayev); *Sangariyeva v Russia* (App. No.1839/04), judgment of 29 May 2008 (the daughter of the disappeared man).

³⁸ See, e.g. *Taymushkanov v Russia* (App. No.11528/07), judgment of 16 December 2010 at [122] (a two-year-old child and a child born after the disappearance); *Makharbiyeva v Russia* (App. No.26595/08) at [102] (a two-year-old child and a child born after the disappearance).

³⁹ See, e.g. *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [103]; *Dokayev v Russia* (App. No.16629/05) at [105]; *Khachukayev v Russia* (App. No.34576/08) at [74].

question of participation in the search.⁴⁰ Apart from the Court's inconsistencies, the very nature of this division raises serious doubts. Young children, regardless of whether they were born before or after the disappearance, are certainly not actively involved in the search for a disappeared person. At the same time, the impact that disappearance has on children's lives—especially if it is one of the children's parents who has disappeared—is the same, regardless of whether they were born before or after the disappearance. It is difficult to understand why a child two years old at the time of disappearance can be considered a victim of a violation of art.3 of the ECHR and a child born several months after the disappearance cannot.⁴¹ It therefore seems more reasonable to treat children in the same way, whether they were born before or after disappearance. If the Court criteria were rigorously applied, the Court could not regard any young children as victims of art.3 of the ECHR. Surely, however, an upbringing in a family in which the fate of one of its members is unknown is a source of suffering, different from the suffering that is inevitable for close victims of serious human rights violations.⁴² Therefore, it would be justified to consider all children growing up in such a family as victims of a violation of art.3 of the ECHR. Moreover, when the Court reported on rare occasions the reason for its case-law in relation to children, it argued that this was done because of non-involvement in the search,⁴³ to which, as shown in Part IV, the Court has paid no attention since 2009.

By contrast, the Inter-American Court of Human Rights notes the particularly difficult situation of children growing up in families affected by enforced disappearance. As it stated in the 2011 judgment in the context of children born after the disappearance of older siblings:

“Regarding the siblings who had not been born at the time of the facts ..., it has been determined from the evidence that they also suffered a violation of their moral and mental integrity. The fact of living in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims, despite the ceaseless efforts of their parents, harmed the mental and moral integrity of the children who were born and lived in that environment.”⁴⁴

The Human Rights Committee has not made such a detailed analysis of the situation of children growing up in families where one of the members has disappeared, but its decision also shows that the violation of the prohibition of inhuman treatment applies to all children, regardless of their date of birth.⁴⁵

In this context, the Court's first judgment in the *Janowiec v Russia* case, in which the criteria analysed were applied in very specific circumstances, is worth mentioning. This case was brought to the Court by relatives of people murdered during the Katyń massacres in 1940, when more than 20,000 people were executed by the Soviet authorities by virtue of a decision of the authorities of the Soviet Union. The crime was subsequently denied for many decades. The relatives of the murdered people tried to obtain more information in the 1990s and for this purpose they initiated proceedings in Russia, which were finally discontinued and the files were kept secret. Russia has been a party to ECHR since 1998, so the complaint

⁴⁰ See, e.g. *Taymushhanov v Russia* (App. No.11528/07) at [122] (the author's emphasis): “... It is quite natural that the second applicant, who was under two years old at the time of his father's disappearance, and third applicant, who had not even been born at the material time, *did not participate in any manner in the search for Ruslan Taymushhanov* (see, by contrast, *Luluyev and Others*, cited above, § 112). *In the light of these circumstances*, the Court, while accepting that the fact of being raised without their father may be a source of continuing distress for the second and third applicants, cannot assume that the mental anguish they experienced on account of Ruslan Taymushhanov's disappearance and the authorities' attitude towards that incident was distinct from the inevitable emotional distress such a situation would entail, and that it was serious enough to fall within the ambit of Article 3 of the Convention”. Similarly in the case of *Makharbiyeva v Russia* (App. No.26595/08) at [102] and *Vitayeva v Russia* (App. No.27459/07), judgment of 7 June 2011 at [144].

⁴¹ See, e.g. *Dokayev v Russia* (App. No.16629/05) at [105]. At the time of the judgment, children were nine and seven-years-old respectively.

⁴² Boss, “Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11” (2004) 66 *Journal of Marriage and Family* 551.

⁴³ *Taymushhanov v Russia* (App. No.11528/07) at [122] (judgment from 2011).

⁴⁴ *Contreras et al v El Salvador Merits, Reparations and Costs*, 31 August 2011 at [122]. See also A. Murray, “Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts” (2013) 2(1) *International Human Rights Law Review* 57.

⁴⁵ E.g. Communication No.1751/2008, *Aboussredra v Libyan Arab Jamahiriya*, Views adopted by the Committee on 25 October 2010; the Human Rights Committee does not even mention the children's dates of birth.

to the Court covered only those acts and omissions of the authorities after that date.⁴⁶ The Chamber found that there had been a violation of art.3 of the ECHR in respect of some of the applicants, which was not upheld by the Grand Chamber in its judgment rendered one-and-a-half years later. In its first judgment, the Chamber referred to the criteria established in *Çakıcı* and the case-law of the Court, and on that basis ruled out the claims of the applicants, who never had personal contact with the men because they were born after their loved ones had been taken prisoner.⁴⁷ As indicated above, when the Court justified its failure to recognise young children as victims of a breach of art.3 of the ECHR, it referred to their lack of involvement in the search. Since the complaint concerned only actions taken by the Russian authorities after 1998, there is no doubt that all the applicants, including those born after the Katyń massacres, were able to participate actively in the proceedings. In this specific complaint, taking into account all the criteria of the judgment in the case of *Çakıcı*, the question of birth after disappearance should therefore not have any meaning. Although the Grand Chamber ultimately rejected the claims of all the applicants for violation of art.3 of the ECHR,⁴⁸ the reasoning of the Chamber indicates how problematic the Court's practice with regard to underage children of disappeared persons is.

VI. Reaction of the authorities

While adopting the criteria, the Court stressed that the nature of the violation does not so much concern the disappearance of a family member as it concerns the reaction of the authorities and their attitude when the disappearance is reported.⁴⁹ Presently, the Court often confines itself to this statement and merely refers to judgments in which it has dealt more broadly with the other criteria.⁵⁰ There is therefore no doubt that this criterion is key to establishing a violation of art.3 of the ECHR with regard to the relatives of disappeared persons. However, it is not clear from the Court's case-law how the authorities' reaction and attitudes are assessed when a disappearance is reported to them.⁵¹

In several cases, the Court found that there had been no violation of art.3 in respect the applicants because there were no "aggravating features arising from the response of the authorities",⁵² or in other

⁴⁶ The Court considers the disappearance to be a continuous infringement, so that the obligation to carry out an investigation also applies to disappearances occurring before the cut-off date. For more on the subject of enforced disappearances as continuous infringements in the case law of the Court, see A. van Pachtenbeke and Y. Haeck, "From De Becker to Varnava: The State of Continuing Situations in the Strasbourg Case Law" [2010] 1 *European Human Rights Law Review* 47; Antoine Buyse, "A Lifeline in Time—Non-retroactivity and Continuing Violations under the ECHR" (2006) 75 *Nordic Journal of International Law* 63.

⁴⁷ *Janowiec v Russia* (App. Nos. 55508/07 and 29520/09), judgment of 16 April 2012 at [150]–[154].

⁴⁸ *Janowiec v Russia* (2014) 58 E.H.R.R. 30 at [182]–[189]; see also S. Sanz Caballero, "How could it go so wrong? Reformatio in peius before the Grand Chamber of the ECtHR in the case Janowiec and others v. Russia (or Polish collective memory deceived in Strasbourg)" (2013) 33 *Polish Yearbook of International Law* 259 and I. Kaminski, "Comments on Janowiec and others v. Russia. The Katyń massacre before the European Court of Human Rights: a personal account" (2013) 33 *Polish Yearbook of International Law* 784.

⁴⁹ *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5 at [98].

⁵⁰ *Turtyjeva v Russia* (App. No.63638/09), judgment of 20 June 2013 at [116]; *Pitsayeva v Russia* (App. Nos 53036/08, 61785/08, 8594/09, 24708/09, 30327/09, 36965/09, 61258/09, 63608/09, 67322/09, 4334/10, 4345/10, 11873/10, 25515/10, 30592/10, 32797/10, 33944/10, 36141/10, 52446/10, 62244/10 and 66420/10) at [477]; *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [100]; *Kushtova v Russia* (No.2) (App. No.21885/07) at [90].

⁵¹ The Human Rights Chamber for Bosnia and Herzegovina developed several factors for analysing the reaction and attitude of the authorities when the disappearance was brought to their attention, see e.g. CH/99/2150 *Unković v Federation of Bosnia and Herzegovina*, decision on review of 6 May 2002 at [114]; see also G. Baranowska, "The Families of Disappeared Persons in the Jurisprudence of the Human Rights Chamber for Bosnia and Herzegovina and the Human Rights Advisory Panel in Kosovo" (2016) 7 *International Journal of Rule of Law, Transitional Justice and Human Rights* 21, 26–27. The Chamber was a judicial body set up by the Dayton Treaty, to which complaints could be addressed against violations of the ECHR and its protocols, as well as against discrimination in the exercise of the rights guaranteed by these 16 international agreements. In practice in the vast majority of cases the Chamber examined whether the ECHR had been violated and applied case-law of the European Court of Human Rights. It is therefore an interesting example of the application by another judicial authority of the case-law of the Court, including on enforced disappearances. For more about the Chamber and its case-law on enforced disappearances, see M. Nowak, "Individual Complaints before the Human Rights Commission for Bosnia and Herzegovina", in G. Alfredsson et al. (eds), *International Human Rights Monitoring Mechanisms* (Brill/ Nijhoff, 2001); G. Citroni and T. Scovazzi, *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention* (Leiden and Boston: Martinus Nijhoff, 2007), pp.224–243; T. Blumenstock, "Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina" (2006) 19 *Leiden Journal of International Law* 773, 781–793; D. Rausching, "Menschenrecht auf Information über das Schicksal Vermisster. Das Beispiel von Bosnien und Herzegowina", in J. Bröhmer et al. (eds), *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress* (Carl Heymanns Verlag, 2005), pp.161–175.

⁵² *Koku v Turkey* (App. No.27305/95), judgment of 31 May 2005 at [171]; see further, e.g. *Çakıcı v Turkey* (2001) 31 E.H.R.R. 5 at [99].

words “that there is nothing in the content or tone of the authorities’ replies to the enquiries made by the applicant that could be described as inhuman or degrading treatment”.⁵³ This wording implies that, in order to find that there has been a breach of art.3, the Court examines in detail the specific reaction of the state. However, the analysis of the case-law does not indicate this: in most cases, the Court does not invoke any specific reaction by the state in finding that the family members of a disappeared person were found to be victims of violations of art.3.⁵⁴ It is unclear whether, in these situations, the Court considers that there have been actions by state authorities which fulfil these conditions—and only those circumstances were not mentioned in the judgment—or whether the decision was based on other grounds.

Ineffectiveness of the investigation itself is certainly not the basis for finding that family members of disappeared persons are victims of a violation of art.3 of the ECHR.⁵⁵ However, when analysing the breach of the Convention in respect of relatives of disappeared persons the Court very often invokes the fact that it found in the case under examination a violation of the procedural aspect of art.2 of the ECHR, i.e. that the Court considered the investigations to be ineffective.⁵⁶ In more than 100 judgments between 2008 and 2013, the Court stated that infringement of the obligation to effectively investigate is “of direct relevance”⁵⁷ in this context. Also, in its most recent judgments in disappearance cases of 2016 and 2017, the Court starts the consideration whether there has been a violation of art.3 of the ECHR in respect of the applicants by recalling that the authorities have not carried out an effective investigation into the disappearance case and that the Court has attributed to them responsibility for the detention of the disappeared person.⁵⁸ In the context of the second factor, it is interesting to note that, although the Court has made it clear in 2013 that finding a violation of art.3 in respect of a family member of a disappeared person is not limited to cases where the state is to be held responsible for the disappearance,⁵⁹ an analysis of the Court’s case-law points to the opposite practice.⁶⁰ When finding that there has been a violation of the prohibition of inhuman treatment against the applicants, the Court has repeatedly invoked the fact that the state’s responsibility for deprivation of freedom has been established.⁶¹ By analogy, in finding that there was no breach of art.3 of the ECHR, it referred to the fact that the involvement of state officials in the disappearance was not demonstrated.⁶² In several judgements, the Court has made it clear that, in the absence a finding of state responsibility for the disappearance: “the Court is not persuaded that the investigating authorities’ conduct could have in itself caused the applicants mental distress in excess of the minimum level of severity which is necessary in order to consider treatment as falling within the scope of Article 3”.⁶³ An exception worth recalling is the 2008 judgment in the *Osmanoğlu v Turkey* case, in which the Court found a violation of art.3 of the ECHR in respect of the father of a disappeared man⁶⁴ despite the fact that the Court was not in a position to establish whether the individuals who arrested his son were in fact police officers. The

⁵³ *Seker v Turkey* (App. No.52390/99), judgment of 21 February 2006 at [83]; see further, e.g. *Tekdağ v Turkey* (App. No.27699/95), judgment of 15 January 2004 at [86].

⁵⁴ See, e.g. *Tanış v Turkey* (App. No.65899/01), judgment of 2 August 2005 at [220]; *Kushtova v Russia (No.2)* (App. No.21885/07) at [92] (the Court speaks of a “manner in which their complaints have been dealt with”, which does not allow a conclusion to be drawn as to what treatment the Court speaks about).

⁵⁵ See, e.g. *Tagirova v Russia* (App. No.20580/04), judgment of 4 December 2008 at [102]; *Zakriyeva v Russia* (App. No.20583/04), judgment of 9 January 2009 at [97].

⁵⁶ More about procedural obligation under art.2 of the ECHR, see Schabas, *The European Convention on Human Rights. A Commentary* (Oxford: Oxford University Press, 2015), pp.134–139.

⁵⁷ See, e.g. *Baysayeva v Russia* (2009) 48 E.H.R.R. 33 at [141]; *Alikhadzhiyeva v Russia* (App. No.68007/01), judgment of 5 July 2007 at [81]; *Umarova v Russia* (App. No.25654/08), judgment of 31 July 2012 at [101]; *Askhabova v Russia* (App. No.54765/09), judgment of 18 April 2013 at [166].

⁵⁸ *Kushtova v Russia (No.2)* (App. No.21885/07) at [92]; *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [102].

⁵⁹ *Janowiec v Russia* (2014) 58 E.H.R.R. 30 at [178].

⁶⁰ Also after the 2013 judgment, in which the Court held that it is not necessary to determine the responsibility of the state, see e.g. *Kagirov v Russia* (App. No.36367/09), judgment of 23 April 2015 at [118]–[120].

⁶¹ See, e.g. *Kushtova v Russia (No.2)* (App. No. 21885/07) at [92]; *Ortsuyeva v Russia* (App. Nos 3340/08 and 24689/10) at [102]; *Nazyrova v Russia* (App. Nos 21126/09, 63620/09, 64811/09, 32965/10 and 64270/11), judgment of 9 February 2016 at [160].

⁶² See, e.g. *Tekdağ v Turkey* (App. No.27699/95) at [86]; *Shakhgiriyeva v Russia* (App. No.27251/03), judgment of 8 January 2009 at [185].

⁶³ *Zakriyeva v Russia* (App. No.20583/04) at [97]; see also *Shaipova v Russia* (App. No.10796/04), judgment of 6 November 2008 at [110]; *Khumaydov and Khumaydov v Russia* (App. No.13862/05) at [130]; *Toysultanova v Russia* (App. No.26974/06), judgment of 17 June 2010 at [104].

⁶⁴ *Osmanoğlu v Turkey* (App. No.48804/99) at [97].

Court pointed out that the impossibility to establish that finding was directly attributable to the lack of reaction by the state authorities to the applicant's allegations.⁶⁵ Drawing such conclusions is beneficial for applicants, especially since proving the state's involvement in disappearances is one of the main challenges facing applicants in enforced disappearances cases. However, this practice has not been subsequently adopted by the Court in its case-law.

It is worth mentioning, that in many cases of enforced disappearances, the Court finds that there has been a violation of its obligations under art.38 of the ECHR, mainly due to the failure to provide it with the documents requested by the Court.⁶⁶ The Court does not take into account that the conduct of the authorities during proceedings before the Court itself can lead to the aggravation of the suffering of the loved ones of a disappeared person. The relatives of the disappeared persons suffer from uncertainty as to the fate of the disappeared person and the authorities of the state may have information that could put an end to their suffering. If they do not provide the applicants or the ECHR with the requested documents and, at the same time, are not able to convincingly justify their refusal, they directly contribute to the further suffering of the relatives of the disappeared persons.⁶⁷

VII. Conclusions

In its practice, the Court has found that relatives of disappeared persons may be victims of a breach of art.3 of the ECHR. The adopted criteria have evolved, with more and more people covered over time. For example, while the Court initially examined in great detail the involvement of individual applicants in the search for the disappeared persons and in contact with the authorities and considered as victims of inhuman treatment only those who were active in this area, it does not currently pay any attention to this aspect. There are a number of inconsistencies in the case-law under analysis. For example, in most cases, children born shortly before the disappearance of a family member are regarded as victims of a violation of art.3 of the ECHR, but there are also judgments in which the Court has taken reverse decisions. As indicated above, the different treatment of children born before and after disappearance raises serious doubts. Another example of inconsistencies is the recognition of the victims of inhuman treatment of relatives of persons whose disappearance was not attributed to the state by the Court. The Court has made it clear that in such a situation, art.3 of the ECHR may be violated, but has adopted the opposite practice. Finally, the Court considers that the nature of the breach is the reaction of the authorities and their attitude when disappearances are reported to them. However, the Court jurisprudence does not show how the Court assesses the authorities' reaction and attitudes when disappearances are reported to them.

The ICPPED, which entered into force in 2010, is the first international agreement explicitly recognising relatives of a disappeared person also as victims of enforced disappearances. The Court could therefore treat this as a starting point for changing its case-law in such a way as to recognise the difficult situation of all the relatives of disappeared persons. This has long been the practice of other international bodies. For example, the Human Rights Committee does not apply any criteria and, from the very first cases under consideration, states that relatives of disappeared persons are treated inhumanely because they were entitled to know the truth about the fate of disappeared persons.⁶⁸ The basis for their recognition as victims of the International Covenant on Civil and Political Rights' violation is therefore the mere fact that the authorities have not informed the authorities of the fate of the disappeared person, which is an inseparable element

⁶⁵ *Osmanoğlu v Turkey* (App. No.48804/99) at [53].

⁶⁶ Jötten, *Enforced Disappearances und EMRK* (Berlin: Duncker & Humblot, 2012), p.229.

⁶⁷ An especially striking example is the case *Janowiec v Russia* (2014) 58 E.H.R.R 30, in which the Court held only and exclusively an infringement of art.38 of the ECHR by Russia. While Russia's conduct during the proceedings before the Court could certainly lead to an aggravating of the suffering of the applicants, this subject was not examined by the Court.

⁶⁸ Communication No.107/1981, *Quinteros v Uruguay*, Views adopted by the Committee on 21 July 1983 at [14]; Communication No.1085/2002, *Bousroual v Algeria*, Views adopted by the Committee on 15 March 2006 at [9.8]; Communication No.950/2000, *Sarma v Sri Lanka*, Views adopted by the Committee on 16 July 2003 at [9.5]; Communication No.1327/2004, *Grioua v Algeria*, Views adopted by the Committee on 10 July 2007 at [7.7].

of the enforced disappearances. Another possibility to recognise the difficult situation of the next-of-kin to disappeared persons would be to consider them as victims of a violation of art.8 of the ECHR, which guarantees the right to respect for private and family life.⁶⁹ This has been raised by many applicants in the analysed cases.⁷⁰ However, the Court only recognised this in very few cases where, in addition to disappearance, other violations of the ECHR have occurred.⁷¹ The Court has therefore many possibilities to change its case-law in order to acknowledge the different situations of all of the family members of a disappeared person: relying on other ECHR provisions, invoking international jurisprudence or raising rights contained in a new international treaty. No matter how the case-law evolves, if the Court really wants to recognise the “particular burden on the relatives of missing persons”⁷² it should introduce some changes to its current practice.

⁶⁹ This approach was adopted by Human Rights Chamber for Bosnia and Herzegovina (cf. e.g. CH/01/8365 et al., *Selimović v The Republika Srpska*, decision on admissibility and merits of 3 March 2003 at [179]–[181]).

⁷⁰ See, e.g. *Şeker v Turkey* (App. No.52390/99) at [85]; *Luluyev v Russia* (2009) 48 E.H.R. 45 at [131]; *Ibragimov v Russia* (App. No.34561/03), judgment of 29 May 2008 at [118]; *Osmano?lu v Turkey* (App. No.48804/99) at [105]; *Ruslan Umarov v Russia* (App. No.12712/02), judgment of 3 July 2008 at [136]; *Lyanova and Aliyeva v Russia* (App. Nos 12713/02 and 28440/03), judgment of 2 October 2008 at [127]; see also Jötten, *Enforced Disappearances und EMRK* (Berlin: Duncker & Humblot, 2012), pp.66–67. The applicants started to invoke an infringement of art.8 of the ECHR following decisions of the Human Rights Chamber for Bosnia and Herzegovina.

⁷¹ For example, there were no legal regulations concerning the contact between the detained person and his or her family and the father was not allowed to contact his detained son: *Ucar v Turkey* (App. No.52392/99), judgment of 11 April 2006 at [130]–[141].

⁷² *Varnava v Turkey* (2010) 50 E.H.R.R. 21 at [200].

Case and Comment

Selected decisions from the European Court of Human Rights for May and June 2018

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Hate speech and mere criticism of the State in a democratic society

Political speech—hate speech—appeal to extremist activities—Chechen conflict—freedom of expression—art.10

☞ Extremism; Freedom of expression; Hate speech; Margin of appreciation; Russia

Stomakhin v Russia (Application No.52273/07)

European Court of Human Rights: Judgment of 9 May 2018

Facts

The applicant, Mr Stomakhin, is a Russian national who was the editor-in-chief of a monthly newsletter between 2000 and 2004. This newsletter critically covered the events of the Chechen civil war which lasted from 1999 to 2009. It notably accused the Russian regime to “[wage] a war aimed at the physical extermination of Chechens as an ethnic group”. In 2004, the applicant participated in an unauthorised meeting in protest of the current regime. He also disseminated issues of the newsletter during a meeting in Moscow. A criminal investigation was launched against him on suspicion that the views expressed in the newsletter amounted to appeals to extremist activities and incitement to racial, national, social and other hatred. In a judgment of 20 November 2006, the District Court convicted him of “having publicly appealed to extremist activities through the mass media” and of having committed “actions aimed at inciting hatred and enmity as well as at humiliating the dignity of an individual or group of individuals on the grounds of ethnicity, origin, attitude towards religion and membership of a social group, through the mass media”, according to the Russian Criminal Code. The domestic court relied on the language used in the newsletter to conclude that the applicant’s actions constituted criminal offences and that he had

abused his right of freedom of expression secured by the Russian Constitution. Mr Stomakhin was sentenced to five years' imprisonment and was banned from practising journalism for three years. The judgment was upheld by the Moscow City Court on appeal.

The applicant complained before the European Court of Human Rights (the Court) on the grounds of violations of his right to freedom of expression under art.10 and his right to freedom of peaceful assembly under art.11 of the Convention. When the case was examined by the Court, the applicant had completed his sentence.

Held

- (1) The Court deemed it appropriate to examine the complaint within the scope of art.10 only. It declared the remainder of the complaint inadmissible (unanimous).
- (2) There had been a violation of art.10 of the Convention (unanimous).
In assessing whether the interference with the applicant's right to freedom of expression pursued a legitimate aim, the Court noted the difficult situation in the Chechen Republic and the existence of an illegal insurgency in the region. In the light of these circumstances, the applicant's conviction pursued the legitimate aim of protecting the rights of others, national security, public safety and public order. In order to determine whether the interference had been "necessary in a democratic society" and whether the applicant's conviction answered a "pressing social need", the Court divided its reasoning in three groups of statements. The first group concerned the newsletter statements which appealed to extremist activities. The wording of the texts glorified the violent methods of action of the Chechen separatists, including terrorist attacks which had resulted in the deaths of innocent people. The Court noted that some of the impugned extracts rejected democratic principles, such as the respect for the Constitution and openly called to violent uprising and armed resistance. It reiterated its well-established case-law according to which the limits of permissible criticism are wider with regard to the government than in relation to a private individual or even a politician, and the mere facts that forms of expression offend, shock or disturb does not suffice to justify the interference with one's right to freedom of expression. However, in the present case, the criticism went far beyond what is acceptable in a democratic society and amounted to glorification of terrorism and deadly violence. Moreover, Russian armed and security forces were accused of serious violations, such as mass murder or torture. While the Court had previously found Russia responsible for such abuses in previous cases, the wording of the impugned text aimed at stigmatising and dehumanising Russian servicemen as a whole and incited hatred against them. In the light of the above findings, the Court concluded that there was a "pressing social need" to interfere with the applicant's right to freedom of expression. It reached the same conclusion for the third group of statements, which had generalised isolated cases of alleged abuses as representative of ethnic Russians and Orthodox believers, such as the keeping of slaves. Whilst the Court said that there is little scope under art.10(2) for restrictions on political speech and on debate of questions of public interest, the margin of appreciation is wider when it comes to regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. The second group of statements described the actions of Russian authorities in the Chechen Republic as a "totally destructive genocidal war against the Chechen people". They notably called people to abstain from participating in the presidential election of March 2004. The Court deemed that the domestic courts' conclusion that such statements amounted to appeals to extremist activities were not "relevant and sufficient" to justify the interference with the applicant's exercise of freedom of

expression. Seeking the truth and starting a debate on the causes of serious abuses which amount to war crimes or crimes against humanity constitute an integral part of freedom of expression. Therefore, domestic authorities should adopt a cautious approach in determining the scope of “hate speech”, especially when it comes to mere criticism of the state. Consequently, the Court held that the applicant’s conviction did not meet a “social pressing need” in respect of the second group of statements. Furthermore, the Court reached the conclusion that the conviction had not been proportionate with the legitimate aim pursued. Given that the applicant had no criminal record and the newsletter had had a limited impact in terms of dissemination of information, sentencing the applicant to five years of imprisonment coupled with a three-year ban on practising journalism was a particularly harsh measure.

- (3) The Court rejected the claim for pecuniary damage in respect of the applicant’s loss of earnings for the five years in which he was in prison. However, it awarded the applicant €12,000 in respect of non-pecuniary damage (four votes to three).
- (4) It rejected the applicant’s claim of €3,000 for the cost and expenses incurred before the Court (six votes to one).

Cases considered

- Akhmadov v Russia* (App. No.21586/02), (2011) 52 E.H.R.R. 17
Bédat v Switzerland [GC] (App. No.56925/08), (2016) 63 E.H.R.R. 15
Belge v Turkey (App. No.50171/09), judgment of 6 December 2016
Ceylan v Turkey [GC] (2000) 30 E.H.R.R. 73
Chauvy v France (2005) 41 E.H.R.R. 29
Chitayev v Russia (App. No.59334/00), (2008) 47 E.H.R.R. 1
Dlugolecki v Poland (App. No.23806/03), judgment of 24 February 2009
Dmitriyevskiy v Russia (App. No.42168/06), judgment of 3 October 2017
Erdogdu v Turkey [GC] (2002) 34 E.H.R.R. 50
Esmukhametov v Russia (App. No.23445/03), judgment of 29 March 2011
Estamirov v Russia (App. No.60272/00), (2008) 46 E.H.R.R. 33
Fatullayev v Azerbaijan (2011) 52 E.H.R.R. 2
Féret v Belgium (App. No.15615/07), judgment of 6 July 2009
Gerger v Turkey [GC] (App. No.24919/94), judgment of 8 July 1999
Goncharuk v Russia (App. No.5864/00), judgment of 4 October 2007
Gormiüs v Turkey (App. No.49085/07), judgment of 19 January 2016
Gough v United Kingdom (2015) 61 E.H.R.R. 8
Gül v Turkey (App. No.4870/02), (2011) 52 E.H.R.R. 38
Gündüz v Turkey (2005) 41 E.H.R.R. 5
Karatas v Turkey [GC] (App. No.23168/94), judgment of 8 July 1999
Kerimova v Russia (App. No.17170/04), judgment of 3 May 2011
Khashiyev and Akayeva v Russia (2006) 42 E.H.R.R. 20
Leroy v France (App. No.36109/03), judgment of 2 October 2008
Mamère v France (2009) 49 E.H.R.R.39
Morice v France [GC] (2016) 62 E.H.R.R. 1
Murphy v Ireland (2004) 38 E.H.R.R. 13
Novikova v Russia (App. No.25501/07), judgment of 26 April 2016
Okçuoğlu v Turkey [GC] (App. No.24246/94), judgment of 8 July 1999
Osmani v Macedonia (dec.) (App. No.50841/99), judgment of October 2001

- Özturk v Turkey* [GC] (App. No.22479/93), judgment of 28 September 1999
Palomo Sanchez v Spain [GC] (2012) 54 E.H.R.R. 24
Pentikäinen v Finland [GC] (2017) 65 E.H.R.R. 21
Perinçek v Switzerland [GC] (2016) 63 E.H.R.R. 6
Sadykov v Russia (App. No.41840/02), judgment of 7 October 2010
Saygili and Falakaoglu v Turkey (No.2) (App. No.38991/02), judgment of 17 February 2009
Sürek v Turkey (No.1) [GC] (App. No.26682/95), judgment of 8 July 1999
Sürek v Turkey (No.4) [GC] (App. No.24762/94), judgment of 8 July 1999
Sürek and Özdemir v Turkey [GC] (App. No.23927; 24277/94), 8 July 1999
Tara and Poiata v Moldova (App. No.36305/03), judgment of 16 October 2007
Taranenko v Russia (App. No.19554/05), judgment of 15 May 2014
Skalka v Poland (App. No.43425/98), (2004) 38 E.H.R.R. 1
Stoll v Switzerland [GC] (2008) 47 E.H.R.R. 59
Vejdeland v Sweden (2014) 58 E.H.R.R. 15
Wingrove v United Kingdom (1997) 24 E.H.R.R. 1
Zana v Turkey (1999) 27 E.H.R.R. 667
Ziembinski v Poland (No.2) (App. No.1799/07), judgment of 5 July 2016

Commentary

Stomakhin v Russia is a landmark case in that the Court for the first time had the opportunity to rule on the compliance of the Suppression of Extremist Activities Act adopted in 2002 and the definition of extremist activities with the Convention. As noted by Judge Keller in the concurring opinion, the case marks the beginning of a body of case-law not only in relation to Russia, but also in relation to other Contracting Parties. Many states in the Council of Europe are affected by terrorism. Moreover, separatist movements have increasingly emerged. It is thus essential that the Court delineates the limits of what constitutes acceptable criticism in such sensitive circumstances.

This judgment is important in that it limits the margin of appreciation enjoyed by Contracting Parties in relation to restrictions of “hate speech”. The context in which the impugned statements had been formulated was particularly sensitive, i.e. the ongoing civil war in the Chechen Republic, the Russian regime policies in that region, and the events that occurred outside of the Chechen territory, such as the taking of hostages by Chechen separatists in the Moscow theatre which ended by a military operation and resulted in the death of 129 hostages. The Court recognised that in cases of conflict governments have to be vigilant regarding the use of media that disseminate hate speech and promote violence against the state. However, the Court reiterated that a fair balance should be struck between the individual’s fundamental rights to freedom of expression and a democratic society’s legitimate right to protect itself against the activities of terrorist organisations.

The Court insisted that not all forms of criticism are to be considered as “hate speech”, especially when the recipient is the government, and clarified what forms of expression go beyond what is acceptable in a democratic society. At a time where freedom of the press is under tension in several European countries, the democratic values underlying freedom of expression, such as the possibility to freely “seek historical truth” or to start “a debate on the causes of acts of particular gravity” are of prime importance. The Court’s warning that domestic authorities should be cautious when determining the scope of “hate speech” crimes is certainly not only addressed to Russia, but also to other countries such as Turkey, where the government has undertaken a purge on media after the failed *coup d'état* in 2016.

The impact of *Stomakhin v Russia* on future case-law is indisputable. However, Judge Keller disagreed with the majority’s classification of the impugned statements, whereas the domestic courts had used a more “holistic” approach. Judge Keller notes that the Court is not a court of fourth instance and, thus,

should not conduct a new assessment of the facts. Moreover, the rigidity of the majority's reasoning in classifying the statements depending on whether they constitute hate speech or political speech may have unforeseen implications in the future, especially when considering the increase in separatist movements in several European countries.

Lucie Laffont

Extraordinary rendition and secret detention

Extraordinary rendition—secret detention—war on terror—black sites—torture—ill-treatment—effective investigation—art.3—unacknowledged and incomunicado detention—art.5—art.8—effective remedy—art.13 right to a fair trial—art.6(1)—art.2—death penalty—art.1 of Protocol No.6

Detention without charge; Duty to undertake effective investigation; Inhuman or degrading treatment or punishment; Right to effective remedy; Right to fair trial; Right to liberty and security; Romania; Suspects; Terrorists; Torture; United States

Al Nashiri v Romania (Application No.33234/12)

European Court of Human Rights (First Section): Judgment of 31 May 2018

Facts

The applicant, Mr Abd Al Rahim Husseyn Muhammad Al Nashiri, a Saudi Arabian national of Yemeni descent is at present being detained by the US Central Intelligence Agency at the Guantánamo Bay Naval Base in Cuba for alleged terrorism offences. The applicant was initially captured in Dubai and was detained by the CIA under the High-Value Detainee (HVD) Programme from November 2002 onwards for his alleged role in the orchestration of the attacks on the US Navy ship *USS Cole* in Aden, Yemen, in 2000 and on the French oil tanker *MV Limburg* in the Gulf of Aden in 2002. Mr Al Nashiri was transferred to several secret detention centres known as “black sites” in Thailand, Afghanistan and Poland before his rendition to Romania in April 2004. According to a US Senate Committee Report published in 2014, the applicant was transferred five times between June 2003 and September 2006, before being returned to detention in Guantánamo Bay. The applicant was detained at a CIA black site in Romania from April 2004 to October/November 2005.

While in CIA custody, the applicant alleges that he was routinely subjected to torture and ill-treatment, with interrogators employing a range of so-called “enhanced interrogation techniques”, including wall standing, stress positions, waterboarding and cramped confinement standing in a box. The applicant further testified that he was hung upside down and forced to stand for extended periods of time, that he was deprived of clothes, forced to sleep on the floor, and had his diet manipulated. Following an attempted hunger strike, the applicant was forced fed rectally by CIA staff. A psychological evaluation conducted by the US government revealed that Mr Al Nashiri was suffering from Post-Traumatic Stress Syndrome.

In 2011 United States Military Commission prosecutors brought capital charges against the applicant for his alleged role in the attacks of 2000 and 2002, in respect of which he is currently awaiting trial. A parliamentary inquiry in Romania on the questions of the existence of US secret detention sites and the participation of the authorities in the illegal transport of detainees was concluded in the negative in 2007. A criminal investigation based upon a complaint lodged before the Prosecutor General in 2012 remains

pending. Bringing a case before the European Court of Human Rights (the Court), the applicant complained that the respondent government enabled his incommunicado detention, torture and ill-treatment at the black site, along with the continued deprivation of contact with his family. Mr Al Nashiri also complained that in enabling his transport to other sites, the Romanian authorities exposed him to significant additional risks of an unfair trial, torture and the death penalty. Finally, the applicant complained that the authorities failed to carry out an effective and thorough investigation. The complaints cover art.3, art.5, art.8, art.13, art.6(1) and art.2 of the Convention, and art.1 of Protocol No.6.

Held

- (1) The respondent government's objections that the issues complained of did not fall under the jurisdiction of Romania for the purposes of art.1 were dismissed (unanimous).
Based upon an analysis of both the evidence presented in the relevant international inquiries and its own previous case-law, the Court held that it was established beyond reasonable doubt that the respondent government had hosted a CIA detention site, had cooperated in the HVD programme, and were aware that the detainees were being exposed to serious risks to their Convention rights. The Court affirmed that these findings were sufficient to establish the responsibility of a state and to fulfil the jurisdictional requirements of art.1.
- (2) The objections of the respondent government on the grounds of the non-exhaustion of domestic remedies and of non-compliance with temporal restrictions were also dismissed (unanimous).
On the questions of the exhaustion of domestic remedies and compliance with the six-month rule, the Court held that they should be joined to the merits on the basis that they overlapped with the applicant's claim under the procedural limb of art.3. These objections were subsequently dismissed.
- (3) The applicant's complaints under arts 23, 5, 6(1), 8 and 13 of the Convention, together with art.1 of Protocol No.6 were admissible (unanimous).
- (4) There had been a violation of art.3 on both procedural and substantive grounds (unanimous).
The applicant complained under the procedural limb of art.3 that the Romanian authorities had failed to conduct a prompt and thorough investigation into the alleged ill-treatment at the CIA detention site, resulting in a violation of the right to the truth. Citing its previous case-law, the Court reaffirmed the duty arising from art.3 and art.1 to undertake prompt, thorough and effective investigations that are independent of the executive into ill-treatment, including the actions of foreign nationals performed with the state's acquiescence. The Court examined the extent to which the parliamentary inquiry concluded in 2007 and the pending criminal investigation launched in 2012 were capable of fulfilling the investigative requirements. It was held that in light of the limited scope of the inquiry which did not seek to ensure any accountability of the officials involved, the long delay in bringing a criminal investigation, and the failure to disclose information to the public, the respondent government had failed to comply with the requirements under the procedural limb of art.3.
On the question of a substantive violation of art.3, although the applicant was found not to have been subjected to the most severe enhanced interrogation techniques while in detention in Romania, the Court found that the "standard conditions of confinement" in accordance with CIA guidelines including hooding, solitary confinement, the application of constant noise and light, and shackling were routinely used as an integral part of the programme. The Court made reference to the force-feeding incident in May 2004, along with the constant fear and mental suffering resulting from the applicant's previous experiences of torture, including waterboarding and prolonged close confinement. Consequently, it was held that

- the cumulative effects on the applicant, his physical and mental suffering amounted to inhuman treatment. The government's role in facilitating the operation of the HVD programme on Romanian territory, and the public availability of information on the treatment of terror suspects was deemed to evidence an "acquiescence and connivance" in the programme. The Court further emphasised that the respondent government's awareness of the extraordinary rendition of the applicant, together with the real risk of further ill-treatment, enabled a breach of art.3 to be established.
- (5) There had been a violation of art.5 of the Convention (unanimous). The Court stated strongly that the unacknowledged detention of an individual amounts to a "most grave violation" of the fundamental provisions under art.5. The Court held that the cooperation and logistical assistance provided by the Romanian authorities secured the effective operation of the HVD programme outside the jurisdiction of the US courts. In light of the support provided, and the respondent government's knowledge of the activities and risks, the Court concluded that there had been a violation of art.5.
- (6) There had been a violation of art.8 of the Convention (unanimous).
In relation to the art.8 claim on the basis of incommunicado detention and the deprivation of any contact with the applicant's family, the Court emphasised that an essential purpose of art.8 is to protect individuals against arbitrary interference by public authorities. It was further underlined that "private life" may include the moral and physical integrity of a person. In light of the respondent state's responsibility under arts 3 and 5, the Court concluded that an unjustified interference with the applicant's art.8 right had similarly occurred in the context of his unlawful secret detention.
- (7) There had been a violation of art.13 of the Convention (unanimous).
The Court found in favour of the applicant's argument that his art.13 right to an effective remedy in conjunction with arts 3, 5, and 8 of the Convention had been breached. The Court clarified that where an arguable claim of ill-treatment exists, the requirements under art.13 go beyond those under arts 3 and 5 to conduct an effective investigation, requiring independent and rigorous scrutiny of the claim. The Court referred to its findings on the applicant's arts 3, 5 and 8 complaints and held that the criminal investigation in Romania did not amount to an effective remedy for the purposes of art.13.
- (8) There had been a violation of art.6(1) of the Convention (unanimous).
The Court recalled its previous case-law that a flagrant denial of justice for the purposes of art.6 would occur where the breach of fair trial principles is "so fundamental as to amount to a nullification or destruction of the very essence of the right" and that the admission of evidence obtained through torture would amount to such a breach. The Court found that the same concerns expressed in the *Al Nashiri v Poland* case in respect of the military tribunals the applicant would be exposed to on transfer out of the territory applied, including the sufficiently high probability that evidence obtained through torture would be admitted. Accordingly, the Court held that Romania's cooperation in the transfer of the applicant and the foreseeability of a flagrant breach of fair trial rights amounted to a violation of art.6(1).
- (9) There had been a violation of arts 2 and 3 of the Convention taken together with art.1 of Protocol No.6 (unanimous).
The Court held that it was foreseeable that the applicant would be exposed to a substantial risk of having the death penalty imposed on him if tried by a military commission after being transferred. The persistent nature of the risk was evidenced by the capital charges levelled against the applicant in 2011.

- (10) The respondent state was obliged to pay the applicant €100,000 in respect of non-pecuniary damages, in addition to any tax due, within a period of three months (unanimous).
- (11) The remainder of the applicant's claim for just satisfaction was dismissed (unanimous).

Cases considered

- Aksoy v Turkey* (1997) 23 E.H.R.R. 553
Al Nashiri v Poland (2015) 60 E.H.R.R. 16
Al-Saadoon v United Kingdom (2010) 51 E.H.R.R. 9
Assanidze v Georgia (2004) 39 E.H.R.R. 32
Assenov v Bulgaria (1999) 28 E.H.R.R. 652
Chahal v United Kingdom (1997) 23 E.H.R.R. 413
El-Masri v Macedonia (2013) 57 E.H.R.R. 25
Husayn (Abu Zubaydah) v Poland (2015) 60 E.H.R.R. 16
Ilascu v Moldova (2005) 40 E.H.R.R. 46
Imakayeva v Russia (2008) 47 E.H.R.R. 4
Mocanu v Romania (2015) 60 E.H.R.R. 19
Nasr and Ghali v Italy (App. No. 44883/09), judgment of 23 February 2016
Othman (Abu Qatada) v United Kingdom (2012) 55 E.H.R.R. 1
Selmouni v France (2000) 29 E.H.R.R. 403
Soering v United Kingdom (1989) 11 E.H.R.R. 439

Commentary

The judgment of the Court in the present case represents a clear statement of the principles on the complicity of European states in the US “war on terror” policies introduced by the Bush administration in the wake of the September 11 terror attacks. The accommodation of the CIA’s extraordinary rendition flights and the hosting of secret “black site” detention centres on European soil has become the subject of international inquiries as well as a burgeoning body of jurisprudence before the European Court of Human Rights. The routine use of “enhanced interrogation techniques” upon suspects, the conditions under which they were transported and detained, as well as their exposure to fair trial and death penalty risks have formed the basis of a number of complaints. This judgment should therefore be viewed in the context of the Court’s preceding and concurrent decisions on extraordinary rendition and CIA detention, most notably those of *El-Masri v Macedonia* (2013), *Al Nashiri v Poland* (2014) and *Abu Zubaydah v Lithuania* (2018).

The Court in this case was obliged to overcome the evidentiary challenges associated with the highly covert nature of the CIA’s operations and the corresponding secrecy surrounding the bilateral arrangements with the Romanian government. It did so by relying upon a range of international inquiries and expert findings from the UN, the Council of Europe, the European Parliament, US policy documents, NGO reports, and media reports presenting evidence on the involvement of the Romanian authorities in CIA activities, the conditions of detention, and the paths of the rendition flights.

The Court’s unanimous decision finding violations of arts 3, 5, 8, 13, 6(1), (2), and art.1 of Protocol No.6 and awarding €100,000 in non-pecuniary damages closely followed the decision in *Al Nashiri v Poland*. The Court made many significant statements of principle, affirming for example the legitimate public interest in investigations and the democratic importance of freedom from arbitrary detention under art.5. Most significantly, however, the Court reaffirmed the non-derogable nature of the prohibition of torture, even in the fight against terrorism and strongly condemned any Court that would permit the admission of evidence obtained through torture. In the words of the Court, “[t]he trial process is the cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for

the rule of law and taints the reputation of any court that admits it". This case, alongside those that have preceded it, is likely to have significant ramifications both for the development of art.3 protections under the Convention and, more broadly, for the future evolution of counter-terror policies in Europe.

Alice Venn

Confiscation of land over unlawful site development

Confiscation of land—site development—compensation—penalties—criminal proceedings—no punishment without law—art.7—right to a fair trial—art.6—protection of property—art.1 of Protocol No.1—just satisfaction—art.41

↳ Confiscation; Italy; National courts; No punishment without law; Protection of property; Right of access to court; Unauthorised development

GIEM Srl v Italy (Application Nos 1828/06, 34163/07 and 19029/11)

European Court of Human Rights (Grand Chamber): Judgment of 28 June 2018

Facts

The applicants in *GIEM Srl v Italy* are a group comprised of four companies, GIEM Srl, Hotel Promotion Bureau Srl, RITA Sarda Srl and Falgest Srl, together with one individual, Mr F. Gironda, an Italian national. The cases concern the confiscation of land in the event of unlawful site development.

The company GIEM Srl owned land in Bari situated in the coast at Punta Perotti, which was at the time classified as suitable for development. In May 1992, the Bari municipal council adopted a draft site development agreement presented to an adjacent land owner, the company Sud Fondi, within which, according to GIEM Srl, its land was incorporated. In October 1992, the Bari municipal authority asked GIEM Srl if it would agree to a site development agreement, with GIEM Srl agreeing but receiving no subsequent reply. In February 1995, Sud Fondi began construction on the site. In 17 March 1997, following a news article concerning the building works, the public prosecutor ordered a criminal investigation and a temporary measure restraining disposal of property in respect of all the buildings in question on the grounds that Punta Perotti was a protected natural site and the construction was illegal. The Bari District Court acknowledged the illegality of the buildings in a judgment of 10 February 1999. While the Court found that no negligence or criminal intent could be imputed to the defendants because the local authority had issued the permits and because of lack of coordination between local and regional legislation, the Court ordered the confiscation of all the developed land at Punta Perotti belonging to the applicant company without compensation. Following an appeal against the judgment from the public prosecutor calling for the defendants to be convicted, the Bari Court of Appeal, in a judgment of 5 June 2000 overturned the decision of the court below, acquitting the defendants and revoking the confiscation measure. In a judgment of 29 January 2001, the Court of Cassation quashed the Court of Appeal's decision without remitting it, acknowledged the material illegality of the site development plans and permission, acquitted the defendant and ordered the confiscation of all buildings on land. On 3 May 2001, G applied to the Court of Appeal of Bari to return its land, but the Court upheld its claim. The Court of Cassation then quashed the Court of Appeal decision in April 2009, remitting the case to the Bari District Court. In October 2012, the Bari

municipal authority asked the Bari District Court to return the confiscated land, which the company recovered in December 2013.

The company RITA Sarda Srl owned land it wished to develop and in March 1991 received approval from the Sardinia Region to build a minimum of 150 metres from the sea, receiving subsequent approval by the municipality of Golfo Aranci on 17 December 1991. On 22 June 1992, a regional law removed the possibility of derogating from the prohibition of building a minimum of 2 kilometres from the sea for dwelling, a category extending to the hotel-type building the applicants wished to build. In October 1997, RITA Sarda Srl sold part of its land and 16 built units to Hotel Promotions Bureau Srl, thereby assigning construction rights. Suspected of a number of offences including unlawful site development, the public prosecutor of Olbia opened a criminal investigation in respect of the legal representatives of the applicant companies, resulting in a court order restraining disposal of land and buildings. In March 2002, the land and buildings were returned to the rightful owners by the Sassari District Court. In March 2003, the Olbia District Court acquitted the defendants of all offences, with the exception of unlawful site development which was declared statute-barred, taking the view that the municipality of Golfo Aranci should not have issued the building permits. The Court ordered the confiscation of the property, with the Court of Appeal upholding the dismissal of the statute-barred offence and confirming the confiscation order. A further appeal by the defendants was made on points of law but dismissed by the Court of Cassation.

The company Falgest Srl and Mr Gironda co-owned land at Testa di Cane and Fiumarella di Pellaro, with the land use plan providing for the possibility of building hotel-type buildings. A building permit was issued by the municipality of Reggio di Calabria in September 1997. In 2002 the public prosecutor opened an investigation in respect of Mr Gironda and five others on suspicion of multiple offences including unlawful site development, for which the District Court acquitted all defendants on all charges except unlawful site development, which it declared statute-barred, thereby ordering the confiscation of the land and buildings. In April 2009, the Court of Appeal revoked the confiscation and returned it to the owners. The Court of Cassation quashed the judgment of the Court of Appeal without remitting it, finding that the charge of unlawful site development was substantiated by the change in purpose of the constructions.

The applicants complained before the European Court of Human Rights (the Court) that they had been denied access to a court and therefore a violation of art.6(1), punishment without law and therefore a violation of art.7, no effective remedy and therefore a violation of art.13, and on account of confiscated property a violation of art1. Protocol No.1. Mr Gironda argued that his right to be presumed innocent had been breached under art.6(2).

Held

- (1) The Court decided to join the applications (unanimous).
In view of similar events and legislative contexts giving rise to the applications, and in the interest of the proper administration of justice, the Court declared that it was appropriate to join the applications.
- (2) The Court declared the applications admissible as to the complaints under art.6(1) and (2) and art.13 of the Convention, and art.1 of Protocol No.1 of the Convention (unanimous).
- (3) The Court declared, by a majority, the applications admissible to the complaint under art.7 of the Convention.
- (4) There had been a violation of art.7 of the Convention in respect to all the applicant companies (15 votes to two).
The Court found, having regard for the principle that a person cannot be punished for an act engaging the criminal liability of another, that the confiscation measures applied to individuals or legal entities not parties to the proceedings, in this case the applicant companies, are incompatible with art.7 of the Convention.

- (5) There had been no violation of art.7 in respect to Mr Gironda (10 votes to seven).
- (6) The Court found that the domestic court's findings that all elements of unlawful site development were met in the proceedings against him can be regarded, in substance, as a declaration of liability meeting the requirement of art.7.
- (7) That there had been a violation of art.1 of Protocol No.1 to the convention in respect of all applicants (unanimous).
The Court found that the confiscation of the applicant's land and buildings had constituted an interference with their right to the peaceful enjoyment of their property as protected by art.1 of Protocol No.1. The Court noted that the automatic application of confiscation in cases of unlawful site development as provided by Italian legislation does not provide for which instrument is most appropriate for specific circumstances and imbalanced application with respect to the legitimate aim of the law and those affected. Therefore, the Court views the confiscation as disproportionate in nature.
- (8) There was no need to decide whether there had been a violation of art.6 (1) of the Convention in respect to the company GIEM Srl, or of art.13 in respect of the companies GIEM Srl and Falgest Srl (15 votes to two).
While the Court found the complaints not manifestly ill-founded within the meaning of art.35(3)(a), it took the view that it was not necessary to examine the complaints because they are covered by the complaints already examined under art.7 and art.1 of Protocol No.1.
- (9) There had been a violation of art.6 (2) of the Convention with respect to Mr Gironda (16 votes to one).
- (10) The Court acknowledged that the applicant, Mr Gironda, was acquitted on appeal and the confiscation measure revoked following recognition that the site-development plan was found compatible with relevant regulations. The Court found that the applicant's presumption of innocence was breached because the acquittal was quashed by the Court of Cassation, without being remitted, finding that the liability of the applicant has been proven and declared guilty, in substance, notwithstanding that the prosecution of the offence was statute-barred.
- (11) The question of the application of art.41 is not ready for decision (unanimous).
The Court decided to reserve the said question in whole; to invite the government and the applicants to submit, within three months from the date of notification of the judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach; and to reserve the further procedure and delegates to the President of the Court the power to fix the same if need be.

Cases considered

- A. Menarini Diagnostics Srl v Italy* (App. No.43509/08), judgment of 27 September 2011
Agrotexim v Greece (1996) 21 E.H.R.R. 250
Berland v France (App. No.42875/10), judgment of 3 September 2015
Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland [GC] (2005) 42 E.H.R.R. 1
Bowler International Unit v France (App. No.1946/06), judgment of 23 July 2009
Brossel-Triboulet v France [GC] (App. No.34078/02), judgment of 29 March 2010
Čanády v Slovakia (App. No.53371/99), judgment of 16 November 2004
Del Río Prada v Spain [GC] (2014) 58 E.H.R.R. 37
Depalle v France [GC] (2012) 54 E.H.R.R. 17
Ezeh and Connors v United Kingdom (2002) 35 E.H.R.R. 28
Grande Stevens v Italy (App. No.18640/10), judgment of 4 March 2014
Hammerton v United Kingdom (2016) 63 E.H.R.R. 23

- Iatridis v Greece* [GC] (2000) 30 E.H.R.R. 97
Klouvi v France (App. No.30754/03) judgment of 30 June 2011
Maggio v Italy (2015) 61 E.H.R.R. 42
Mamidakis v Greece (App. No.35533/04), judgment of 11 January 2007
Paksas v Lithuania [GC] (App. No.34932/04), (2014) 59 E.H.R.R. 30
Société Oxygène Plus v France (dec.) (App. No.76959/11), judgment of 17 May 2016
Sud Fondi Srl v Italy (App. No.75909/01), judgment of 20 January 2009
Valico Srl v Italy (dec.) (App. No.70074/01), judgment of 21 March 2006
Varvara v Italy (App. No.17475/09), judgment of 29 October 2013
Yildirim v Italy (dec.) (App. No.38602/02), judgment of 18 December 2012

Commentary

GIEM Srl v Italy is a landmark decision of the Court, although the dissenting judges felt strongly about the lack of clarity in terms of the interpretation of art.7. Given that at the heart of the case was the way the Italian Constitutional Court interpreted the Convention, the separate opinions are also of great interest as they focused on the relationship between the Court and the domestic courts.

In her concurring opinion, Judge Motoc clarified that she agreed with the majority, but for reasons related to the coherence of the judicial dialogue between the Court and the Italian domestic courts. The judge emphasised the need to promote judicial dialogue between the Court and domestic courts particularly in an evolving area of law. She discussed the challenges domestic courts face in aligning their jurisprudence with the Court when the relevant international law keeps changing and commended the case for confirming the principles established in the *Varvara v Italy* case and for clarifying the less clear aspects of that case. In his lengthy opinion, Judge Pinto de Albuquerque also emphasised the importance of judicial dialogue and of the role of the Court “as the first interpreter” of the universality of human rights. His opinion was a strong reminder for domestic courts that all the judgments of the Court have the same legal value and that their binding nature and interpretative authority cannot depend on the formation by which they were rendered. In their partly dissenting, partly concurring opinion Judges Spano and Lemmens criticised the majority for missing an opportunity to correct their own case-law, for failing to engage with the Italian courts and for trying to force upon the domestic authorities an interpretation of domestic law that ignored its essential features. The judges agreed with the majority that the Italian legislation on the matter was problematic and therefore there had been a violation of art.1 of Protocol No.1. However, they concluded that the Italian system of confiscation in the area of site development is not a “penalty” within the meaning of art.7 and therefore does not fall within the application of the provision. Judges Sajó, Karakaş, Pinto de Albuquerque, Keller, Vehabović, Küris and Grozev expressed a joint partly dissenting opinion in which they expressed concern about the way the Court applied its *Varvara v Italy* principles. The opinion focused on the fact that the majority found no violation of art.7 in respect of Mr Gironda, while they concluded that there had been a violation of art.6. In *Varvara*, just as in the present case, a confiscation was imposed despite the fact that the criminal offence had been time-barred and there had been no verdict to establish his criminal liability. The lack of a formal verdict led the Court to conclude at the time that the confiscation was incompatible with art.7. In this case, however, the majority argued that a declaration of guilt was enough to meet the art.7 conditions. It is for this reason that the dissenting judges criticised the majority arguing that while the Court is not strictly speaking bound to follow its previous rulings, for the sake of legal certainty and foreseeability, they should at least give the reasons why they departed from previous case-law and explain whether this approach will form a new general rule or an exception to the *Varvara* ruling.

Anthony Morelli

Expulsion of aliens on national security grounds

Expulsion—aliens—lawful residence—national security—procedural guarantees—art.1 of Protocol No.7

☞ Expulsion; Foreign nationals; Macedonia; National security; Right to fair trial

Ljatifi v Macedonia (Application No.19017/16)

European Court of Human Rights (First Section): Judgment of 17 May 2018

Facts

Aged eight in 1999, the applicant Ms Ljatifi of Serbian nationality fled Kosovo with her family and settled in the former Yugoslav Republic of Macedonia where she has been living since. In 2005 she was granted asylum and residency. The applicant and a Macedonian national entered into a common-law partnership and they have three minor children who are all of Macedonian nationality. Until 3 February 2014 the applicant's residence permit was extended each year until the Ministry of Interior stopped her asylum due to her posing a "risk to [national] security". The applicant was legally represented at interview where she confirmed her family situation and intention to marry her partner. However, the threat she was considered posing to national security was not discussed at this interview. The state's decision required her to leave the country "within twenty days of receipt of the final decision" and the applicant appealed the decision as arbitrary. She argued that there was no evidence that her presence in the country posed a threat to national security, nor was the applicant given the opportunity to address any evidence. On 3 July 2014, the Administrative Court dismissed the applicant's appeal, upholding the Ministry's decision as they had obtained a classified written note from the Security and Counter Intelligence Agency regarding the applicant representing a threat to national security. There were no further details provided about this document and it ruled that lawful proceedings had been adhered to. The applicant's lawyer appealed the decision before the Higher Administrative Court, echoing previous arguments made. In addition, it was expressed that the wording used by the Administrative Court suggested that there were existing documents which the decision was based on, yet the applicant had been given no opportunity to comment on such evidence. On 6 October 2015, the applicant was served the decision that upheld the Ministry's decision "on the basis of ... classified information obtained from a relevant body [which] proves indisputably that her presence ... represents a threat to [the state's] security". This classified information was later revealed to relate to the applicant's crimes of theft and concealment, as well as living in a common-law partnership in order to obtain monetary allowance she was entitled to as a resident with granted asylum status.

The applicant complained before the European Court of Human Rights (the Court) that there had been a violation of her right to a fair trial under art.6 because there had been no evidence that she represented a threat to national security; she had not been given any opportunity to have knowledge of or comment on the evidence; and the authorities had given no reason of their decision.

Held

- (1) The Court declared the application to be admissible and decided to examine the applicant's complaint under art.1 of Protocol No.7 that protects an alien lawfully residing in the territory of a state to be able to challenge their expulsion (unanimous).
- (2) There had been a violation of art.1 of Protocol No.7 (six votes to one).

The Court found that the applicant was not offered the minimal procedural safeguards guaranteed by the provision. The domestic courts also failed to provide a reason for their decision. The Court noted that the Ministry's order for expulsion stated no more reason than the applicant being a risk to national security. Such a general statement with no details of factual evidence leading to this decision do not sufficiently deliver administrative and procedural justice to the applicant.

- (3) The Court decided not to examine the complaint under art.13 as the applicant accused the administrative courts of not providing effective review of her case (unanimous).
- (4) The respondent government is to pay the applicant €2,400 in respect of non-pecuniary damage as well as €1,600 in respect of costs and expenses within three months of the final judgment (unanimous).

Cases considered

- Belchev v Bulgaria* (App. No.39270/98), judgment of 8 April 2004
- Bolat v Russia* (2008) 46 E.H.R.R. 18
- CG v Bulgaria* (2008) 47 E.H.R.R. 51
- Société Plon v France* (App. No.58148/00), judgment of 18 August 2004
- Hajnal v Serbia* (App. No.36937/06), judgment of 19 June 2012
- Kaya v Romania* (App. No.33970/05), (2010) 50 E.H.R.R. 14
- Lupsa v Romania* (App. No.10337/04), judgment of 8 June 2006
- Nolan v Russia* (2011) 53 E.H.R.R. 29
- Radomilja v Croatia* (App. No.37685/10), judgment of 20 March 2018
- Regner v Czech Republic* (2018) 66 E.H.R.R. 9
- Söderman v Sweden* (App. No.5786/08), judgment 12 November 2013
- Vučković v Serbia* (2014) 59 E.H.R.R. 19

Commentary

This is an interesting case in that the Court “being the master of the characterisation to be given in law to the facts of the case” decided that the applicant’s complaint should be examined under art.1 of Protocol No.7 instead of art.6 as requested by the applicant. Given that art.1 of Protocol No.7 has not been used as much as art.6, it is important to see the clear and straightforward interpretation of the provision and its application to the facts, especially at a time the rights of asylum seekers are being constantly challenged. The two opinions by Judge Eicke and Sicilianos, although adopting different approaches, also shed light on the interpretation of the provision and the Court’s previous case-law.

Judge Eicke focused on a technical point arguing that there should be a distinction between the actions of the competent authorities that constitute an actual and a would-be violation. He referred to the Court’s previous case-law on expulsion and emphasised the fact that Ms Ljatifi’s case does not demonstrate a direct violation of art.1 of Protocol No.7, but rather the potential for a violation to occur. Judge Eicke argued that in previous decisions where a violation was found, the Court had to deal with the forceful removal of applicants from the territory of a country or the prevention of re-entering a country where the applicants had previously lawfully resided. In contrast, Ms Ljatifi was not removed from the country but was served with a decision ending her right to asylum in Macedonia and that she “should voluntarily leave” on national security grounds. Furthermore, she was given permission to re-enter the country “one month after the expiry of the time-limit for returning”. As a result, Judge Eicke argued that there was no definitive departure of the applicant and she was granted re-entry to remain with her family despite national

security concerns. This should lead to the conclusion that there “would have been a violation ... if the applicant had been expelled on the basis of the decision of 3 February 2014”.

On the other hand, the concurring opinion of Judge Siciliano placed significant emphasis on the preventative character of the procedural guarantees of art.1 of Protocol No.7. The effectiveness of the article rests on the ability to exercise the principle before an expulsion of an alien occurs in order to ensure accessible and foreseeable legal grounds and to allow the individual concerned to submit reasons against their expulsion and have their case reviewed. To wait until the expulsion has occurred renders the right as inefficient. The judge compared Ljatifi’s circumstances to the recent case of *Regner v Czech Republic*, in which a Czech national was found to have no right of reviewing documents containing classified information when he was dismissed from the Ministry of Defence for representing a threat to national security. The judge highlighted the difference between the two cases in which a national was dismissed and an alien faced expulsion and argued that while access to classified intelligence is not a right in itself, an alien should have the right to challenge and defend their case.

Kaj Hadad

Police entrapment and undercover work

Victim of police entrapment—police undercover work—police collaborators—witness—right to a fair trial—art.6

☞ Bribery; Entrapment; Georgia; Police powers and duties; Right to examine witnesses; Right to fair trial

Tchokhonelidze v Georgia (Application No.31536/07)

European Court of Human Rights (Fifth Section): Judgment of 28 June 2018

Facts

The applicant was a Georgian national who was deputy to the Governor of the Marneuli Region responsible for managing state-owned land and developing infrastructure. The applicant was assigned to examine an application for a permit to build a petrol station which was made by an individual, Ms K. The official reports show that the applicant asked Ms K for a bribe of US\$30,000, of which US\$20,000 would go to the Governor, and the remaining US\$10,000 would be split between the applicant and representatives of other agencies involved. Ms K supposedly reported this to the Department of Constitution Security of the Ministry of Internal Affairs (the “DCS”), which then opened a criminal investigation into the applicant.

The DCS set up Ms K to pay the applicant a US\$10,000 down payment, and when the payment was made, the DCS entered the room and arrested the applicant. He was charged with the crime of requesting a large bribe. At trial, the applicant did not contest the evidence that he took the money but claimed that he had been entrapped by the DCS. He claimed he had not asked for the money as a bribe but as an advance payment to a construction company to expedite the construction of the petrol station. Ms K gave evidence, conflicting with the official report, saying that this was the case, but that she was not sure if the applicant had intended to keep the money and suspected that he might. She was then herself charged with giving conflicting witness statements.

Ms K was established in court to have been an undercover agent for the DCS prior to the first meeting with the applicant, seeking to expose criminal activity by the Governor. It also appeared that Ms N, who the land had been purchased from (with the sale expedited by the applicant), was also in collaboration with the DCS. The applicant tried to summon Ms N as a witness to support his claim of entrapment, but her whereabouts was unknown, so the court ruled that it was objectively impossible to summon her as a witness.

The trial court found the applicant guilty, stating that the available evidence did not support his claim that the money was taken as an advance payment for construction. They did not address the argument that the applicant had been entrapped by Ms K on behalf of the DCS. The applicant appealed upon this point, seeking again to call Ms N as a witness. Despite some evidence of her whereabouts coming to light, she did not appear before the appellate court, submitting a written statement stating that she could not do so due to her family situation. The appellate court upheld the conviction, reiterating the lack of support for the argument that the money was an advance payment, and again neglecting to examine the claim for entrapment. Further appeal to the Supreme Court by the applicant was rejected, but the applicant was granted a presidential pardon after serving two of his seven years sentence. The applicant complained before the European Court of Human Rights (the Court) that his conviction had been unfair because it had been based on evidence obtained through police entrapment (art.6(1)) and also that his right to obtain attendance and examination of witnesses had been violated because the courts failed to question the second undercover officer.

Held

- (1) The Court declared the complaints under art.6(1) right to fair hearing and art.6(3)(d) right to examine witnesses admissible (unanimous).
- (2) The Court held that there had been a violation of art.6(1) right to fair hearing (unanimous). The Court accepted that it should use the facts as found by the domestic courts, therefore worked from the basis that the applicant did ask for the money as a bribe from Ms K. The point left unexamined therefore was whether the applicant was the victim of an entrapment by the police, and the question of an art.6(1) violation turned on whether the domestic courts failed to address it. The Court noted that its jurisprudence had previously held that entrapment is not justifiable in the public interest, whereas undercover police work is justifiable as long as there are sufficient safeguards in place.
The Court's test to distinguish between entrapment and undercover police work consists of examining the substance first, and then if there is insufficient information available to conclude whether there were sufficient procedural safeguards to prevent entrapment from happening. The Court felt unable to conclude whether the DCS had confined itself to "investigating criminal activity in an essentially passive manner". It felt the investigation was tainted by the fact that Ms K was not an ordinary private citizen, as it was on record that she had been a frequent collaborator with the DCS; on the other hand, they also noted that the applicant was the one who proposed the financial pay-off, whether they accepted or not that it was for his personal benefit. It was therefore unclear whether Ms K had taken an active and decisive role in the commission of the offence.
On the procedural point, the Court looked for evidence of authorisation or supervision, ideally by a judge, of the DCS's operation which could ensure it was justified and accountable. They found no such supervision and felt that this was made more serious by the failure of any judicial review when the issue of entrapment was raised by the applicant in his trial. The Court held that the inadequate framework for supervising and reviewing the

- use of an undercover agent, particularly following the applicant raising the well-substantiated allegations of entrapment at trial, violated his art.6(1) right to fair trial.
- (3) The Court held that there was no need to examine the complaint under art.6(3)(d) (unanimous). The Court acknowledged the applicant's submission that his art.6(3)(d) right to examine witnesses against him was also implicated by not having opportunity to examine Ms N in this case. They felt that this was amply covered by the finding of violation of art.6(1), however, and did not consider it necessary to consider this separately.
- (4) The Court held that the respondent state is to pay the applicant €2,500 in respect of non-pecuniary damage (unanimous).
- (5) The Court dismissed the remainder of the applicant's claim for just satisfaction (unanimous).

Cases considered

- Bannikova v Russia* (App. No.18757/06), judgment of 4 November 2010
- Eurofinacom v France* (App. No.58753/00), judgment of 17 September 2004
- Furcht v Germany* (2015) 61 E.H.R.R. 25
- Ildani v Georgia* (App. No.65391/09), judgment of 23 April 2013
- Khudobin v Russia* (2009) 48 E.H.R.R. 22
- Lüdi v Switzerland* (1993) 15 E.H.R.R. 173
- Matanović v Croatia* (App. No.2742/12), judgment of 4 April 2017
- Milinienė v Lithuania* (App. No.74355/01), judgment of 24 June 2008
- Nosko and Nefedov v Russia* (App. Nos 5753/09 and 11789/10), judgment of 30 October 2014
- Ramanauskas v Lithuania* (App. No.74420/01), (2010) 51 E.H.R.R. 11
- Sandu v Republic of Moldova* (App. No.16463/08), judgment of 11 February 2014
- Sepil v Turkey* (App. No.17711/07), judgment of 12 November 2013
- Shannon v United Kingdom* (2006) 42 E.H.R.R. 660
- Teixeira de Castro v Portugal* (1998) 28 E.H.R.R. 101
- Veselov v Russia* (App. Nos 23200/10, 24009/07 and 556/10), judgment of 2 October 2012

Commentary

While relatively uncontroversial, this case does represent some development of the Court's jurisprudence on the human rights implications of entrapment. It is significant in that it aims to analyse the factual situation which constitutes entrapment, while maintaining the principle of subsidiarity, and not acting as a "court of fourth instance". In this sense, the Court analysed the police procedure, and safeguards taken in conducting an undercover operation, to find a violation of the applicant's art.6(1) right to fair trial. The Court was careful to note its position as a supervisory body and stated that it would not re-evaluate the domestic courts' finding of fact in this case.

In dealing with the substantive aspect of the test for entrapment, the judgment opted not to draw a conclusion on whether the applicant was, in fact, a victim of entrapment, but it is noteworthy that the Court's treatment of the facts does appear to show some sympathy to the applicant's claim that the factual findings of the domestic courts were inaccurate. They refer to the domestic courts' finding frequently as the "official version of events" and compare this in their analysis of the substance of the investigation with the applicant's version. This could be interpreted as some evaluation of the facts, contrary to the statement made in the judgment.

The Court opted to make its finding based instead on the procedural aspect of the test for entrapment, analysing legislative safeguards and judicial supervision of the police investigation, and relying on this

as the reasoning for its finding of a violation. This is another incident in the Court's case-law (similar to some art.2 cases) where it opts to use analysis of procedural safeguards to create a quasi-presumption in favour of the claimant, to overcome an inability to draw safe conclusions based on the substance of the allegation.

Christopher Gray

Freedom of expression in the political sphere

Political opinion—defamation—insult via the press—interference by a public authority—necessary in a democratic society—“chilling effect”—criminal sanctions—freedom of expression—art.10

↳ Convictions; Defamation; Freedom of expression; Greece; Interference; Necessary in democratic society; Proportionality

Paraskevopoulos v Greece (Application No.64184/11)

European Court of Human Rights (First Section): Judgment of 28 June 2018

Facts

In December 2007, the applicant, Mr Panagiotis Paraskevopoulos, published an article in a local newspaper (*Chortiatis 570*) titled “The ludicrousness of power”. In the article, he made a series of statements that although did not mention any people directly, contained sufficient information from which to deduce that the person the article was written about was the head of the local council, EP.

EP filed a criminal complaint against the applicant alleging that the applicant had committed slanderous defamation via the press. In response, the applicant argued that what he had written was correct and therefore not unlawful. He further argued that he had written his article with a legitimate interest in the case given his position as a constituent of EP. The case was heard in the Court of First Instance of Thessaloniki on 24 September 2008 at which time the applicant was found guilty and sentenced to a six-month suspended sentence.

The applicant appealed the decision and on 28 May 2009 the Court of Appeal altered the charges from slanderous defamation to insult via the press and accordingly found the applicant guilty and sentenced him to a four-month suspended sentence.

The applicant appealed this decision to the Court of Cassation arguing that the Court of Appeal provided insufficient reasoning for rejecting the arguments he had advanced. On 5 May 2010 the Court of Cassation quashed the sentence against which the applicant had appealed and returned the case to the Court of Appeal in order to be retried.

On 13 July 2010 the Court of Appeal reheard the case and again rejected the applicant's argument that he had not committed a crime under art.367 of the Greek Criminal Code and sentenced him to a two-month suspended sentence for insult via the press.

The applicant once more appealed to the Court of Cassation which, on 23 February 2011, dismissed his appeal finding that this time the Court of Appeal had provided sufficient reasoning and that the Court of Appeal had acted correctly in dismissing the applicant's arguments as he had “intended to insult EP” and had used expressions which were not necessary for defending a legitimate interest.

The applicant subsequently lodged an application with the European Court of Human Rights (the Court) on 23 September 2011 alleging his art.10 right had been violated.

Held

- (1) There had been a violation of art.10 (unanimous).

The Court found that the actions by the Government amounted to an “interference by a public authority” and were therefore a *prima facie* breach of art.10. As such, it was required to examine whether the arguments advanced by the Government fell within the exceptions found in art.10(2). The cumulative test for whether the exceptions have been satisfied is as follows: the infringement must be prescribed by law, pursue one or more of the legitimate aims set out in para.2 and it must be necessary, in a democratic society, to infringe the applicant’s rights in the way that they were infringed in order to achieve those aims.

The Court found that the infringement was prescribed by provisions of the Greek Criminal Code and that it pursued the legitimate aim of “protecting the reputation or rights of others” as set out in para.2.

The primary point of discussion was whether the infringement was necessary in a democratic society. The Court began by reaffirming its assertion that art.10 protects not only information and ideas that are received favourably but also information and ideas which shock, offend or disturb, as such a level of pluralism is necessary for a democratic society to function.

In order to determine whether the interference was necessary in a democratic society the Court was required to ascertain whether it was in response to a “pressing social need”, a matter in which, it was opined, states are afforded a certain margin of appreciation. The Court was careful to point out that its function was not to assume the position of the domestic courts but rather to exercise a supervisory function and ascertain whether the interference was relevant, sufficient and proportionate to the aims pursued. In doing so, the Court found it important to differentiate between “statements of facts” and value judgments as the existence of the former is demonstrable whilst determining the truth of the latter is impossible. Also, the Court held that even though the protection afforded to value judgments under art.10 is wide, the judgment must be based upon a sufficient factual basis. The Court further reasoned that when exercising its supervisory function, the statements in question must be viewed in their full context as opposed to an abstract manner.

Finally, the Court reasoned that in deciding whether an interference is necessary in a democratic society in order to protect the reputation or rights of others, it was required to determine whether the domestic authorities had struck a fair balance between two competing rights both guaranteed by the Convention. In the present case, these were deemed to be art.10 (right to freedom of expression) and art.8 (right to private life). The Court held that in order for art.8 to be triggered, the attack on a person’s reputation must attain a certain level of seriousness and be carried out in way which prejudices the personal enjoyment of their art.8 right. In deciding whether these two competing rights have been balanced correctly, the Court stated that the following criteria ought to be considered: (a) whether the remarks were a contribution to a debate of general interest; (b) how well known the person concerned is and what the subject of the publication was; (c) prior conduct of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form and consequences of the publication; and (f) severity of the sanction imposed.

In applying these principles to the present case and given that the accusation made by the applicant concerned the public activities of EP, the Court found that they were clearly a matter of legitimate concern about which the applicant was entitled to hold a view. In

determining this fact, the Court placed a measure of importance on the position EP held as an elected official opining that she is therefore expected to display a greater level of tolerance given the scrutiny which her role entails. The Court also took issue with the way in which the domestic courts did not view the statements in question in their full context but rather they were detached from their context and meaning. In this regard, the Court conceded that the applicants remarks could have been seen as provocative, but it found no evidence to suggest that they were insulting and in doing so, opined that writers are entitled to a degree of sarcasm and exaggeration which need not be subject to proof.

Finally, the Court found that, although the use of criminal sanctions in defamation cases is not automatically disproportionate, they are only considered proportionate in exceptional circumstances, such as hate speech or incitement to violence. In the present case, it found that, given this was a debate of public interest, criminal sanctions were not justified and that, although the sentence was suspended this was not sufficient to negate the disproportionate nature of the sanctions given the “chilling” effect imposing criminal sanctions could have on public discussion.

- (2) The respondent state is to pay the applicant €7,000 in respect of non-pecuniary damage and €5,655 in respect of costs and expenses (unanimous).
- (3) The remainder of the application for just satisfaction was dismissed (unanimous).

Cases considered

- A v Norway* (App. No.28070/06), judgment of 9 April 2009
- Axel Springer AG v Germany* (2012) 55 E.H.R.R. 6
- Bédat v Switzerland* (App. No.56925/08), (2016) 63 E.H.R.R. 15
- Falzon v Malta* (App. No.45791/13), judgment of 20 March 2018
- Instytut Ekonomicznykh Reform, TOV v Ukraine* (App. No.61561/08), judgment of 2 June 2018
- Lindon v France* (2007) 46 E.H.R.R. 35
- Marchenko v Ukraine* (App. No.4063/04), (2010) 51 E.H.R.R. 36
- Mengi v Turkey* (2016) 63 E.H.R.R. 5
- MGN Ltd v United Kingdom* (2011) 53 E.H.R.R. 5
- Pedersen and Baadsgaard v Denmark* (App. No.49017/99), judgment of 19 June 2003
- Perna v Italy* 6 May 2003 (App. No.48898/99), (2006) 42 E.H.R.R. 24
- Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2017) 66 E.H.R.R. 8
- Sokolowski v Poland* (App. No.75955/01), judgment of 29 March 2005
- Tuşalp v Turkey* (App. No.32131/08), judgment of 21 February 2012

Commentary

The present decision is undoubtedly a welcome one owing to the way in which the Court explained, in great detail, the way in which art.10 ought to be considered and approached by domestic courts. In particular, the observation that writers and journalists are able to use a certain degree of sarcasm or exaggeration in their work is welcome given the current political climate in which journalists, and their work, are under increasing scrutiny. In the same vein, the way in which the Court explained that, owing to the elected position of EP she should expect a greater degree of criticism, especially of her official functions, is well-timed given the accusations of “fake news” which appear to regularly permeate political discourse. Finally, the affirmation by the Court that criminal sanctions are a disproportionate way in which to pursue

a legitimate aim, owing to the chilling effect they may have, is welcome as will surely contribute to facilitating political discourse between constituents and their elected representatives.

Jordan Owen

Investigative journalism and classified documents

Investigative journalism—armed forces—reception of classified information—information in the public domain—public interest—criminal sanctions—“chilling effect”—freedom of the press—freedom of expression—art.10

☞ Armed forces; Classified information; Freedom of expression; Interference; Journalists; Necessary in democratic society; Publication; Romania

Gîrleanu v Romania (Application No.50376/09)

European Court of Human Rights (Fourth Section): Judgment of 26 June 2018

Facts

The case concerned a Romanian investigative journalist working for the national daily newspaper *România liberă* and the leaking of secret military information from 2003 and 2004. These leaks and their source were discussed in articles within the national daily newspapers, *România liberă* and *Ziua*. Following the publication of these articles, the prosecutor's office attached to the High Court of Cassation and Justice opened an investigation based on the articles. As a result, the prosecutor decided to initiate criminal proceedings against the applicant and four others (PI—a former member of the armed forces, OS—a journalist, EG and IM) for disclosing classified information on national security. During the course of their investigations, phone calls involving the applicant were intercepted, his house was searched, his computer hard-drive was taken, and the applicant was taken into police custody. The result was the prosecutor discerning that the applicant had received a CD with the leaked military documents from OS on 2 July 2005, that the two had discussed the documents with other journalists and employees of the Romanian Armed Forces and Intelligence Service and that the applicant had subsequently provided copies of the CD to EG and IM. On 15 August 2007, the prosecutor decided that the applicant, as a result of the above conduct, had committed the crime of gathering and sharing secret or confidential information and had acted with the intent to disclose classified information outside the associated legal framework. The prosecutor did, however, decide not to indict the applicant and instead issued a fine and ordered the applicant to pay part of the judicial costs. In doing so, the prosecutor noted the information was not likely to endanger national security and was not likely to endanger military personnel as it had been originally compromised in the summer of 2004. On 6 November 2007, the applicant complained against that decision to the superior prosecutor, who rejected the complaint as ill-founded. Subsequently, on 3 December 2007, the applicant complained against the prosecutors' decisions before the Bucharest Court of Appeal. With the applicant arguing that the laws in question only imposed obligations on those who work with secret information and that, in line with art.10 of the European Convention on Human Rights, it was difficult to justify the imposition of sanctions for the publication of such material after they had entered the public domain. On 5 February 2008, the Bucharest Court of Appeal rejected the applicant's complaint as ill-founded. The applicant appealed the decision before the High Court of Cassation and Justice, also

submitting that that the prosecutor's decision had breached his freedom of expression in an attempt to cover up an embarrassing situation for the authorities. The Court rejected the applicant's complaint with final effect on 23 March 2009, with the Court noting that the law applied to anyone who shared secret information outside the legal framework and that the applicant had done so with direct intent. The Court agreed that the crime had not required criminal sanctions and ordered the applicant to pay court fees.

The applicant subsequently complained before the European Court of Human Rights (the Court) citing an infringement of his right to freedom of expression under art.10 of the Convention.

Held

- (1) The application was considered admissible (unanimous).

Considering the admissibility of the case, the Court joined the issue of admissibility to the merits as the state's objection was "closely linked to the merits of the application". In doing so, the Court confirmed that the application was not manifestly ill-founded under art.35. The Court noted that art.10 has established the importance of gathering information for journalism and has highlighted instances in which journalists have conducted preparatory research and disclosed confidential information or information concerning national security.

- (2) There had been a violation of art.10 (unanimous).

The Court subsequently determined that art.10 was applicable in the case and the actions of the state had constituted an interference with the applicant's right to freedom of expression. As a result, the Court noted that in order to justify such an interference it must be shown that the interference was "prescribed by law", pursued one or more of the legitimate aims mentioned art.10(2) and was "necessary in a democratic society". The Court noted that the domestic legal framework had provided that "no one has the right to make public secret activities regarding national security" and that the domestic courts had decided this applied to everyone. As a result, the Court accepted that the interference was "prescribed by law" within the meaning of art.10(2). The Court also accepted the state's position that the interference pursued the legitimate aim of protecting national security; consequently the Court's analysis focused on whether the interference was "necessary in a democratic society". The Court noted that the question of whether an interference with the freedom of expression is "necessary in a democratic society" is well-established in the Court's case-law. It accepted that there is little scope under the Convention to restrict freedom of expression in two areas, namely political speech and matters of public interest. However, protection afforded to journalists under art.10 is dependent on them acting in good faith to provide accurate and reliable information "in accordance with the tenets of responsible journalism". Whether a journalist's conduct was lawful is also considered a relevant, but not decisive, consideration for deciding whether the journalist had acted responsibly. In order to examine whether the state's conduct was "necessary in a democratic society", the Court would examine the following aspects: the interests at stake, the conduct of the applicant, the review of the measure by the domestic courts and whether the penalty imposed was proportionate. In examining the interests at stake, the Court noted that the documents the applicant had obtained and the fact they had been leaked by the military were likely to "raise questions of public interest". From the state's perspective, the Court was concerned with whether the actions of the applicant were capable of causing "considerable damage" to national security. Having regard for the facts of the case, the Court noted that the information in question was accepted by the domestic courts as outdated, not likely to endanger national security and had been de-classified after the investigation began. Thus, the state had been unable to show that the

applicant disclosing the information to EG and IM was liable to cause considerable damage to national security.

In analysing the applicant's conduct, the Court noted that in comparison to other cases the applicant was not a member of the armed forces with incumbent duties and responsibilities. It was noted that the applicant did not obtain the information illegally and that his first course of action was to discuss the leak with the concerned armed forces, equally the result of the applicant's investigation was the discussion of the subject within the media, Romanian Senate and an internal inquiry within the Ministry of Defence. Regarding the measures taken by the domestic courts, the Court recognised that "the fairness of proceedings may need to be taken into account" when examining cases concerning an interference with the exercise of art.10. The Court's assessment of the state's actions noted that they failed to take into account the above-mentioned conduct of the applicant in dealing with the information, that the information in question was not likely to endanger national security and had failed to consider the public interest in being informed of the information leak. Although recognising that the fines imposed by the state were relatively low, the Court noted that the purpose of the sanctions was to prevent the applicant publishing and sharing the documents and that they should have "more thoroughly weighed" the decision to impose sanctions after the de-classification of the documents. As a result of this analysis, the Court found that the measures taken against the applicant were not reasonably proportionate to the legitimate aim pursued.

Cases considered

- Bédat v Switzerland* [GC] (2016) 63 E.H.R.R. 15
- Bucur and Toma v Romania* (App. No.40238/02), judgment of 8 January 2013
- Cobzaru v Romania* (App. No.48254/99), (2008) 47 E.H.R.R. 10
- Dammann v Switzerland* (App. No.77551/01), judgment of 25 April 2006
- Fressoz and Roire v France* (App. No.29183/95), (2001) 31 E.H.R.R. 2
- Hadjianastassiou v Greece* (App. No.12945/87), judgment of 16 December 1992
- Magyar Helsinki Bizottság v Hungary* (App. No.18030/11), judgment of 8 November 2016
- Nilsen v Norway* [GC] (2000) 30 E.H.R.R. 878
- Pasko v Russia* (App. No.69519/01), judgment of 22 October 2009
- Pentikäinen v Finland* [GC] (2017) 65 E.H.R.R. 21
- Satakunnan Markkinapörssi Oy v Finland* [GC] (2018) 66 E.H.R.R. 8 (extracts)
- Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* (App. No.34124/06), judgment of 21 June 2012
- Shapovalov v Ukraine* (App. No.45835/05), judgment of 31 July 2012
- Stoll v Switzerland* (App. No.69698/01), (2008) 47 E.H.R.R. 59

Commentary

The case confirmed the importance of the freedom of the press under art.10 when dealing with the leaking of secret, classified or confidential information which is likely to raise questions of public interest. In doing so, the Court also confirmed that journalists and the media do themselves have duties and responsibilities in handling and disseminating such information, with the need to act "in accordance with the tenets of responsible journalism". Within the facts of the case an important consideration was the impact of the applicant receiving and sharing the documents on debate concerning the leak in the media as well as the armed forces and Romanian Senate, with this exemplifying the importance placed on the

freedom enshrined in art.10. The Court's analysis also stressed that, although the media may have certain duties and responsibilities, it is for the state to ensure that no confidential material is disclosed and to take appropriate action once a leak is discovered.

The importance of the judgment is equally seen in affirming the principles protected by art.10. During the case, there were prominent third-party submissions and comments concerning the case and art.10, with these concerning the importance of ensuring the activities of investigative journalists. By confirming that the responsibilities and duties of journalists dealing with such information is distinct from the responsibilities of those working for the state or armed forces, the Court has prevented a feared "chilling effect" of imposing similarly strict obligations on journalists who receive or investigate such sensitive information. Considering the Court had recognised that the sanctions imposed on the applicant were themselves "low", the finding that they were still disproportionate would seem to further preclude any attempt by states to impose sanctions on journalists with the aim of preventing the publishing and sharing of confidential or classified documents whose publication are in the public interest. In this sense, the case can be seen as an important affirmation of the importance of investigative journalism for the preservation of "democratic society".

Richard Costidell

Confidentiality of exchanges between a lawyer and their clients

Protected correspondence—interception of a folded piece of paper—clients under police escort—right to respect for private life—art.8

☞ Confidentiality; France; Interception of communications; Legal professional privilege; Police powers and duties; Right to respect for private and family life

Laurent v France (Application No.28798/13)

European Court of Human Rights (Fifth Section): Judgment of 24 May 2018

Facts

The applicant, M. Cyril Laurent, is a French national residing in Brest (France).

On 1 April 2008, M. Laurent, who is a lawyer, conducted the defence of HB and BD who had both been formally charged and placed at that time under police escort. While waiting in the court's lobby under police escort, HB and BD sat around a table with M. Laurent, still wearing his lawyer's robes. During the conversation, HB and BD asked the applicant for his business card. M. Laurent, who did not have any with him, wrote his contact details for each of them on two separate pieces of paper which he then folded and gave to his clients. The deputy police sergeant in charge of the escort requested first that HB, and then BD, showed him what had been written on the papers. The applicant, M. Laurent, reproached the police sergeant for not respecting the confidentiality of the exchange with his clients.

On 8 April 2008, the applicant lodged a complaint with the Brest public prosecutor, alleging that the secrecy of correspondence had been breached by a person exercising public authority. The prosecutor decided to take no action on the matter but asked nonetheless that a recall of the relevant legal provisions be made to the deputy police sergeant as well as to all police officers in charge of escort.

M. Laurent decided to file a criminal complaint with the investigating judge of the Brest *Tribunal de Grande Instance* (TGI). He claimed that the correspondence between a lawyer and their clients was protected by the Penal Code. The investigating judge issued a discontinuance order. On 28 October 2011, this decision was upheld by the Rennes Court of Appeal. M. Laurent lodged an appeal on points of law which was dismissed by the Cassation Court.

The applicant complained before the European Court of Human Rights that art.8 (right to respect for private life) of the Convention had been breached by France.

Held

- (1) There had been a violation of art.8 (unanimous).

Concerning the existence of an interference, the Court reiterated that art.8 protects the confidentiality of communications, whatever the content or the form of these communications. This protection includes the correspondence of prisoners, be they the senders or recipients. A folded piece of paper on which a lawyer has written a message to his client shall be considered as a correspondence protected by art.8. The interception of this correspondence by a police officer then amounts to an interference with this right. However, this interference does not breach art.8 if it is provided for by the law, with a legitimate aim, and is necessary in a democratic society.

First, the Court noted that neither the TGI or the Cassation Court considered that the scrutiny of the exchanges between a lawyer and his clients were regulated by any of the specific legal provisions which had been invoked before them. The Court could thus have raised the question of whether or not the interference was provided for by law. However, in the present case, the Court did not consider that it was necessary since the breach concerned another ground.

Concerning the legitimate aim of the interference, the Court considered that the police officer's interception had the legitimate objective of preventing criminal offences and defending public order.

Finally, the Court analysed whether the interference was necessary in a democratic society. While the Court recognised that a certain control of the prisoners' correspondence was not contrary to the Convention, the exchanges between a lawyer and his detained client enjoy a privileged status under art.8. Accordingly, prison authorities can only open a letter from a lawyer to a prisoner if they have reasons to believe that it contains something illicit which could not be detected through the normal means of detection. The term "necessary", within the meaning of art.8, requires the existence of a pressing social need, and especially the proportionality between the interference and the legitimate aim pursued. In the present case, there was no reason to justify the interception of the pieces of paper and the police officer did not claim that they raised any particular suspicions. Moreover, the applicant, M. Laurent, did not hide his action from the police escort. The interception was thus not justified. The Court also added that the content of the intercepted paper was not relevant since, whatever their purpose, the correspondence between a lawyer and his client concern private and confidential matters.

In view of the above, the Court concluded that the interception and opening of the correspondence were not necessary in a democratic society and that art.8 had been breached.

- (2) The Court held that the finding of a violation provided in itself sufficient just satisfaction for the nonpecuniary damage sustained by M. Laurent (unanimous).

Cases considered

- Campbell v United Kingdom* (1992) 15 E.H.R.R. 137
Frérot v France (App. No. 70204/01), judgment of 12 June 2007
Michaud v France (App. No. 12323/11), (2014) 59 E.H.R.R. 9
Özen v Turkey (2014) 58 E.H.R.R. 27
Silver v United Kingdom (1983) 5 E.H.R.R. 347
Yefimenco v Russia (App. No. 152/04), judgment of 12 February 2013

Commentary

In the present case, the Court reiterated the principle of *Michaud v France* confirming that art.8 of the Convention protects the confidentiality of communications whatever their content or form. A folded piece of paper on which a lawyer has written a message to his client is therefore protected correspondence within the meaning of art.8. As a result, the interception by a police officer of such correspondence shall constitute an interference. The Court also recalled that the exchanges between a lawyer and their clients enjoyed a privileged status which means that, unless the prison authorities have reasonable cause to believe they contain illicit element that the classic means of detection could not reveal, they shall not be opened. In this respect, the content of the intercepted paper in the present case does not matter since the objective is that the correspondence between a lawyer and is client remain confidential and private. Article 8 is thus an essential tool to safeguard the professional secrecy, in particular between a lawyer and a detained client.

Jennyfer Vervisch

Opinion

Neo-Liberalism and Human Rights

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Democracy; Human rights; Jurisprudence; Liberalism; Social justice

Abstract

“Neo-liberalism” is a powerful but amorphous ideology. There is no such thing as a “neo-liberal” jurisprudence and very little has been written about its legal perspectives. Save for regular polemics against the Human Rights Act, even less has been written about its approach to human rights. The existing literature from F.A. Hayek, Keith Joseph and Jonathan Sumption to Richard Posner, Roger Scruton and Policy Exchange will be considered. We will focus upon neo-liberal hostility to “socio-economic” rights and ambivalence about democracy. The underlying social values will be examined, in order to understand the basis for these positions. We will ask what contribution neo-liberal thinking can make to human rights in the 21st century.

Neo-liberalism

In seeking to understand the relationship of neo-liberalism with the law generally, and with human rights in particular, we need briefly to summarise its basic economic and political beliefs.¹

“Liberalism” has a long and honourable tradition of protecting individual liberty. Perhaps the classic texts are John Locke’s *Two Treatises on Government* of 1689, and J.S. Mill’s *On Liberty* of 1859.² In terms of economic theory, the classical “laissez faire” approach to the “free market” allowed a “spontaneous order” to develop, which could only be harmed by outside interference, no matter how well intentioned. This softened into a “social liberalism” associated with increasing welfare provision by the state in the 20th century. President Roosevelt’s “New Deal” in 1933–1936, and the “deficit financing” advocated by economist J. M. Keynes, epitomised this development.

“Neo-liberalism” began as a “monetarist” reaction to those received views, initiated by “Austrian school” economists, von Mises and F.A. Hayek, and Milton Friedman of the “Chicago school”. After the central economic planning necessary to secure victory in the Second World War, they saw the world in binary terms: a drift through social democracy to Soviet Central Planning, or a revival of a “classical liberal” fundamentalist view of the role of government. This founded the familiar politics of the last forty years in the UK, the USA and more widely: deregulation, tax cuts, and broad challenges to the welfare state and trade unions. Their extreme individualism and hostility to collectivism was the basis for Thatcher’s denial of the existence of “civil society”.

The most prominent neo-liberal tenet is minimising state regulation of the “free market”, which is seen as tending inevitably towards totalitarian planning and thus destroying individual liberty. “Freedom” is

¹ It is impossible to avoid over-simplification of many complex ideas here, in order to sketch historical developments by way of broad background. For those who doubt the existence of any coherent set of ideas merititing this name, see Andrew Glyn, *Capitalism Unleashed: Finance, Globalization, and Welfare*, (Oxford: OUP, 2006); Ostry, Loungani and Furceri, “Neoliberalism: Oversold”, *IMF Research Paper*, June 2016: and Stephen Metcalf, “Neoliberalism: the idea that swallowed the world”, *The Guardian*, 18 August 2017. There is a wealth of wider academic commentary.

² John Locke, *Two Treatises on Government*, (Cambridge: CUP, 1988); J. S. Mill and S. Collini (ed.) *‘On Liberty’ and Other Writings* (Cambridge Texts in the History of Political Thought), (Cambridge: CUP, 1989).

the protean watchword, but, as we shall see, this comes to be curiously defined. This ideology has played a crucial role in globalisation, especially in finance, through its combined hostility to nation-state powers, and to supra-national regulatory bodies (on the basis that they lack democratic legitimacy). Ironically, those other supra-national agencies, the IMF and the World Bank, have been instrumental in widely imposing neo-liberal economic orthodoxy upon national governments.

The central fiction behind the deep penetration of neo-liberal economic theory into our national life is that of the free agent, who makes fully informed and “rational choices” in the marketplace. Everything is a “deal”. Everyone is a “customer”, even school pupils and court users.

As Dr Corinne Blalock explains:

“Under neoliberalism, the measures and values of the market are used to index the success of the state and its citizens. Diverging from the constitutional ideal that state power derives from consent by and representation of the people, the state’s authority is both founded on and progressively limited to its ability to guarantee proper conditions for economic activity and individual prosperity. Correspondingly, the democratic will of the people is cast as irrelevant to economic affairs and as harmful if mobilized to intervene in pursuit of social goals. As Margaret Thatcher declared, in perhaps the most famous articulation of neoliberal ideology, ‘There is no such thing as society’.”³

Though, at the time of his writing, F.A. Hayek may not have acknowledged the term, two of his major works became the received texts for “neo-liberalism”. These are “The Road to Serfdom”,⁴ and “The Constitution of Liberty”.⁵ Margaret Thatcher is reported to have declared “This is what we believe!” in relation to the latter. From 1974 with this inspiration, Keith Joseph, and his Centre for Policy Studies provided the intellectual backbone for Thatcherism. The time came for “neo-liberalism” with the elections of Thatcher and Reagan respectively in 1979 and 1981.

The neo-liberal posture towards state power and the law is more complex than the rhetoric of blanket opposition. As Hayek himself readily accepted, the “free market” could never have been maintained without active state promotion. He described “laissez- faire” and “non-intervention” as “old formulae”.⁶

Neo-liberalism and the law

We will look in vain for a comprehensive articulation or analysis of a “neo-liberal” theory of law and human rights in the modern world.⁷ Professor Moyn has examined the striking parallels between the global rise of the international human rights movement and of neo-liberalism: not least one of timing in the 1970s.⁸ He concludes that the former was the ‘powerless companion’ to this triumph. He attributes this to the narrow focus upon state abuses, and the absence of any effective agenda for ‘socio- economic’ rights, which could curtail the manifest social injustices and inequalities of neo-liberal hegemony. The lens has not yet been reversed, to scrutinise any neo-liberal concept of human rights.

This paucity of exposition and of critical analysis is surprising since neo-liberal based legal arguments can have a dramatic impact. In the 1930s, Roosevelt’s “new deal” of business regulation and social welfare, was besieged by successful Supreme Court challenges as a “threat to liberty” and a “socialist incursion”.

³ Blalock, “Neoliberalism and the crisis of legal theory”, in *Law and Contemporary Problems*, (2014) 77(4) Duke Law, 71.

⁴ F. A. Hayek, *The Road to Serfdom*, (Chicago: Univ. of Chicago Press, 1944) [henceforth “Hayek TRTS”].

⁵ F. A. Hayek, *The Constitution of Liberty* (Chicago: Univ. of Chicago Press, 1960) [henceforth “Hayek TCOL”].

⁶ Hayek, TCOL, p.231. See further Karl Polanyi, *The Great Transformation*, (Boston: Beacon Press, 2001) [1944] and John Gray, “The Neoliberal State”, *New Statesman*, 7 January 2010.

⁷ Closest attention seems to have been paid in 10 essays on “Law and Neoliberalism”, (2014) 77(4) *Law and Contemporary Problems* edited by Professors Grewal and Purdy. A day long colloquium was held at Oxford University, in June, 2013, *Understanding neoliberal legality*, organised by Prof. Honor Brabazon. She has since edited a collection of essays in *Neoliberal legality: understanding the role of law in the neoliberal project* (Abingdon, Routledge, 2017). See also J. Whyte “Human Rights and the Collateral Damage of Neoliberalism”, (2017) 20(1) *Theory and Event*, 137–151, available at <https://muse.jhu.edu/article/32601> [Accessed on 19 November 2018].

⁸ S. Moyn, “A powerless companion: human rights in the age of neo-liberalism” (2014) 77(4) *Law and Contemporary Problems* 147.

The decision in *Citizens United v FEC*⁹ “liberalising” political campaign finance, has changed the face of American democracy. In *NFIB v Sebelius*,¹⁰ they just failed to neuter the Obamacare legislation. The UK House of Lords decision in *Bromley LBC v Greater London Council (GLC)*¹¹ declared illegal the GLC’s subsidised “fares fair” policy, in part as failing to accord sufficient weight to the interests of ratepayers. No doubt, similar challenges could be brought against any future radical economic policies in the UK.

Hayek

The clearest exposition is by F.A. Hayek himself in *The Constitution of Liberty*, Part II: Freedom and the Law.¹² He believed in “equality before the law,” and the “rule of law”¹³; and that the government should be subject to the law: i.e. a “rechtsstraat” rather than the kind of tyranny permitted under “legal positivism”.¹⁴ He confessed himself a believer in “natural law”, “Whether … in divine inspiration or in the inherent powers of human reason, or in principles which are not themselves part of human reason…”.¹⁵ He was an admirer of the US Constitution.¹⁶

Without necessarily recognising them as positive rights, or setting them out systematically, Hayek expressly acknowledges the importance of due process, habeas corpus, a free press, freedom of religion, no retrospective punishments, and recognition of a sphere of private life. No doubt he would also recognise many of the interests protected by other provisions of the ECHR as legitimate.

Not surprisingly for a theorist of the “free market”, he highlights rights of property and the limits to expropriation.¹⁷ From this basis, he recognises a right closely akin to art.8 of the ECHR:

“The recognition of private … property is thus an essential condition for the prevention of coercion, though by no means the only one… the recognition of a protected individual sphere has in times of freedom normally included a right to privacy and secrecy, the conception that a man’s house is his castle and that nobody has a right even to take cognizance of his activities within it.”¹⁸

Hayek and “coercion”.

There is a crucial conceptual flaw in Hayek’s account, which depends almost entirely upon his concept of “coercion” and the place he gives it. The touchstone of individual liberty, he says, is “the absence of coercion by another”¹⁹ and “Our definition of liberty depends upon the meaning of the concept of coercion, and it will not be precise until we have similarly defined that term.”²⁰

He suggests a meaning: “… such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Coercion occurs when one man’s actions are made to serve another man’s will, not for his own but for the other’s purpose by the threat of inflicting harm.”²¹

Hayek sets himself strongly against the law as an instrument for the advance of social justice, on the grounds of its necessary “coercive” state powers.

⁹ *Citizens United v FEC* 558 U.S. 310 (2010).

¹⁰ *NFIB v Sebelius* 567 U.S. 519 (2012).

¹¹ *Bromley LBC v Greater London Council* [1982] 2 W.L.R. 62.

¹² Hayek, TCOL, pp.133–252.

¹³ Hayek, TCOL, p.164.

¹⁴ Hayek, TCOL, pp.236–241.

¹⁵ Hayek, TCOL, p.237.

¹⁶ Hayek, TCOL, p.191–2.

¹⁷ Hayek, TCOL, p.217.

¹⁸ Hayek, TCOL, p.140–142.

¹⁹ Hayek, TCOL, p.133.

²⁰ Hayek, TCOL, p.20.

²¹ Hayek, TCOL, p.133–5.

“Within the limits set by the rule of law, a great deal can be done to make the market work more effectively and smoothly; but, within these limits, what people now regard as distributive justice can never be achieved … The law must not be used to further a policy of social improvement.”²²

and

“It would scarcely be an exaggeration to say that the greatest danger to liberty today comes from the men who are most needed and most powerful in modern government, namely, the efficient expert administrators exclusively concerned with what they regard as the public good.”²³

He accepts that the coercive powers of the state can inevitably be used for many proper purposes, without violating the “rule of law”, e.g. taxation and compulsory military service and jury service,²⁴ because these are known powers and, either avoidable or, at least not arbitrarily imposed by one person.

However, a problem arises over the boundaries for these many inevitable concessions. He abjures any blanket abstention of the law and state “coercive powers” from issues of basic deprivation and need.

“All modern governments have made provision for the indigent, unfortunate, and disabled and have concerned themselves with questions of health and the dissemination of knowledge. There is no reason why the volume of these pure service activities should not increase with the general growth of wealth. There are common needs that can be satisfied only by collective action and which can be thus provided for without restricting individual liberty.”²⁵

He wrote that freedom is consistent with “… the use of coercion by government for the sole purpose of enforcing known rules intended to secure the best conditions under which the individual may give his activities a coherent, rational pattern.”²⁶ There is much potential for benevolent state action here.

The problem for Hayek and subsequent writers is how to define these boundaries. He ultimately accepts that the term “coercion” poses many difficulties: “But coercion is nearly as troublesome a concept as liberty itself...”²⁷ He is reduced to preventing “all the more severe forms of coercion”,²⁸ which begs many questions. This test of “improper coercion” therefore loses its explanatory power as the touchstone of “freedom”²⁹. This is however Hayek’s central criticism of the use of the law to promote social justice and for “redistributive” purposes. Stripped of this reasoning, there is the bare assertion, unfounded on any principle, that “social justice” is not where the law should go. Thus, Hayek’s limited structure for the protection of liberty proves to have very uncertain foundations.²⁹

“Coercion” is still used as a key neo-liberal concept, despite having been very widely criticised.³⁰ However, the failure of this attempt to conceptualise the protections for freedom in “negative” terms, and thus to avoid recognising “positive rights”, has not been rectified with any alternative.

²² Hayek, TCOL, pp.232–3 and 243.

²³ Hayek, TCOL, p.262.

²⁴ Hayek, TCOL, p.143.

²⁵ Hayek, TCOL, p.257.

²⁶ Hayek, TCOL, p.144 and more widely.

²⁷ Hayek, TCOL, p.133.

²⁸ Hayek, TCOL, p.139.

²⁹ Hayek lived a long and most prolific life. Unsurprisingly, he was not entirely consistent in everything he wrote. For a more detailed critical analysis, see Roland Kley, *Hayek’s Social and Political Thought*, (Oxford: Clarendon Press, 1994) Chs 1–5.

³⁰ By way of example:

Ellen Frankel Paul, “Hayek’s Conception of Freedom, Coercion and the Rule of Law”, *Reason Papers No. 6* (Spring, 1980) Miami University, 37–52; Hamowy, “Hayek’s Concept of Freedom: a Critique”, *New Individualist Review* (Indianapolis: Liberty Fund, 1981); Bouillon, “Breaking the circle: the definition of individual liberty”, *Ethics and Politics*, 2003, 2; Fukuyama, “Friedrich A. Hayek, Big Government Skeptic” [sic], *New York Times*, 5 June 2011.

Hayek and “justice”

The concept of “justice” also receives a curious definition at the hands of Hayek. “Injustice” can only result from the actions of a person, he suggests. However, the “free market” is not the result of human calculation, but the natural evolution of a “spontaneous order” (thus a “natural order of things”, and beyond challenge or criticism). The free market therefore cannot produce “injustice”. Since no “injustice” arises, it is beyond the purview of the law to provide any remedy. Further, it would be a violation of the “rule of law” to attempt to do so.³¹ He argues:

“Since only situations which have been created by human will can be called just or unjust, the particulars of a spontaneous order cannot be just or unjust.....what is called social or distributive justice is indeed meaningless within a spontaneous order and has meaning only within an organisation.”

Similarly, as Hayek says, the misfortunes of nature, such as a “physical defect” from birth, cannot be regarded as “unjust”. We see here the basis for neo-liberal hostility to equality of opportunity, and to remedies for social disadvantage or for “discrimination.” The misfortunes of nature or of “society” are not “injustices” and should not be remedied by the law.

Hayek and the real world

So much for theoretical deficiencies, but in practice and in terms of human rights, Hayek’s ideas took him in some eccentric directions. He argued that the Nazi regime was truly a form of socialism, and blamed “old socialists” for its rise to power.³² He justified the analysis because Hitler was pursuing “an idea of social justice” (sic).³³ He wrote in 1943 at the height of the war, that “The Rule of Law has never been so severely threatened than it is today.” Many would agree, but not perhaps with his identification of the then sources of that threat: the novelist J. B. Priestley, Professor Harold Laski at the LSE and “the current programme of the Labour Party”. They were described as “the totalitarians in our midst”.³⁴

In 1976, he described the Trade Disputes Act, 1906, granting trade union immunity for the economic impact of strike action, as “the most fateful law in Britain’s modern history”; and shocking to “... the British constitutional tradition probably more than any other act of modern legislative history ...”³⁵

Between 1950 and 1962, Hayek taught and wrote at the University of Chicago. From his work with Milton Friedman and others, a “Chicago School” of economics emerged. Inspired by their “free market” theories, and the perceived “threat” to them from the elected socialist Allende government in Chile, General Pinochet headed a violent military coup in 1973. The dictatorship lasted until 1990 and was responsible for 3,000 deaths and disappearances, with 80,000 people subjected to arbitrary detention and institutional torture.

This form of “coercion” did not seem to concern Hayek. He visited Chile in 1977 and 1981, meeting the military leaders, as he did the Argentinian junta. He wrote in public defence of the South African apartheid regime and the Chilean dictatorship: “If Mrs. Thatcher said that free choice is to be exercised more in the market place than in the ballot box, she has merely uttered the truism that the first is indispensable for individual freedom, while the second is not.”³⁶

Chile did not stand alone. In pursuit of “free market” interests, the US and UK engineered the overthrow of moderate democratic regimes in Iran in 1953 and Guatemala 1954 and others, in favour of enduring

³¹ F. A. Hayek, “The Mirage of Social Justice”, in *Law, Legislation and Liberty*, [henceforth “Hayek, LLL”] Vol.2, (London: RKP, 1976), p.31–33.

³² Hayek, TRTS, Ch. XII, “The socialist roots of Nazism”.

³³ Television interview at <https://www.youtube.com/watch?v=3r4vFnPCCjU> (Accessed 10 November 2018).

³⁴ Hayek, TRTS, pp.61 and 144–5. Tony Judt called this “political autism”: *Thinking the Twentieth Century*, (Penguin, 2012), Ch. 9.

³⁵ Hayek, LLL, Volume 2, *The Mirage of Social Justice*, p.31–33.

³⁶ Letter to the *London Times*, 11 July 1978. For a detailed account of Hayek’s views of the Chilean, Argentinian and Portuguese dictatorships, the South African apartheid government, and democracy see: Farrant and ors., (2012) 71(3) *American Journal of Economics and Sociology*.

dictatorships notorious for their human rights abuses, and large scale loss of life. The public apologies of the US government in 1999 and 2000, for its role in these coups, do not dispel the apparent neo-liberal view that these victims were a price worth paying for higher “free market” values.³⁷ Basic human rights and democracy were simply cast aside.

Hayek took a casual view of the suspension of basic human rights. They were not “... absolute rights which could never be infringed...” but “... any departure from them requires special justification ... when, but only when, it is a question of preserving liberty in the long run ... in situations of ‘clear and present danger’.”

Although he suggested that the suspension should be reviewable by an independent court, he does not concern himself with any attempt to clarify the “public interest” criteria which should be applied. He proceeded predictably with a much more detailed insistence that the owners of expropriated property should receive full indemnification: “as high as possible”.³⁸

Scruton

More recently, the English philosopher, Roger Scruton has sporadically written about the common- law and human rights. As a member of the Mont Pelerin Society, founded by Hayek, he may be taken as “flying the flag” for an updated version of his views. He has long courted controversy for his opinions about multi-culturalism and the “existential threat” of Islam to Christian Europe.

Two essays on Scruton’s personal website from 2011 and 2014 address human rights. This is sadly thin material. He acknowledges the “natural law” basis for “traditional freedoms”, from the English Bill of Rights, through the American Bill of Rights and UN Universal Declaration to the European Convention. However, he draws a clear boundary at the socio- economic rights in art.22 of the Declaration because they found positive claims against the state, rather than negative “freedoms”: and enlarge state powers. As he puts it: “If there are such things as ‘natural rights’, therefore, they ought to have the essentially negative aspect of freedoms: rights not to be molested, rather than claims to be fulfilled.”

Is this distinction workable? Even Scruton must require that his “traditional negative freedoms” be effective, and so positively enforceable against the state or other oppressors by a “claim”. The distinction from what he calls “claim rights” is entirely unclear. The very ancient common law rights to a “fair trial” and to a public investigation of a suspicious death at an Inquest are both “positive” rights, enforceable by “claims”. More recently, the Supreme Court has powerfully endorsed the positive right of unimpeded access to the courts, basing itself upon ancient and modern common law: *R. (Unison) v Lord Chancellor*.³⁹ The successful arguments in the “*Citizens United*” decision were based upon the positive right of “free speech” in the American First Amendment. Are these rights objectionable in principle because they may be depicted as positive “claim rights”? So many “rights” can anyway be couched in positive or negative terms, by a simple switch of language.

Scruton continues: “claim rights push us inevitably in a direction which, for many people, is not only economically disastrous, but morally and politically dangerous. Moreover it is a direction which is diametrically opposed to that for which the idea of a human (natural) right was originally introduced — a direction involving the increase, rather than the limitation, of the power of the state.”

It is counter-intuitive to imagine that socio-economic claims against the state enlarge state powers. Bathetically, Scruton’s complaint focuses upon the powers of taxation to finance welfare support. He ignores those many passages in Hayek which justify such state powers for precisely these reasons. He

³⁷ Shortly after the coups, the “evils” of those overthrown regimes were cited by neo-liberals in their negotiation of international trade regulation: Slobodian, *The Globalists*, (Cambridge, Mass.: Harvard University Press, 2018), p.139.

³⁸ Hayek, TCOL, p.217.

³⁹ *R. (on the application of Unison) v Lord Chancellor* [2017] UKSC 51; [2017] 3 W.L.R. 409 at [66]–[85].

complains that “The agenda has shifted from liberalism to socialism, without any indication of why or how.”

Scruton criticises art.8 of the European Convention as “wish fulfilment” “now applied by an activist court (the European Court of Human Rights) which aims to upset any piece of legislation that might have got up the nose of its far from impartial, and in any case highly politicized, judges.” He claims that “any grievance” can be turned “into an enforceable claim without reference to the wider issues of the public interest. Rights … can therefore be wielded against the state, regardless of the interests that conflict with them.”

In his hyperbole, Scruton forgets that Hayek himself recognised something akin to a liberal reading of art.8 ECHR.⁴⁰ He also ignores the highly qualified terms of art.8, which in nearly every single case require careful assessment of balance and proportionality against other conflicting public and/or private interests. Predictably, Scruton illustrates his concerns with the story of a planning dispute in his country village involving Irish travellers, EU freedom of movement and the “collapse of property values” locally. There may or may not be sympathy for losing such a case, but this is a paltry basis for a legal treatise. He does not attach, or give a reference for, the court’s decision.

The finding of “implied obligations” within the European Convention presumably justifies the attribution of “activism” against the judiciary. These obligations maintain rights as effective and relevant in changing times. The alternative is an “originalism” which freezes any legislation as at the moment of its enactment: a built-in obsolescence. In passing the Human Rights Act, and including a judicial duty to “take into account” Strasburg Court decisions, Parliament clearly approved the long established “living instrument” approach of that Court.⁴¹

Scruton is rightly an admirer of the flexibility and pragmatic development of the common law. That must include many ancient and more modern positive “common law” rights, and negative freedoms. It would be anomalous and unworkable for those rights to be interpreted according to living, flexible and pragmatic criteria, while European Convention rights are tied to a rigid “originalist” approach. This especially applies to those many rights which arise in parallel from both sources.

Neo-liberal thinkers seem anxious to assert the “right to discriminate” in rebuttal of any obligation of “equal treatment”. Hayek described equality of opportunity as a “wholly illusory ideal” and “liable to produce a nightmare”.⁴²

Neo-liberals conventionally insist that “the whole of life is discrimination”. This is so, if the treatment of people is reduced to the level of consumer choice. Scruton complains that “Things are made more complex still by the inclusion, in all European provisions, of ‘non-discrimination’ as a human right. … (he cites employment, education and hospital beds) … But all coherent societies are based on discrimination. A society is an ‘in-group’, however large and however hospitable it may be. Non-discrimination laws effectively tie the hands of the indigenous European communities, forbidding them from offering privileges to their existing members.”⁴³ Even in the heat of battle, common humanity extends impartial medical treatment to all combatants, as required by the Geneva Conventions and military law.⁴⁴ This can be traced back to the 1864, Geneva Convention, art.6. It seems not to survive in 21st century neo-liberalism. In fact, F. A. Hayek himself at one stage was insistent that people should be treated equally and that discrimination in the laws themselves and in their application is unacceptable.⁴⁵

Scruton’s somewhat dyspeptic summation of the current position is:

⁴⁰ Hayek, TCOL, p.142.

⁴¹ As Lord Dyson pointed out in his Bentham Presidential address, “Are the judges too powerful?”, UCL Laws, 2014, p.10, . at https://www.ucl.ac.uk/laws/sites/laws/files/dyson_2014.pdf [Accessed on 10 November 2018].

⁴² Hayek, LLL, Vol. 2, p.84.

⁴³ “The Religion of Rights”, Radio 4, 1 September 2017, reproduced on Scruton’s website.

⁴⁴ Geneva Convention I, 1949, arts. 12 and 15; GC II, 1949, arts 12 and 18; Additional Protocol I, 1977, art. 10; AP II, 1977, arts. 7 and 8.

⁴⁵ Hayek, TCOL, pp.153-4

“The doctrine of human rights, which was introduced to guarantee our freedom, is now being used to remove it. Religious fanatics and Leftist utopians have combined to subvert the only weapon that has until now been effective against them.”

A recent sermon of his revealed the limited progress made towards any coherent legal theory.⁴⁶ Scruton suggested that two sources of the common law were: a summary of what may be assumed between two people in “free dealings” with each other: and, citing St Augustine, “divine revelation” to us as natural beings. Perhaps this does not take anyone very far.

Richard Posner

The fascinating Judge Richard Posner of the Chicago Court of Appeals merits brief mention. He was a maverick pragmatist, who avowedly paid “... very little attention to legal rules, statutes, constitutional provisions.”⁴⁷ He straddled neo-liberal and opposing positions in his prolific writings and judgments. He wrote two very successful books under the influence of Chicago school economists. *Economic Analysis of Law*⁴⁸ and *The Economics of Justice*⁴⁹ explained his view that the law generally could benefit from an acceptance of economic analysis: not to promote a “just” or utilitarian agenda, but with a view to “efficiency” and “wealth maximisation”.

This took Posner into eccentric territory with his advocacy of a formal market in babies, to rectify the defects in the adoption system.⁵⁰ Perhaps he gains a little more credit for his strong criticism of Justice Scalia and his “textual originalism”.⁵¹ However, attempting to extract any legal principle from such a “legal pragmatist” will likely prove to be an oxymoron.

Joseph and Sumption

Neo-liberal hostility to the current state of human rights law may be founded upon irreconcileable theoretical conflict. These objections may also be based upon a more instinctive elitism: a preference for “subjects” with their petitions, rather than “citizens” with their troublesome “rights” and “claims”: a neo-liberal view of human nature, and social values. Those values normally remain discreetly coded.

Fortunately, a remarkable and indiscreet book called *Equality* attempted to explain and justify them.⁵² Keith Joseph was the joint author with Jonathan Sumption, then an academic and barrister. He wrote most of the text, and has been an influential Justice of the UK Supreme Court.⁵³ Both were trained as lawyers and called to the Bar, (as was Scruton). The legal implications of their views, especially with regard to socio-economic rights, cannot have been far from their minds.

Keith Joseph had history. On 19 October 1974, he delivered a revealing speech in Edgbaston, which was disastrous for his then ambitions. He reflected on the “moral” state of Britain: “The balance of our population, our human stock is threatened ... a high and rising proportion of children are being born to mothers least fitted to bring children into the world and bring them up ... who were first pregnant in adolescence in social classes 4 and 5. ... Some are of low intelligence, most of low educational attainment. ... They are producing problem children, the future unmarried mothers, delinquents, denizens of our

⁴⁶ Temple Church Sermon, entitled *The Law of the Land*, 3 October 2018, <https://www.roger-scruton.com/articles/548-the-law-of-the-land-the-temple-church-sermon-3-oct-18> [Accessed 10 November 2018].

⁴⁷ Interview of Posner with Adam Liptak, *New York Times*, 11 September 2017 and see “Rhetoric and Law. The double life of Richard Posner, America’s most contentious legal reformer” *Harvard Magazine* January–February, 2016.

⁴⁸ R. Posner, *Economic Analysis of Law* (Mass.: Harvard University Press, 1977).

⁴⁹ R. Posner, *The Economics of Justice* (Mass.: Harvard University Press, 1981).

⁵⁰ Landes and Posner, “The Economics of the Baby Shortage” (1978) 7 *Journal of Legal Studies* 323. A market in vulnerable children has now developed between some UK privatised care providers: Patrick Greenfield and Sarah Marsh, “Vulnerable children treated ‘like cattle’ in care home system.” *The Guardian*, 10 November 2018.

⁵¹ R. Posner, “The incoherence of Antonin Scalia” *New Republic*, 24 August 2012.

⁵² Joseph and Sumption, *Equality* [henceforth “Equality”] (London: John Murray, 1979).

⁵³ Denham and Garnett, *Keith Joseph*, (Chesham: Acumen, 2001) p.329: from the publishers’ archives.

borstals, sub-normal educational establishments, prisons, hostels for drifters. ... If we do nothing, the nation moves towards degeneration ...”.

Disqualified from the crowning heights, he became Thatcher’s “closest political friend”, in her words, and held ministerial offices for housing, social services and education. In the 1980s, official papers record Joseph as proposing a “managed rundown” of Merseyside, in answer to Michael Heseltine’s plans for re-generation.⁵⁴ This was a man flirting with mass social cleansing, and basing himself in part on the elitist value he placed upon genetics and “intelligence”.

Joseph and Sumption declared in *Equality* that they were advancing “apparently shocking and offensive propositions”⁵⁵. Joseph insisted upon postponing publication until after the 1979 election, for fear of the public reaction.⁵⁶ A small selection of these “apparently shocking..propositions” reveals why.

“It is more comforting to think that one is poor because one belongs to the class whose lot is to be poor.”;

“It is because of the existence of envy that one does not drive Rolls-Royces through the slums of Naples.”;

“Redistribution is unwise. But it is also morally indefensible, misconceived in theory and repellent in practice.”;

“A family is poor if it cannot afford to eat. It is not poor if it cannot afford endless smokes ... By any absolute standard, there is very little poverty in Britain today.”;

“‘Politics’ and ‘scholarship’ are fields ‘in which human achievement would be the poorer for want of men of independent means.’”;

“The level of a community’s civilization is very much the level of civilization of its most discerning and original members [who] must enjoy incomes significantly higher than the average.”;

“A person is morally entitled to everything he can acquire from free agents by honest means.”;

“An unusually skilled businessman ... will require a far greater income in order to achieve personal fulfillment than will another who has not been so well favoured by nature and who will be more easily fulfilled.”;

“Self interest is indeed the first duty which a man owes to his community, so that he supports himself and does not depend on others ... It is not wealth but envy which is divisive.”

This is an impoverished view of human nature and society. Supposedly, we must live as “free” autonomous individuals, pursuing our personal ambitions and material wealth, as in a “cage fight” against our neighbours. The state is merely a distant referee to ensure that things do not get too far out of hand. This was a “moral” catechism for the unlimited acquisition and consumption of recent decades. In the entire book, just three sentences address the needs of some limited categories of the most vulnerable, in highly qualified terms. Hayek’s recognition of some legitimate state powers for these purposes is not acknowledged.

“Freedom” and “equality”

Joseph and Sumption posit “freedom” as irreconcilable with “equality”. The litmus test of a “free society” is its “inequality”: i.e. the extent to which it fosters and protects the accumulation of private wealth.

⁵⁴ According to released government papers: Sally Gainsbury, *Financial Times* (December 30, 2011). “Tories debated letting Liverpool ‘decline’”.

⁵⁵ Joseph and Sumption, *Equality*, p.103.

⁵⁶ Denham and Garnett, *Keith Joseph*, (Chesham, Acumen, 2001), p.329: from the publishers’ archives.

Socio-economic rights are clearly anathema. Exploitation and discrimination are unrecognised, and thus tolerated.

Democracy does not feature in this version of a “free society”. According to the authors, “It may be that the rich recognize that their interests are served by political stability and that political stability can only be had if the differences between rich and poor are kept within bounds. If so, then redistribution is justified to the limited extent that it is necessary for the purpose of achieving that object. But its justification goes not one inch further”.⁵⁷ Revenue would be controlled in the interests of the rich, who should be the sole arbiters of their own perceived self interest in ‘political stability’ and of any necessary redistribution.⁵⁸ The authors find it inconvenient to explain the practical workings of this curious system.

In order to set up this manichean choice between “freedom” and “equality”, each is defined so as to be in direct opposition. This carefully crafted conflict is thus tautological, to fit the authors’ purpose. “Freedom” is defined so as to exclude any feature of ‘inequality’: so a blind man has “freedom” to read a book: and a man is truly “free” if, from his wages, he cannot afford bread.⁵⁹ Joseph and Sumption dismiss moderate social democrats as failing to beware the slippery slope to inevitable totalitarianism. This approach set the scene for the neo-liberal crusade against the perceived suffocating compromises of post-war social democracy.

Sources

It is perhaps not surprising that the bare propositions advanced by Joseph and Sumption can be seen as “off the spectrum” of conventional right-wing political discourse. They are indistinguishable from those of Ayn Rand, the cult figure of the American extreme right, whom many regarded as unhinged. She condemned altruism and praised “the virtue of selfishness”. Rand directed the full range of her contempt at this concept of “equality”. She suggested that altruists “... seek to deprive men of their consequences — of the rewards, the benefits, the achievements created by personal attributes and virtues. It is not equality before the law that they seek, but inequality: the establishment of an inverted social pyramid, with a new aristocracy on top — the aristocracy of non-value”. She added: “There is no such thing as a benevolent passion for equality and ... the claim to it is only a rationalisation to cover a passionate hatred of the good for being the good”.⁶⁰

The topic, the timing and the tone of these parallel works suggest Rand’s influence, but this is not acknowledged. Hayek is avowedly the inspiration. Joseph’s and Sumption’s characterisations of poverty and the working class have deeper roots. They are reminiscent of the 17th century thinker, Bernard Mandeville: “Men who are to remain and end their days in a laborious, tiresome and painful station of life, the sooner they are put upon it, the more patiently they’ll submit to it for ever after.”⁶¹

One of the central fictions of neo-liberal economic theory is that of the free agent, who makes fully informed and “rational choices” in the marketplace. This imagined “free market” does not bear much resemblance to our consumer and investor experience and has been refuted by the research of many economists and psychologists, such as Daniel Kahneman.⁶² The wider “neo-liberal” project seeks to apply this “rational choice” fiction to every aspect of our lives. If everything is a “deal” and everyone is a “customer”, most aspects of social policy and legal rights follow with cold logic. The poor and the

⁵⁷ Joseph and Sumption, *Equality*, p.102.

⁵⁸ Orwell explained this “fear of the mob” in *Down and Out in Paris and London*, (Penguin Classics, 2013), Ch.22.

⁵⁹ Both emerge from Hayek’s concept of “justice”, as explained above.

⁶⁰ Ayn Rand, “Return of the Primitive: The Anti-Industrial Revolution”, in *The Age of Envy*, (New York: New American Library, 1975), at p.140 and p.144.

⁶¹ Bernard Mandeville, *The Fable of the Bees*, 3rd edn, (London, 1724), p.329. Mandeville opposed charity schools for the poor. He was a writer of great interest to F.A. Hayek, see his British Academy annual *Lecture on a mastermind* (OUP, 1966).

⁶² For example, see D. Kahneman, *Thinking Fast and Slow* (Penguin Books, 2012).

vulnerable are losers in the “cage fight”: they have made the “wrong choices”. Morally they deserve their plight: “the poor are to blame”. This is a “hostile environment” for any “rights”.

The “moral blame” of the disadvantaged is a familiar comfort for the privileged. Joseph himself, as Education Secretary in 1984, refused to channel money for the training of young women for science, saying “I do not believe that money is the problem: it is the attitude of parents and the girls themselves.” This is a potent motif. Sumption’s most provocative recent comments partly attributed lack of judicial diversity to, what he termed, the “perfectly legitimate lifestyle choice” of women lawyers, who are unwilling to endure the rigours of successful private legal practice.⁶³

This “world view” precludes any recognition of vulnerability, disadvantage or exploitation: and therefore of any measures to rectify them. Joseph and Sumption make this clear: “Equality of opportunity (it is said) is a fine thing … but it can be achieved only by equalising standards of living, therefore in order to create true equality of opportunity one must prevent the ablest from achieving their full potential … broadly speaking … all the brave new experiments in manufacturing equality by educational manipulation [have produced] little or no effect. … institutional factors have no appreciable effect upon achievement … At no point in their lives are men equal in ability and capacity to exploit the opportunities which all equally enjoy. Nor at any point in their lives can they be made so”⁶⁴.

These are powerful elitist assumptions, with strong social policy consequences. The desirability, or even possibility, of overcoming social disadvantage and discrimination is vigorously denied. More generally in *Equality*, it is futile to try to find any reference to the position of women at all, save for the “derived wealth” of a woman living with a husband “on his large income”. In this “empathy free” zone, the poor or vulnerable do not belong: nor does any provision for them, such as social housing.

In its resistance to market forces, social housing became a crucible for neo-liberal hostility. The values behind this hostility have had real consequences. In 1979, the Conservative Chair of Kensington and Chelsea Council Housing Committee declared that “Middle income people are the life blood of our nation” and needed help against the encroachments of “the subsidised poor”.⁶⁵ This was followed by the Westminster Council “homes for votes” scandal in 1987, in which the poor were treated as pawns in an electoral power game. These values are now emerging as a factor in the Grenfell catastrophe.

Joseph and Sumption wrote: “the fact that bread is a necessity of life whereas books are not, may well be a very good reason for helping out on humanitarian grounds those who cannot afford it, but it cannot be a reason for saying that such people are not free”⁶⁶. The futility of such a concept of “freedom” could not be better expressed. The lofty conditional (“may well be”) is so telling. This account of neo-liberal values does not sit easily with any universal human rights at all.

Policy Exchange and Hayek.

Policy Exchange, an influential, so-called “centre-right” think-tank, has recently published a critical account of “human rights” law.⁶⁷ It established a Judicial Power Project, whose basic premise is “rising concern at judicial overreach”. Under this aegis, the paper by Noel Malcolm, a historian and journalist, purports to discover the predicated “rising concern at judicial overreach”.

Malcolm argues that “human rights” are matters for political theory, and not moral philosophy: and thus can be “relativist”.⁶⁸ He advocates leaving the ECHR, and establishing a Bill or Charter of UK rights.⁶⁹ That instrument would “be concerned only with real, essential human rights … the violation of which

⁶³ *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture, 15 November 2012, p.11.

⁶⁴ Joseph and Sumption, *Equality*, pp.31–35.

⁶⁵ *Time Out*, London, 10–16 August 1979, p.7.

⁶⁶ Joseph and Sumption, *Equality*, p.49.

⁶⁷ Noel Malcolm, *Human Rights and Political Wrongs: a new approach to Human Rights law* (Policy Exchange, 2017).

⁶⁸ Malcolm, “Human Rights and Political Wrongs”, p.99–135.

⁶⁹ Malcolm, “Human Rights and Political Wrongs”, p.139–140.

would count as oppression and tyranny ..." above a certain "... threshold of seriousness.." No attempt is made to define "real, essential human rights" or "serious oppression or tyranny". Yet again, a critic of the Convention finds it too embarrassing to spell out which of the rights should be eliminated. With painful predictability, the author's two factual examples for exclusion involve "the other": an asylum seeker being detained in poor conditions for two hours, and any positive state obligation to "facilitate one's gypsy identity."⁷⁰

By way of compensation, a much more general "Code of Protected Rights" would be promulgated, ranging far beyond "the human ones" [sic] and the ECHR.⁷¹ On one reading, some undefined "socio-economic rights" would be included, with a principle of "non-discrimination."⁷² Confusingly, this imaginative suggestion is undermined on the same page, by the argument that increasing the extent of rights reduces the extent of "...a decent, well-functioning democracy." There are rather long odds against any such a code seeing the light of day, in tandem with any post-Brexit Charter.

What is specifically "neo-liberal" about this paper, for there is only space here to deal with that legacy? Hayek is not mentioned once, and nor is "absence of coercion" as a touchstone of liberty. Malcolm does however pursue a very Hayekian motif. The legal "coercive powers" of the state must be predictable or at least under "known rules."⁷³ Hayek argues that such knowledge is necessary to enable the individual to arrange his affairs, and the context betrays his relentless focus upon protecting property rights.

Malcolm suggests that the predictability of legal rights is of vital importance. "And if we do possess a body of accurately defined and mutually coherent rights, we must also stand in need of reliable and objective ways of applying those rights to the facts of any particular case, so that we may know precisely which right is involved, and what needs to be done in order to protect it... a system of just law must involve a high degree of knowability and predictability."⁷⁴ He argues that this predictability is currently inadequate and compromised by laws requiring or permitting judicial "overreach": namely judges assessing the balance between competing rights and public and private interests.

Malcolm does not claim to allow for the vast majority of disputes in our society which are never litigated, precisely because the legal answer is clear and acted upon by the parties. In the inevitable marginal or problematic cases, he elides the obvious distinction between "known rules" or "known principles" and "known outcomes". The accessibility and predictability of the law is a very important principle. However, no common law or civil code system can possibly clarify in advance the answers to the many and varied conflicts that arise in society. Malcolm suggests, to the contrary, that it would be helpful to specify in advance each of the possible ways in which, for example, a 'fair trial' might be compromised. This is unrealistic, and involves a standard which cannot practically be applied to any area of the law, let alone selectively to human rights law.⁷⁵

Malcolm cites one French post-adoption legal dispute involving issues of maternal anonymity.⁷⁶ "One does not need to enter into the specifics of many cases in order to sense that there is something deeply problematic about these 'balancing' exercises ... Judgments in such cases are less like technical applications of settled law, and more like political decisions ...".

This is simply absurd. Malcolm does not suggest who else should decide such issues other than a judge in a court of law: or any different mechanism which could credibly do so. These are neither "technical applications of settled law" nor "political decisions". No pre-ordained "weighting" for the conflicting interests could possibly cater for the complexities of life. Our Family Courts decide such difficult cases perfectly conventionally, balancing the common law and other rights of all relevant parties, in the context

⁷⁰ Malcolm, "Human Rights and Political Wrongs", p.141.

⁷¹ Malcolm, "Human Rights and Political Wrongs", p.141-2.

⁷² See also Malcolm, "Human Rights and Political Wrongs", p.121.

⁷³ Hayek, TRTS, Ch. VI, "Planning and the Rule of Law", p.60.

⁷⁴ Malcolm, "Human Rights and Political Wrongs", pp.20 and 34.

⁷⁵ Lord Dyson makes this point in his Bentham Presidential address, "*Are the judges too powerful?*", UCL Laws, 2014, p.2.

⁷⁶ Malcolm, "Human Rights and Political Wrongs", pp.25-26.

of statute, and applying them to the facts of the case. They have always been, and will be, obliged to balance such interests with or without the Human Rights Act.

Malcolm's error is his suggestion that the judicial "balancing" of various rights and interests, is uniquely problematic and confined to "human rights" law.⁷⁷ He cites *Daly v SSHD*⁷⁸ as a landmark introduction of the principle of "proportionality" into English law. However, the decision in that case was based first upon "an orthodox application of common law principles", after consideration of the balance between prisoner's rights and the need to maintain discipline and security in prisons.⁷⁹ If that "balancing exercise" of individual rights and the public interest at common law was not "judicial overreach", then why does it become so when, a few paragraphs later, European Convention rights are considered? Is it "judicial overreach", for example, when the courts assess the boundaries of the common law "duty of care" or 'vicarious liability' in the law of negligence? Both are replete with policy implications. Parliament is welcome to legislate on all such issues, but has not done so.

Surprisingly, Malcolm does not refer to the *Kennedy* case, an important decision of the Supreme Court, explaining the primary role of common- law rights, relative to Convention rights.⁸⁰ Nor does he cite the Supreme Court decision in the *Unison* case, above, on access to the courts. This was decided primarily on common- law constitutional principles, which were then confirmed by reference to EU and ECHR law.

Malcolm, later and more realistically, concedes that there will always be "interpretative problems" for judges, who will be obliged in some cases to make assessments of 'balance' with policy implications.⁸¹ So, this vehement objection to the judicial balancing of interests, is reduced to a question of degree and not of principle. Any degree of excess would require much more nuanced assessment than that given by Malcolm, in order to justify any criticism.

What is clear is that such exercises are not confined to "human rights" cases, and are no symptom of "judicial overreach". Nor are they the touted "threats to democratic values", with which neo- liberals anyway have a decidedly ambivalent history and opportunistic relationship. Another such unfounded accusation of "judicial overreach", specifically regarding judicial review, was advanced by Jonathan Sumption in 2011, and refuted by Lord Justice Sedley and Lord Dyson.⁸²

Tom Bingham and Aharon Barak were respectively Presidents of the UK and the Israeli Supreme Courts. They were amongst the most internationally respected of judges of the last century, with a combined experience of 56 years at the highest levels of the judiciary. They each adopted a purposive approach to the interpretation of human rights instruments. Throughout their careers, they had been obliged to resolve the most anxious of conflicts between public and private interests and rights, by balancing them on the facts of each case. They have written and spoken with unquestionable integrity about the importance and legitimacy of these tasks.⁸³ Neither was engaged in anti-democratic empire building. It would take rather more than the efforts of Scruton, Sumption and Malcolm so far to bring home any charge of judicial "overreach".

⁷⁷ Malcolm, "Human Rights and Political Wrongs", pp.24–29.

⁷⁸ R. (on the application of *Daly*) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 A.C. 532.

⁷⁹ *Daly* [2001] 2 A.C. 532 at [18]–[23].

⁸⁰ *Kennedy v Charity Commissioners* [2014] UKSC 20; [2015] A.C. 455, esp. at [46], and see M. Tugendhat, "Human Rights and the Common Law –Where next after *Kennedy v The Charity Commission*? ", The Jan Grodecki Lecture 2014, University of Leicester School of Law Research Paper No. 14-29; available at <https://ssrn.com/abstract=2521034> [Accessed 10 November 2018].

⁸¹ Malcolm, "Human Rights and Political Wrongs", p.141.

⁸² See Sumption's F.A. Mann Lecture, 2011, "Judicial and Political Decision Making, the Uncertain Boundary"; Stephen Sedley, *London Review of Books*, Vol. 34, No. 4, 23 February 2012. and Lord Dyson, Bentham Presidential address, "Are the judges too powerful?", UCL Laws, 2014.

⁸³ Aharon Barak, *Purposive Interpretation in Law*, (Princeton: Princeton University Press, 2007); Aharon Barak, *The Judge in a Democracy*, (Princeton: Princeton University Press, 2008); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*. (Cambridge: Cambridge University Press, 2012); Bingham, *The Rule of Law*, (Penguin Books, 2011) and Bingham, Interview with the Constitution Society, published 21 October 2011, <https://www.youtube.com/watch?v=L69LJL4Qk5A> [Accessed 10 November 2018].

Returning to the Judicial Power Project's assertion of "rising concern at judicial overreach", Lord Dyson strongly doubted the existence of such concern.⁸⁴ Does this have any more credibility than Hayek writing in 1982 of "general disillusionment about the consequences of democracy"?⁸⁵

Socio-economic rights

There is considerable irony in the neo-liberal hostility towards certain kinds of "socio-economic rights". I say "certain kinds" because the most wealthy and powerful individuals and corporations have a fortress of such defensive rights. They were established and are maintained under the neo-liberal flags of "freedom" and hostility to regulation.

With characteristic restraint, Hayek suggested that the imposition of "exchange controls" on the movement of money across borders would be "the decisive advance on the path to totalitarianism and the suppression of individual liberty."⁸⁶ He placed "distributive justice" beyond the pale of his "rule of law". Joseph and Sumption followed suit.

The immediate post-war construction of international trade regulation was dominated by organised neo-liberal influence. This included the drafting of what was called a "Magna Carta" of private investor rights.⁸⁷ Perhaps the most important relationship between neo-liberalism and the law, is the ability to fashion legislative agendas and pre-empt inconvenient developments. This is how it is done. The role of the Mont Pelerin Society would be the stuff of a bad novel, but an engrossing documentary. It was established by Hayek at a meeting in Switzerland in 1947. Its immediate concern was the potential seizure of private property by western social democratic governments, inspired by the example of post-war eastern Europe. It has since exercised quite extraordinary influence, lobbying through neo-liberal power networks and proliferating, well-funded "think-tanks".⁸⁸

Today, the *de facto* freedoms of wealthy individuals and corporations are legion, from ineffective tax, market and accounting regulation, to the remarkable abstention of the criminal law after the 2008 banking crisis. These are the outcomes of the neo-liberal success in achieving our de-regulated, financialised and globalised world. The revelations of the "Panama Papers" are only the tip of an iceberg. The nexus between this ideology and current practice was well put by Nicholas Shaxson, in his recent study of offshore financial centres and tax havens. He describes their beneficiaries as "members of ancient continental aristocracies, fanatical supporters of American libertarian Ayn Rand, global criminals,.... Its bugbears are government, laws and taxes and its slogan "freedom"."⁸⁹

The insistence upon strong "negative" rights, and hostility to "positive" or "claim" rights, reflects a rather crude conflict of material interest. The rich and powerful want their assets negatively protected from control or diminution. The needy and vulnerable require positive provision and protection, which has to be funded. Beyond such interests, what is the principled objection to positive socio-economic rights?

We have seen how the boundary between positive and negative rights is unworkable, and certainly not maintained generally by neo-liberals. We have seen how Hayek's categorisation of redistribution as involving "improper coercive state powers" and thus in defiance of the "rule of law" has fallen apart. We have seen how the many predictions of totalitarian doom have proved empty, and "historicist". So perhaps this simply comes down to *realpolitik* without legal principle.

⁸⁴ Bentham Presidential address, *Are the judges too powerful?*, UCL Laws, 2014, p.7.

⁸⁵ Hayek, LLL, Vol. 3, p.1-2.

⁸⁶ Hayek, TRTS, p.69.

⁸⁷ See Quinn Slobodian, *The Globalists*, (Harvard, 2018), Ch. 4, pp.121–145 and Arthur S. Miller, 'Protection of Private Foreign Investment by Multilateral Convention', (1959) 53(2) *The American Journal of International Law*, 371–378.

⁸⁸ *The Road from Mount Pelerin: the making of a neo-liberal thought collective* ed. Mirowski and Plehwe, (Harvard University Press, 2009); and Quinn Slobodian, *The Globalists* (2018).

⁸⁹ *Treasure Islands* (Vintage Books, 2012), p.230.

Positive arguments for socio-economic rights can be found through a more sensible idea of “freedom” than the definition in *Equality*, and in the concept of “human dignity”⁹⁰. Those arguments will face aggressive opposition. Joseph and Sumption suggest: “Statistical demonstrations [of wealth and income distribution] are an appeal to envy and an abuse of people’s dissatisfactions and disappointments … [and] likely to be unrewarding as well as irrelevant.”⁹¹ Even to prepare factually for an informed debate about “inequality” is, for them, to commit four cardinal sins: and all in the name of a “free society”.

This moment

“Human rights” now face dangerous cross-currents, which are too complex and fresh for analytical perspective. The populist nationalism of Brexit will advance the cause for a UK Bill of Rights and the opportunity for narrower scope and weaker protection. Conor Gearty has lucidly explained this threat.⁹²

In some ways Brexit and rising populist nationalism run counter to the neo-liberal macro-economic project. This was on the verge of carving up the world into supra-national trading blocks, beyond any effective democratic control, under such as the Transatlantic Trade and Investment Partnership (TTIP). However, under that surface, there is an intense neo-liberal focus upon any post-Brexit world for the UK, with the prospect of low tax and low regulation bilateral trade deals. The dangers are equally clear for human rights as for employment and equality protections, and food and environmental standards.

The Malcolm paper for Policy Exchange shows how these forces can combine, taking over and adapting Hayek’s arguments in this new context. It is now more important than ever that the challenges of neo-liberal ideology be understood and resisted.

Conclusion

The poverty of “neo-liberal” “human rights” theory may arise from several layers of incompatibility with “effective”, and even “formal”, human rights. The insistence, from Hayek to Scruton, upon purely “negative” freedoms and the resistance to “claim rights”, is purely doctrinal and unworkable. The continuing focus upon “absence of coercion” is no guide to which freedoms should be protected. The disregard for democracy and human rights, when convenient for the protection of the “free market”, taints the credibility of any neo-liberal account of “freedoms”. Liberty is secured by the “rule of law” and vigorous democracy, not the “rule of law” and “market forces”. The state cannot be regarded as the exclusive source of oppression, in our privatised, deregulated and profit-obsessed world. The dystopia of Joseph and Sumption sits uneasily with any universal rights at all.

The “human rights” movement (so called) has rightly been subjected to close testing for “fuzziness” over its conceptual foundations and the reach of its “rights”.⁹³ By contrast, it may be a measure of the hegemony of “neo-liberalism” that there has been no significant critical account of its view of the law and human rights since Hayek and the debates he triggered. It would be gratifying if this article were to make a modest start to such a process.

Neo-liberals may acquire a relevant “rights theory” when they grapple with protections from the “coercion” which ordinary citizens suffer today (if Hayek’s own concept is to be revived). Does “coercion” include a pension fund being destroyed in reckless corporate games; or exploitation by monopoly or rigged pricing; or deception by marketing devices; or the ruin of a career by race or gender discrimination; or

⁹⁰ See from a burgeoning literature, Sen, *Development as Freedom*, (Oxford, OUP, 2001); Nussbaum, *Creating capabilities: the Human Development Approach*, (Harvard University Press, 2011); *Understanding human dignity*, ed. McCrudden, (OUP/ British Academy, 2014); Barak, *Human dignity: the Constitutional Value and the Constitutional Right* (Cambridge University Pres, 2015) and Sangiovanni, *Humanity without dignity: Moral Equality, Respect and Human Rights.*, (Harvard University Press, 2017).

⁹¹ Joseph and Sumption, *Equality*, p.104–5.

⁹² Conor Gearty, “States of denial: What the search for a UK Bill of Rights tells us about Human Rights Protections today” [2018] E.H.R.L.R. 415.

⁹³ See extensively Malcolm, *Human Rights and Political Wrongs*, at pp.101–116.

the enforced inhalation of poisonous pollutants in our cities? Hayek himself expressly included the first three, but the subtlety of some of his thinking has escaped later writers.⁹⁴

Lord Reed in the *Unison* decision, above, at paras. [66]–[73] felt obliged to deliver a basic lesson upon the importance to society generally of the “rule of law”, and basic individual rights. It is striking that the lesson had to be addressed immediately to the practices and arguments of the Respondent, the Lord Chancellor, as responsible for the Ministry of Justice. This was also however a considered refutation of the set of ideas addressed in this article.

He said at paras. [66]–[67]:

- “66. The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the “users” who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent times is apparent from the consultation papers and reports discussed earlier. It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since ‘ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services’.
- 67. It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.”

The profound lesson of these and his subsequent words will of course be lost upon those who believe that “There is no such thing as society”. An impoverished belief system, which reduces most aspects of human life to the fiction of a “free dealing” between two equally informed and empowered individuals, is unlikely to contribute anything to the problems of oppression facing the world in the 21st century.

⁹⁴ Hayek, TCOL, p.136 and 143–4; and see the discussion of unlawful “economic coercion” at p.15 of David Miller, editor, in the introduction to *Liberty*, (OUP, 1991). J. S. Mill saw improper “coercion” as not just emanating from the state: but, for example, from aspects of the then institution of marriage. He also saw child labour as “coercion” under the guise of “freedom of contract”: *On Liberty*, Bk. V, Ch. XI.

Point of View

Divorce Reform in England and Wales: The Human Rights Perspective

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✉ Behaviour; Civil partnerships; Discrimination; Divorce; Human rights; Irretrievable breakdown

It is rare these days to have some unreservedly good human rights news from the UK. The recent announcement of a Government consultation on proposals to reform the grounds for divorce in England and Wales¹ is hugely welcome from a human rights perspective.

The consultation, announced in September 2018, proposes to retain the sole ground for divorce (and civil partnership dissolution) of irretrievable breakdown. However, breakdown would be established by a simple notification procedure taking about six months whether for sole or joint applications. That notification process would replace the current requirement where breakdown must be evidenced by one of five “facts”, namely adultery, (unreasonable) behaviour, desertion, two years’ separation with consent or five years’ separation.² It is also proposed that the ability to defend (or prevent) the divorce or dissolution is removed. Decisions about children and finances would continue to be entirely separate matters.

The proposals are not necessarily the most radical or liberal proposals in Europe (or the US), but they do represent a very significant change to a divorce law dating back to the late 1960s. More importantly, they offer an effective solution to a number of human rights problems with the current law.

For decades, parties who wish to avoid having to wait out a two or five-year separation period have relied on the adultery or behaviour facts to secure a divorce within a few months. That tactical use of fault has meant that about 60% of divorces in England and Wales are based on adultery or behaviour, about 10 times the proportion as in neighbouring Scotland or France where separation periods are much shorter. To make the system work, and to reduce the potential conflict generated by allegations of fault, lawyers advise their clients to make allegations of behaviour as mild as possible. In turn, the courts “pretend” to inquire, but in any case, can only take allegations of fault at face value. The courts process about 100,000 divorces and dissolutions each year on that basis, with very few cases failing to meet a very low threshold. As the most senior family judge in England and Wales put it, the law and procedures are based on “hypocrisy and lack of intellectual honesty”.³

So what are the human rights problems? The first is that the gap between the law in theory and the law in practice offends Lord Bingham’s first principle of the rule of law that the law must be intelligible, clear and predictable.⁴ What is particularly offensive from a human rights perspective is that only legal insiders know how the law actually works in practice. Thus, full access to the legal remedies actually available requires access to legal advice, which is determined primarily by economic status. Those who can afford legal advice will be let into the secret of how the system works in practice—that anyone can secure a quick divorce based on the behaviour fact, regardless of the happiness of the marriage. In contrast, those

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¹ Ministry of Justice, “Reducing family conflict: reform of the legal requirements for divorce” <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/> [Accessed 10 November 2018].

² Matrimonial Causes Act 1973 s.1.

³ *Owens v Owens* [2017] EWCA Civ 182 at [94].

⁴ Lord Bingham, “Rule of Law” (2007) 66 C.L.J. 67, 69–70.

who cannot afford to hire a lawyer can and do assume that their only option is to wait for two or five years, if they cannot show evidence of, say, domestic abuse or alcohol addiction. Alternatively, some parties may be forced to use the fault-based facts of adultery or behaviour simply because they cannot afford to maintain two separate households for years. The differential access to faster or slower, or blame and non-blame, remedies is deeply troubling given the legal and emotional significance of the change of status conferred by a decree of divorce or civil partnership dissolution.

A more recent problem with differential, and overtly discriminatory, access to the five facts occurred with the introduction of civil partnership in 2004 and same-sex marriage in 2013. Rather than take the opportunity at that point to rethink how irretrievable breakdown would be established, parliament simply replicated the existing legal structures, but with one crucial difference. Parliament's squeamishness about defining gay sex means that the adultery fact can only be used by same-sex spouses if the respondent's "conduct" is with an opposite-sex partner. Adultery cannot be used as a fact at all for civil partnership dissolution. In other words, only heterosexual sex can be "adultery" and only in the context of marriage. In practical terms, this unequal treatment may make little difference to outcomes, as petitioners can use the behaviour fact where a partner has been unfaithful. In human rights terms, however, it is a clear example of discrimination, contrary to art.14 of the ECHR.

The human rights problems do not end there. It could be argued that producing a long list of misdemeanours raises privacy issues, in breach of the art.8 ECHR rights of the respondent and any children. That argument may be strengthened in the many cases where the drafting of the petition has not been a collaborative process and where the respondent may disagree with what has been included but nonetheless enters the public domain.

That takes us on to possible violations of art.6 of the ECHR and the fair determination of civil rights. As noted in *Owens*, and as established by research,⁵ unless the respondent formally defends any allegations made in a behaviour petition, the court will take the petitioner's account as true, however much the respondent may protest. Yet, defence is not an accessible or effective remedy. Defending the divorce is prohibitively expensive, legally challenging and unlikely to work, even after the *Owens* case. There are only a dozen or so defences each year, with family lawyers otherwise encouraging respondent clients to "suck it up" and viewing the process as "a means to an end".

So why is the Government addressing divorce reform now? It does seem that the stars are aligning for divorce reform in an otherwise unhappy political context. Family lawyers and the senior judiciary have been calling for reform for years. Then in 2017 things came to a head with the first major research for 20 years,⁶ a Private Member's Bill introduced by a former President of the Family Division,⁷ a campaign for reform led by *The Times* newspaper and, perhaps most importantly of all, a very rare defended divorce case that reached the Supreme Court. The *Owens* case involved a highly unusual combination of a husband unwilling to accept the divorce and a trial judge unwilling to find enough evidence of "behaviour" in the petition. The result was that the wife's petition was refused even though the trial judge found that the marriage had broken down irretrievably. The decision was upheld (reluctantly) by the Court of Appeal and Supreme Court with both courts suggesting that Parliament look at the issue.⁸ The case attracted a huge public outcry, focusing on the plight of Mrs Owens trapped in a dead marriage and with no legal remedy other than a five-year wait.

⁵ Liz Trinder, Debbie Braybrook, Caroline Bryson, Lester Coleman, Catherine Houlston and Mark Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017); Liz Trinder and Mark Sefton, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation, 2018), <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales> [Accessed 10 November 2018].

⁶ Trinder, Braybrook, Bryson, Coleman, Houlston and Sefton, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017); Trinder and Sefton, *No Contest: Defended Divorce in England and Wales* (Nuffield Foundation, 2018), <http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales> [Accessed 10 November 2018].

⁷ The Divorce (etc.) Law Review Bill introduced by Baroness Butler-Sloss, <https://services.parliament.uk/Bills/2017-19/divorceetlawreview.html> [Accessed 10 November 2018].

⁸ *Owens v Owens* [2017] EWCA Civ 182; *Owens v Owens* [2018] UKSC 41.

Also of significance in human rights terms, and underpinning the public reaction, is the shift in understanding of the nature of marriage as a partnership of equals and one that is based on consent. Whilst a major focus of the Government's consultation document is on the negative impact of fault allegations on children, there is also a strong recognition of the increasing importance of autonomy within family law. Thus "The Government strongly supports marriage as a legal union that is freely entered into. We therefore believe that the law should respect people's autonomy in decision-making at the end of a marriage as much as at its beginning".⁹ It is not, therefore, appropriate to require people to justify their decision to divorce to the court by reference to the five facts or to provide evidence of breakdown beyond a simple notification. And if one party has withdrawn their consent, the marriage is over.

The consultation closes on 10 December 2018.¹⁰ A Bill could be expected in Autumn 2019. The only real concern now is that these unnervingly positive and sensible proposals will get derailed or sidelined by the British preoccupation with Brexit.

⁹Ministry of Justice, "Reducing family conflict: reform of the legal requirements for divorce" (September 2018), https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf [Accessed 10 November 2018], p.25.

¹⁰Ministry of Justice, "Reducing family conflict: reform of the legal requirements for divorce", <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/> [Accessed 10 November 2018].

Bulletin

The Court issued, *inter alia*, judgments and decisions in the following cases in August–September 2018:

Article 2 of the Convention

- *Gulyan v Armenia*, finding substantive and procedural breaches where the applicant's son, a witness in a murder case, died after falling from the second-floor window of a police building;
- *Mendy v France*, rejecting as inadmissible complaints where a police officer shot, fatally injuring, the applicant's relative who had been menacing another with a knife.

Articles 2 and 3

- *Saidani v Germany*, rejecting as inadmissible the complaints of the applicant, who was expelled to Tunisia as a supporter of ISIS and liable to faces charges as a terrorist.

Article 3

- *Ocalan v Turkey*, rejecting as inadmissible the complaints by the imprisoned head of the PKK concerning alleged ill-treatment.

Articles 3, 5(1) and (3), 6(1) and 11

- *Mushegh Saghatelyan v Armenia*, finding numerous violations where the applicant, an opposition activist, was arrested during a demonstration, suffered injuries, was detained in breach of domestic law provisions and his trial demonstrated various irregularities.

Article 3, 5(1) and 4, 8 and 18

- *Aliyev v Azerbaijan*, finding that the applicant, an opposition activist, had suffered, *inter alia*, from inhuman conditions of detention, an unjustified arrest, lack of judicial redress for said arrest and an unjustified search of his home, which measures disclosed an abuse on restriction of rights contrary to art.18.

Article 6(1)

- *Kontalexis v Greece (No.2)* finding no breach arising where the domestic courts refused to re-open a criminal case after the finding of a breach of art.6 by the Court in Strasbourg.

Article 6(1) and (3)(d)

- *Dayan v Armenia*, finding a breach where the applicant, tried in Armenia for aiding and abetting the smuggling of enriched uranium, was convicted largely on the basis of the written statements of the principal smugglers who were not heard at his trial, as Georgia refused to transfer them to Armenia.

Articles 6(1) and (3)

- *Vizgirda v Slovenia*, finding a breach where the applicant, a Lithuanian, was provided Russian interpretation in criminal proceedings in Slovenia.

Articles 6 and 8

- *Denisov v Ukraine (GC)*, finding a breach of art.6 due to lack of fair and independent procedures relating to the dismissal of the applicant from his position as president of an

appeal court, but rejecting as inadmissible his complaints that this breached his right to respect for private life under art.8.

Articles 6, 8 and 10

- *Big Brother Watch v United Kingdom*, finding violations of art.8 due to various inadequacies in the oversight of the bulk interception regime and the regime for obtaining communications data from communications providers and a violation of art.10 due to deficient safeguards in those regards as to the interception of journalistic materials; no violation was found as to the sharing of intelligence with foreign powers or as regarded art.6.

Article 8

- *Tuheiava v France*, rejecting complaints that a president of a bar association visited the office of a lawyer in his absence to verify financial and administrative matters;
- *Jishkariani v Georgia*, finding a violation where the domestic court rejected the complaints of a psychiatrist that the Georgian Minister of Justice had defamed her on TV by alleging that she gave prisoners medical reports for money;
- *Solska and Rybicka v Poland*, finding a breach where the applicants, relatives of a victim in the plane crash which killed the Polish President and others in 2010, had no effective opportunity to contest the exhumation of their family member;
- *Brazzi v Italy*, finding a lack of lawfulness in the search of the applicant's home due to the lack of judicial scrutiny of the search warrant either before or after.

Article 9

- *Lachiri v Belgium*, finding a violation where a woman was barred from entering a courtroom as she was wearing a headscarf.

Article 10

- *Savva Terentyev v Russia*, finding a breach where the applicant was convicted and given a suspended sentence for insulting the police in an internet blog post;
- *Ibragim Ibragimov v Russia*, finding a breach where the courts, without making its own assessment, relied on expert evidence to rule that Islamic books by a Said Nursi, a Turkish Islamic theologian and Koran commentator, were to be banned from publication and distribution;
- *Fatih Taş v Turkey (No.5)*, finding a breach where the applicant, the owner of a publishing company, was convicted for denigrating the Republic of Turkey due to publication of a book about a journalist who disappeared in 1994;
- *Annen v Germany (Nos 2–5)*, finding no violation where the applicant, an anti-abortion activist, was subject to an injunction to prevent him accusing doctors, involved in abortions, of committing “aggravated murder”.

A fourth inter-state case has been introduced by Ukraine against Russia concerning primarily the arrest, detention, prosecution and conviction of Ukrainian nationals on charges including membership of organisations proscribed by Russian law, terrorism, espionage and war crimes. A third inter-state case has been introduced by Georgia against Russia, concerning alleged deterioration in human rights conditions along the Georgian-controlled administrative border with Abkhazia and South Ossetia.

The Court held a hearing in the following case in September 2018:

- *ND and NT v Spain*, concerning the complaints under art.4 of Protocol No.4 and art.13 of the Convention by the applicants, migrants from Mali and the Ivory Coast, about their immediate return to Morocco after their attempt to enter the Spanish enclave of Melilla off the north African coast.

Guido Raimondi (Italy) was re-elected as President of the Court.

CPT

From August to September 2018, the CPT made the following visits: an eight-day visit to Spain, focusing on Catalonia; and a 12-day visit to Georgia, following up on recommendations made following its 2014 visit. It also monitored a flight returning foreign nationals from Germany to Afghanistan.

It issued reports on its 2017 visit to Ukraine; and on its 2017 visit to the transit camps in Hungary, finding decent conditions but noting complaints of ill-treatment of migrants being “pushed back” to Serbia.

Bulletin: EU Charter of Fundamental Rights

General Court of the European Union

The Court issued, inter alia, judgments and decisions in the following during August–September 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 7 and 17

- *Amicus Therapeutics UK and Amicus Therapeutics v EMA* (T-33/17), 25 September 2018, regarding authorisation for the medicinal product Galafold, in which the applicant requested access to documents concerning Galafold's authorisation, which request was refused. The claim was that this refusal was a breach of their right to conduct a business, but it was held that there was no general presumption of confidentiality in respect of clinical study reports, so the appeal was dismissed in its entirety.

Articles 16, 17, 41, 47 and 52

- *Sberbank of Russia, VTB Bank, Gazprom Neft and DenizBank v Council* (T-732/14, 734/14, 735/14 and 798/14), 13 September 2018, on sanctions imposed on Russia, the claim being based on the grounds of interfering with the claimant's right to conduct a business, which the Court accepted the sanctions do, but the right is limited proportionately.

Articles 41, 47, 49 and 52

- *Rosneft v Council* (T-715/14), 13 September 2018, on sanctions imposed on Russia, the claim being based on the grounds of refusal of access to documents in the own file, and an infringement of the right to fair judicial proceedings. The appeal was dismissed in its entirety.

Articles 41, 47 and 52

- *Almaz-Antey v Council* (T-515/15), 13 September 2018, on sanctions imposed on Russia, the claim being based on the grounds of failing to disclose evidence for the claimant's inclusion on the sanctions list. The appeal was dismissed in its entirety.

Articles 47 and 48

- *Ezz v Council* (T-288/15), 27 September 2018, on sanctions imposed on Egypt. The claim argued that the Council applied an irrefutable presumption of respect for rights by the Egyptian authorities, and thereby breached its obligation to ensure respect of the claimants' rights. The appeal was dismissed in its entirety.

The Court of Justice of the European Union

The Court issued, inter alia, judgments and decisions in the following during August–September 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 4

- *RO* (C-327/18 PPU), 19 September 2018, in which the claimant was the subject of two European Arrest Warrants (EAWS) issued by the UK to Ireland. It was argued that because of the UK's withdrawal from the EU, he will be subject to degrading treatment in a Northern

Irish prison. It was held that the mere notification of withdrawal did not justify the refusal to execute the EAW, especially when the Member State still remains part of the EU.

Articles 4, 18, 19 and 47

- *Belastingdienst v Toeslagen* (C-175/17), 26 September 2018, in relation to the withdrawal of an Iraqi national's Dutch residency permit. He was refused international protection, and subject to the threat of return to Iraq. It was held that the principle of effectiveness did not allow for the suspensory effect of national legislation that originally denied him international protection and required his return.

Articles 16 and 47

- *Colino Sigüenza* (C-372/16), 7 August 2018, in relation to an individual's claim of unfair dismissal as part of a collective dismissal that was carried out because of the declining economic situation of the employer. The claimant argued that extending res judicata of the collective dismissal claim already brought by the workers' representatives was an infringement of his own right to an effective remedy. The question was declared inadmissible for lack of information.

Articles 18, 19(2) and 47

- *Staatssecretaris van Veiligheid en Justitie* (C-180/17), 26 September 2018, in which two Russian nationals were denied international protection and ordered to return, which they appealed. It was held that the principle of effectiveness did not allow for the suspensory effect of national legislation that originally denied them international protection and required their return and that this was not a breach of their right to an effective remedy.

Article 21

- *IR* (C-68/17), 11 September 2018, the claimant was dismissed from IR, a company that carried out the work of Caritas (a Roman Catholic Church confederation of charities), which was established by German law. He was dismissed for remarrying and claimed that this was discrimination on the grounds of religion. It was held that if it is impossible for national courts to interpret provisions of national law consistent with EU law, then the national courts must disapply those provisions.

Articles 41, 47 and 48

- *UBS Europe* (C-358/16), 13 September 2018, concerning the claimant's dismissal as a director and his claim that his file should be an exception to the obligation of professional secrecy. It was held that in accordance with the rights of defence, it was for the national court to balance the obligation of professional secrecy with whether that information is objectively connected to the complaints upheld against him.

Articles 41 and 47

- *Klein v Commission* (C-364/17 P), 6 September 2018, a claim against the decision to prohibit an inhaler and "effecto" device. The arguments concerned the right to a fair trial. However, it was held that there was nothing to justify setting the judgment under appeal aside because there had not been any detrimental consequences for the appellant.

Article 47

- *Hochtief* (C-300/17), 7 August 2018, the applicant submitted to a tender for contracts but their application was rejected because of a conflict of interest. The question for the court related to the right to judicial effectiveness. It was held that the right does not preclude a national procedural rule which restricts judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for examining only the pleas raised before that committee;
- *CE and NE* (C-325/18 and 375/18 PPU), 19 September 2018, in relation to British parents who arrived in Ireland with three children who were made wards of court, to be returned to the UK. A challenge to this decision was made on the grounds of rights to effective judicial protection. It was held that enforcement of the decision, prior to a declaration of enforceability against the parents, was not allowed.

Articles 47 and 48

- *Milev* (C-310/18 PPU), 19 September 2018, the claimant was arrested on suspicion of being the perpetrator of various criminal cases, on the basis of a witness statement, which was considered *prima facie* “credible” enough. It was argued that this infringed his right to effective judicial protection, but it was held that as long as he was not being referred to as “guilty” there was no breach of his rights.

Article 49

- *Cleargeau* (C-115/17), 7 August 2018, the claimant fraudulently declared that they had “boneless cuts from hindquarters” of adult male cattle, when the cuts were actually from the forequarters. After this, the rules changed and from the deceit the claimant was able to fraudulently claim export refunds. The question was whether the principle of the retroactive application of the more lenient criminal law would apply in this case, it was held this case it did not because of the claimant’s deceitful behaviour.

European Court of Human Rights

The European Court of Human Rights issued, *inter alia*, judgments and decisions in the following during August–September 2018 (all articles refer to the EU Charter, unless otherwise specified):

Articles 7, 8 and 11

- *Big Brother Watch v United Kingdom* (App. Nos 58170/13, 62322/14, and 24960/15), judgment of 13 September 2018, in which the Court considered the UK system of bulk interception of communications under the previous legislative regime (i.e. pre-Investigatory Powers Act 2016). It held the regime to be incompatible with the rights to respect for private and family life and to freedom of expression.

Articles 47, 48(2)

- *Vizgirda v Slovenia* (App. No.59868/08), judgment of 28 August 2018, in which it was held that provision of translation only in Russian for a Lithuanian national on trial for criminal offences in Slovenia was a violation of the right to a fair trial.

UK Appellate Courts

The appellate courts in the UK issued, inter alia, judgments and decisions in the following during August–September 2018 (all articles refer to the EU Charter, unless otherwise specified):

Article 46

- *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, in which the Court of Appeal dismissed an appeal against the first instance decision to uphold the legality of the deprivation of the appellant's British citizenship on grounds of the public good.

The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit¹

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✉ Brexit; European Court of Human Rights; European Court of Justice; Human rights; Immigration policy; Parliamentary sovereignty

Abstract

In this article, the authors discuss the cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights to re-evaluate the major promises of the Leave Campaign, namely parliamentary sovereignty and immigration control. The authors also analyse the potential of such cross-fertilisation for the development—or regress—of international human rights. In particular, the authors point out that the interplay between the two courts would lead to continued leverage of the Luxembourg Court and EU law on British human rights practices through the binding force of the European Convention on Human Rights and the judgments of the European Court of Human Rights. Meanwhile, the authors also highlight the importance of protecting the Strasbourg Court from attacks on its legitimacy and desirability that fuelled the momentum for Brexit and the challenge to the European Court of Justice's jurisdiction over the United Kingdom.

1. Introduction: is Brexit a crisis for human rights?

In July 2018, the British Prime Minister Theresa May reassured the EU that the UK will not withdraw from the European Convention on Human Rights (ECHR or the Convention).² After her advocacy for Britain to leave the Convention entirely, regardless of the outcome of the Brexit vote,³ the Prime Minister's pledge was very welcome. Her shift in attitude was in large part thanks to pressure from Brussels, which

¹ This text is based on the speech delivered by Professor Pinto de Albuquerque at the annual meeting of the European Society of International Law, at the University of Manchester, on 15 September 2018. The usual caveat applies: the opinion expressed in this text binds only its authors and not the Court.

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² UK Government, "The Future Relationship between the United Kingdom and the European Union" (July 2018), p.52, available at: <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> [Accessed 10 November 2018] ("The UK is committed to membership of the European Convention on Human Rights").

³ A. Asthana and R. Mason, "UK must leave European convention on human rights, says Theresa May" (25 April 2016), *Guardian*, <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> [Accessed 10 November 2018].

had warned that the UK's exit from the Convention will result in a "guillotine clause" nullifying any security partnership between the country and the EU.⁴

This news triggered a sigh of relief for the international human rights community, which had legitimate concerns for the future of human rights in the UK should Brexit be finalised.⁵ For those paying attention to the legal consequences of the EU Withdrawal Act in particular, this reprieve was timely. A potential British exit from the EU does pose a real threat to human rights: the Withdrawal Act would dilute EU legal standards in important areas such as personal privacy, data protection, workers' rights and non-discrimination, allowing them to be amended or reversed by domestic legislation. Moreover, if exit day were to come, the EU Charter would technically lose its status as binding domestic law as the British courts would no longer be obligated to follow the case-law of the Court of Justice of the European Union (CJEU).

Contrary to the belief of some optimists,⁶ common law is not a satisfactory alternative. For one, common law is underdeveloped in emerging areas of law like data protection and environmental conservation. Furthermore, especially in the context of the growing popularity of the low-regulation economic model, the undoing of pro-labour and equality-enforcing human rights norms appears likely.⁷ In addition, the rights and freedoms guaranteed in the EU Charter of Fundamental Rights (CFR) would lose their supremacy and be at the mercy of a politically charged Parliament. Worse still, the UK government may now be free to amend or repeal legislation with little parliamentary scrutiny, thereby diminishing the accountability of the executive branch.

Meanwhile, Britain's renewed endorsement of the Convention does not mitigate the serious risk to human rights in the UK and beyond.⁸ A relatively undiscussed aspect in this analysis is the phenomenon of cross-fertilisation between the CJEU and the Strasbourg Court, which means that Britain's disavowal of the former may have reverberating consequences for the latter.

More specifically, the backlash directed at the CJEU that partly motivated the Brexit referendum needs very little justification to transfer to the European Court of Human Rights.⁹ After all, every EU Member State must abide by the requirements of the protection of fundamental rights, which both Courts enforce through their respective mechanisms. Indeed, the European Court of Human Rights has not been a popular institution with the British in recent years. The public outrage at *Hirst v United Kingdom*¹⁰—although the UK government eventually reached a contestable compromise with the Committee of Ministers¹¹—was an early warning that the European Court of Human Rights could very well be the next target of an affront.

In the debates leading up to the Brexit referendum, two strands of criticism had been prominent in the European political Zeitgeist. On the one hand, parochialists insisted that the EU, Council of Europe and

⁴ James Crisp, "EU could cancel Brexit security deal if UK Quits European Court of Human Rights" (18 June 2018), *Telegraph*, <https://www.telegraph.co.uk/politics/2018/06/18/eu-could-cancel-brexit-security-deal-uk-quits-european-court/> [Accessed 10 November 2018].

⁵ See, e.g. Amnesty International UK, "Brexit Bill: A risk to your human rights" (26 February 2018), <https://www.amnesty.org.uk/annual-report-2017-18-brexit> [Accessed 10 November 2018]; Equality and Human Rights Commission, "Joint statement: the UK's human rights and equality bodies on Brexit" (13 June 2018), <https://www.equalityhumanrights.com/en/our-work/news/joint-statement-uks-human-rights-and-equality-bodies-brexit> [Accessed 10 November 2018].

⁶ See, e.g. S. Parsons, "The Brexit Effect" (2018) 168 *New Law Journal* 7795 ("whatever happens to the Convention or the Charter after Brexit the protection of the common law against the power of the state will remain").

⁷ See O. Gersemann and I. Grabitz, "Philip Hammond issues threat to EU partners" (15 January 2017), *WELT*, <https://www.welt.de/english-news/article161182946/Philip-Hammond-issues-threat-to-EU-partners.html> [Accessed 10 November 2018]; D.J. Mitchell, "The UK Should Brexit the Singapore Way" (16 October 2017), *Foundation for Economic Education*, <https://fee.org/articles/the-uk-should-brexit-the-singapore-way/> [Accessed 10 November 2018].

⁸ See, e.g. K. Boyle and L. Cochrane, "The Complexities of Human Rights and Constitutional Reform in the United Kingdom: Brexit and a Delayed Bill of Rights: Informing (on) the Process" (2018) 16 *Northwestern Journal of Human Rights* 22, 36 (warning that the UK "risks sleepwalking into a legal human rights deficit"); Lauren Fielder, "Is Nationalism the Most Serious Challenge to Human Rights? Warnings from Brexit and Lessons from History" (2018) 53 *Texas International Law Journal* 212 (noting that "the human rights implications of the exit will be staggering").

⁹ D. Aronofsky, "Brexit Human Rights Issues: It's Time to Play E.U. Hardball" (2018) 53 *Texas International Law Journal* 178, 181–205.

¹⁰ D. McNulty et al., "Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate" (20 May 2014), *Howard Journal of Crime and Justice*.

¹¹ O. Bowcott, "Council of Europe accepts UK compromise on prisoner voting rights" (7 December 2014), *Guardian*, <https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights> [Accessed 10 November 2018].

the European courts' global reach are threats to democracy at home. For them, universal human rights is a foreign concept, imposed by alien judges who lack sensitivity to domestic traditions.¹² On the other hand, cynics claimed that the European courts' application of human rights law exceeded their authority, venturing into the realm of politics. Related to this line of contention are the accusations of judicial activism and mission creep, which allegedly take place in a non-transparent development of the case-law.¹³

Unfortunately, both of these voices became part of the widespread discourse which has hijacked the media with alarmist cries that the government is losing control over its borders, and that Europe may be risking its cultural identity. The misleading image of Europe under constant siege from international organisations became powerful as a populist battle-cry. In other words, the scepticism at international law was not directed solely at Luxembourg, but applied seamlessly to hostility at the Strasbourg Court as well.¹⁴

This danger is sobering, and raises questions about the sustainability of the relationship between the European Court of Human Rights and the UK. At present, s.2 of the UK Human Rights Act¹⁵ survives, and the European Court of Human Rights case-law will remain as a decisive criterion in adjudicating human rights cases.¹⁶ This means that the rights and principles of EU law insofar as they have been incorporated in the Strasbourg case-law will remain binding for the UK; failure to comply with them may give rise to a right of action. Hence, the European Court of Human Rights could continue to be a thorn for some, who may renew a campaign to target the Convention and the Court. In the face of these possible attacks, the Court would be faced with a choice: to appease the critical voices by issuing more favourable rulings through its margin of appreciation doctrine, or firmly stand its ground to hold the state accountable even after its departure from the EU.

2. Cross-fertilisation between the CJEU and the European Court of Human Rights

In principle, the CJEU and the European Court of Human Rights are separate bodies with no binding force on each other. The autonomy of each court is not an accident: art.52(3) of the CFR, setting out the relationship between the two courts, consciously prevented the European Court of Justice (ECJ) from being subordinate to the Strasbourg Court.¹⁷ While art.52(3) also states that the Charter rights equivalent to those in the ECHR are alike in scope and meaning, there is no other codification of the legal authority of European Court of Human Rights judgments. Nonetheless, respect for the Strasbourg Court's interpretation of overlapping rights is especially strong for "rights on the integrity of the person, the prohibition of torture, inhuman and degrading treatment and punishment, slavery and forced labor".¹⁸ As

¹² Judge Pinto highlighted this contention in a recent article. See P. Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 120.

¹³ See Conservative Party, "Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Human Rights Laws" (October 2014), www.conervatives.com/-/media/files/downloadable%20Files/human_rights.pdf [Accessed 10 November 2018]. See also Human Rights Watch, "The UK government's proposals regarding the Human Rights Act and the European Court of Human Rights" (20 May 2015), <https://www.hrw.org/news/2015/05/20/uk-governments-proposals-regarding-human-rights-act-and-european-court-human-rights> [Accessed 10 November 2018] ("[Conservatives] have accused judges at the European Court of Human Rights of engaging in 'mission creep'—expanding the meaning of rights in the Convention beyond what was originally intended").

¹⁴ See, e.g. W. Worley, "Theresa May 'Will Campaign to Leave the European Convention on Human Rights in 2020 Election'" (29 December 2016), *Independent*, <https://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html> [Accessed 10 November 2018].

¹⁵ Section 2(1) of the HRA 1998 requires domestic courts to take into account "any judgment, decision, declaration or advisory opinion of the European Court of Human Rights". Section 3(1) provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

¹⁶ On the legal force of the Strasbourg judgments in the UK legal order, see Judge Pinto de Albuquerque's dissenting opinion in *Hutchinson v United Kingdom* [GC] (App. No.57592/08), judgment of 17 January 2017.

¹⁷ The relevant section reads: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection", EU Charter of Fundamental Rights art.52(3).

¹⁸ D. Shelton, "The Boundaries of Human Rights Jurisdiction in Europe" (2003) 13 *Duke Journal of Comparative and International Law* 95, 117.

of today, there is no momentum to change the “current informal, distant, mutually respectful arrangement between the two courts”¹⁹.

To present, there has been some hesitation to make a formal arrangement to recognise each other’s authority. The EU itself is not a party to the Convention, and apparently cannot become a party without amendment of the Treaty on the European Union. The CJEU made this point in *Opinion 2/13*, in which it held that the EU’s accession to the ECHR would be incompatible with existing treaties.²⁰

A revealing example of such cautious attitude is *Elgafaji*,²¹ in which the ECJ discussed the authority of the European Court of Human Rights’ interpretation of art.3. Although the ECJ admitted that European Court of Human Rights decisions “form[ed] part of the general principles of Community law … and while the case-law of the [European Court of Human Rights] is taken into consideration in interpreting the scope of that right in the Community legal order”,²² it nonetheless refused to accept the Strasbourg jurisprudence as conclusive in adjudicating art.15(c) of the CFR.

The merely “persuasive” nature of the European Court of Human Rights’ case-law was also delineated by Advocate-General Darmon, who stated:

“… most importantly, I must not fail to remind the Court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.”²³

Nevertheless, the jurisprudential dialogue between the two courts is unmistakable. As this section will demonstrate, there are countless examples of the European Court of Human Rights informing the CJEU’s interpretation of the general principles of EU law. In fact, we use the term “cross-fertilisation”²⁴ precisely because the two courts influence each other even where there is no jurisdictional overlap, or legal necessity to rely on each other. While the exact limits of European Court of Human Rights’ status as persuasive authority are not clear, Strasbourg judgments are frequently invoked by the ECJ. This exchange is partly owed to the constitutional traditions common to the EU Member States, who have incorporated the Convention into their domestic legal systems.²⁵ Consequently, the Luxembourg Court refers to the European Court of Human Rights on a “considerable variety of issues”.²⁶ Direct citations to Strasbourg case-law have been increasingly frequent,²⁷ an “important development from the earlier conduct of the ECJ, in which it would look at the text of the ECHR but make little reference to the European Court of Human Rights’ case[-law]”.²⁸

¹⁹ G. de Burca, “The Road Not Taken: The European Union as a Global Human Rights Actor” (2011) 105 *American Journal of International Law* 649, 679.

²⁰ *Opinion 2/13* of the European Court of Justice (Full Court), 18 December 2014.

²¹ *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] E.C.R. I-921.

²² *Meki Elgafaji* (C-465/07) [2009] E.C.R. I-921 at [28].

²³ Opinion Advocate General in *Orkem v Commission of the European Communities* (C-374/87) [1989] E.C.R. 3283 at [139]–[140].

²⁴ As used by the former Advocate General of the CJEC, Francis G. Jacobs. See F.G. Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice” (2003) 38 *Texas International Law Journal* 547.

²⁵ *Erich Stauder v City of Ulm—Sozialamt* (C-29/69) [1969] E.C.R. 419 at [7]; *Bernard Connolly v Commission of the European Communities* (C-274/99) [2001] E.C.R. I-1611 at [38]; *ASML Netherlands BV v Semiconductor Industry Services GmbH* (C-283/05) [2005] E.C.R. I-0000 at [26].

²⁶ S. Douglas-Scott, “The ECJ and European Court of Human Rights after Lisbon”, in S. Alexander de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishers, 2013), p.157. See also J. Callewaert, “The European Convention on Human Rights and European Union Law: A Long Way to Harmony” [2009] E.H.R.L.R. 768.

²⁷ A. Balfour, “Eliminating Conflicting Interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: The PDIQ System as a Preventative Solution” (2007) 2 *Intercultural Human Rights Law Review* 183, 193.

²⁸ Balfour, “Eliminating Conflicting Interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: The PDIQ System as a Preventative Solution” (2007) 2 *Intercultural Human Rights Law Review* 183, 193.

The phenomenon is unsurprising, given that the CJEU has held that the substantive fundamental rights provisions of the Convention reflect existing general principles of EU law. Such overlap could be summarised as follows: “[f]undamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.²⁹ Moreover, the ECJ has generally been a principled protector of rights and freedoms in Europe, making it aligned with the Strasbourg Court in its vision and values. As Philip Aston said, the ECJ “deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter”.³⁰

Thus, without citing the European Court of Human Rights as a conclusive judicial authority, the ECJ has ruled in striking likeness with Strasbourg when faced with parallel cases. One example is *NS v Secretary of State for the Home Department*, which addressed the expulsion of non-EU national asylum seekers under the Dublin II Regulation.³¹ Here, the ECJ held that the Member States may not transfer an asylum seeker to the “Member State responsible” where there are systemic deficiencies in the asylum application procedure, and grounds for believing that the asylum seeker would face a real risk of inhuman or degrading treatment due to conditions of reception.³² Earlier that year, the European Court of Human Rights had reached a similar decision in *MSS v Belgium and Greece*, in which the Court found Greece and Belgium to have violated the Convention through its treatment of an Afghan asylum seeker; Greece had serious deficiencies in the asylum procedure that put the applicant at risk of expulsion without proper examination of merits, and Belgium knowingly exposed him to sub-standard detention and living conditions.³³ Thus, the CJEU adopted the European Court of Human Rights’ reasoning in holding that states are responsible for knowingly exposing the applicant to danger. For critics, this invoked the argument that by “endorsing the [European Court of Human Rights’] analysis, the ECJ profoundly unsettled the principle of mutual confidence that underlies the CEAS common European asylum system, and by extension, the entire edifice of European integration”.³⁴

The ECJ more explicitly followed the European Court of Human Rights’ interpretation in *MP v Secretary of State for the Home Department*, in which it explained that “in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR”.³⁵ Consequently, the ECJ held that a non-EU national asylum seeker could not be expelled where his medical conditions would put his life at risk. Similarly, the ECJ adopted Strasbourg’s approach to the rights of asylum seekers in *Hirsi Jamaa*, quoting the rationale of *Hirsi* in its own judgments of *Moussa Abdida* and *Abdoulaye Amadou Taal*.³⁶ In sum, the substance of many CJEU decisions resembles much of the European Court of Human Rights’ case-law.³⁷

The influence is bilateral.³⁸ The Strasbourg Court “has been deferential to the Community in most of its decisions”,³⁹ respecting the CJEU’s competence to protect the rights and freedoms in Member States. For instance, in *Pafitis v Greece*, the European Court of Human Rights ruled in a like manner to the Court

²⁹ Treaty Establishing a Constitution for Europe art. I-9; Treaty on European Union (Lisbon Treaty), art.6(3).

³⁰ P. Alston and J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy” (1998) 9 *European Journal of International Law* 658, 709.

³¹ *NS v Secretary of State for the Home Department* [GC] (C-411/10) [2012] 2 C.M.L.R. 9.

³² *NS* (C-411/10) [2012] 2 C.M.L.R. 9 at [94].

³³ *MSS v Belgium and Greece* [GC] (2011) 53 E.H.R.R. 2.

³⁴ G.de Baere, “The Court of Luxembourg Acting as an Asylum Court” (2013) *Leuven Centre for Global Governance Studies* (2013).

³⁵ *MP v Secretary of State for the Home Department* [GC] (C-353/16), 24 April 2018 at [37].

³⁶ Compare *Centre public d'action sociale d' Ottignies-Louvain-la-Neuve v Moussa Abdida* [GC] (C-562/13) [2015] 2 C.M.L.R. 15 and *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy* (C-239/14), 17 December 2015 with *Hirsi Jamaa v Italy* [GC] (2012) 55 E.H.R.R. 21.

³⁷ See S. O’Leary, “Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU” (2016) 56 *Irish Jurist* 22.

³⁸ See generally, G. Harpaz, “The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance Coherence and Legitimacy” (2009) 46 C.M.L.R. 105.

³⁹ Shelton, “The Boundaries of Human Rights Jurisdiction in Europe” (2003) 13 *Duke Journal of Comparative and International Law* 95, 116.

of Justice of the European Communities, which had faced the same complaint from the applicants.⁴⁰ Even in controversies that do not have an overlapping jurisdictional issue, the European Court of Human Rights “increasingly refers to the ECJ’s case[-law]”,⁴¹ signalling convergence between the two bodies’ interpretation of human rights standards. *Pellegrin v France* is an early example of this approach.⁴² A more recent example is *Scoppola*,⁴³ in which the European Court of Human Rights made considerable reference to the ECJ judgment of *Berlusconi* under a section dealing specifically with “the case-law of the court of Justice of the European Communities”.⁴⁴ In concluding that the retroactive application of the more lenient penalty was part of the constitutional traditions common to the Member States, the Strasbourg Court quoted at length the decision from Luxembourg.⁴⁵ Another case in point is *DH v Czech Republic*,⁴⁶ in which the European Court of Human Rights cited multiple cases from the CJEU when introducing the concept of indirect discrimination as a violation of art.41.⁴⁷

The borrowing of CJEU case-law has been especially noticeable in cases without precedent in Strasbourg. An early example is *Marckx v Belgium*.⁴⁸ Faced with provisions in Belgian law that disadvantaged an unmarried mother in establishing maternity of the child, the European Court of Human Rights made a brief reference to the ECJ’s *Defrenne* judgment in striking down the distinction between “legitimate” and “illegitimate” families for the purpose of protecting the right to respect for family life under art.8 of the Convention.⁴⁹ Likewise, several innovations in ECJ jurisprudence were cited in European Court of Human Rights’ judgments on issues involving self-incrimination, the right to a name, or the right to privacy in one’s health status.⁵⁰

Influence from the CJEU has not only been evident in the form of case-law, but through the more general impact of EU law on the Court as well. In *Karacsony*, the CJEU’s interpretation of the EU Charter of Fundamental Rights served as one of the guiding comparative principles for the Strasbourg Court.⁵¹ The judges were more explicit in *Magyar Helsinki*, dedicating a section to the CFR and two CJEU Grand Chamber rulings on the protection of personal data vis-à-vis the freedom of expression and information to support the finding of violation of art.10.⁵²

Indeed, the Strasbourg Court has adopted EU law in many consequential areas, including the mutual recognition of judicial decisions,⁵³ procedural rights in criminal proceedings,⁵⁴ and data protection.⁵⁵ And most importantly for the Brexit debate, EU law on asylum proceedings and family reunification has also had a significant effect on how the European Court of Human Rights treats relevant applications. For example, in *JK*, the Court extensively cited the Council Directive on minimum standards for the qualification and status of third country nationals, as well as three CJEU judgments, before concluding that the non-EU national applicants’ deportation would give rise to a violation of ECHR art.3.⁵⁶ Similarly, *Biao v Denmark* relied on the European Convention on Nationality in addition to recommendations and reports from the

⁴⁰ *Pafitis v Greece* (1999) 27 E.H.R.R. 566.

⁴¹ Douglas-Scott, “The ECJ and European Court of Human Rights after Lisbon”, in S. Alexander de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (2013), p.159.

⁴² *Pellegrin v France* [GC] (2001) 31 E.H.R.R. 26. Paragraph 47 cites *European Commission v Grand Duchy of Luxembourg* (C-473/93) [1996] E.C.R. I-3248.

⁴³ *Scoppola v Italy* [GC] (2013) 56 E.H.R.R. 19; *Berlusconi* [GC] (C-387/02) [2005] E.C.R. I-3565.

⁴⁴ *Scoppola* [GC] (2013) 56 E.H.R.R. 19 at [37]–[39].

⁴⁵ The European Court of Human Rights cited *Criminal Proceedings against Silvio Berlusconi* (C-391/02 and C-403/02) [2005] E.C.R. I-3565.

⁴⁶ *DH v Czech Republic* [GC] (2008) 47 E.H.R.R. 3.

⁴⁷ *DH* [GC] (2008) 47 E.H.R.R. 3 at [85]–[91].

⁴⁸ *Marckx v Belgium* (1979) 2 E.H.R.R. 330.

⁴⁹ *Marckx* (1979) 2 E.H.R.R. 330 at [59].

⁵⁰ L. Scheeck, “The Relationship between the European Courts and Integration through Human Rights” (2005) 65 *Heidelberg Journal of International Law* 837, 869 [citing D. Simon, “Les droits du citoyen de l’Union” (2000) 12 *Revue universelle des droits de l’homme* 1.

⁵¹ *Karacsony v Hungary* (2017) 64 E.H.R.R. 10 at [54]–[55].

⁵² *Magyar Helsinki Bizottság v Hungary* (App. No.18030/11), judgment of 8 November 2016 at [58]–[59].

⁵³ *Ayotins v Latvia* (2017) 64 E.H.R.R. 2.

⁵⁴ *Ibrahim v United Kingdom* (App. Nos 50541/08, 50571/08, 50573/08 and 40351/09), judgment of 13 September 2016.

⁵⁵ *Barbulescu v Romania* (App. No.61496/08), judgment of 5 September 2017.

⁵⁶ *JK v Sweden* [GC] (2017) 64 E.H.R.R. 15 at [47]–[51].

Council of Europe Commissioner for Human Rights, Parliamentary Assembly of the Council of Europe, and the Committee of Ministers to rule in favour of the applicants. In *Biao*, the Court also referenced at length the CJEU's *Metock* judgment for the "conditions and limits applicable to the right of residence of spouses of EU citizen".⁵⁷ *Jeunesse* is another recent Grand Chamber judgment on the right to family reunification under art.8, in which the CJEU's *Gerardo Ruiz* and *Dereci* played an influential role.⁵⁸

Notably, even after the "disappointment"⁵⁹ of Opinion 2/13, European Court of Human Rights' references to the latter's case-law on the Charter and the CFR itself have increased.⁶⁰

3. A double-edged sword: "virtuous" or "vicious" cycle of cross-fertilisation

Commentators studying the "increasingly tight and symbiotic relationship between the European Court of Justice and the European Court of Human Rights" have suggested that this jurisprudential dialogue may be strategic, "with the aim of allowing each other to increase domination of public and private actors who march into judicial arenas".⁶¹ According to such view, judges of the two courts establish an integrative framework in which they "increase each other's voice and power".⁶² The convergence has been interpreted by a former President of the European Court of Human Rights as a demonstration of "a clear commitment to ensure harmony between" Luxembourg and Strasbourg.⁶³

To be clear, this is not to say that the two Courts are always in agreement with each other. The ECJ has never ruled that the decisions of the European Court of Human Rights are controlling on matters of interpretation of human rights. As a result, they have at times "interpreted the rights outlined in the Convention on Human Rights differently".⁶⁴

However, a "virtuous cycle" of the two courts' mutual reinforcement has been visible in some recent cases. One prominent example is the impact of the European Court of Human Rights' *Bosphorus* judgment on the *Kadi* saga. In *Kadi I*, the ECJ clarified the constitutional order of the EU vis-à-vis other international obligations of Member States, creating a benchmarking effect for the evaluation of any Community or domestic act implementing Security Council resolutions.⁶⁵ *Kadi I* affirmed that immunity from European jurisdiction would "appear unjustified, for clearly that re-examination procedure [before the Sanctions Committee] [did] not offer the guarantees of judicial protection".⁶⁶ This was essentially an application of the *Bosphorus* test, under which the European Court of Human Rights recognises a presumption that action taken pursuant to an international obligation complies with the ECHR if the organisation provides equivalent human rights protections; but the protection must be both substantive and procedural—the presumption may be rebutted if that protection is deemed manifestly deficient.⁶⁷ Applying the *Bosphorus*

⁵⁷ *Biao v Denmark* [GC] (2017) 64 E.H.R.R. 1 at [59] [citing *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] E.C.R. I-6241].

⁵⁸ *Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17 at [71]–[72] [citing *Gerardo Ruiz Zambrano v Office national de l'emploi* (C-34/09) [2011] E.C.R. I-1177 and *Dereci v Bundesministerium für Inneres* (C-256/11) [2011] E.C.R. I-11315].

⁵⁹ European Court of Human Rights, 2014 Annual Report, Foreword by President Spielmann, p.6.

⁶⁰ L.R. Glas and J. Krommendijk, "From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts" (2017) 17 *Human Rights Law Review* 567, 577.

⁶¹ C.P.R. Romano, "Symposium: The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems: Deciphering the Grammar of the International Jurisprudential Dialogue" (2009) 41 *New York University Journal of International Law and Politics* 755, 770.

⁶² L. Scheek, "The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?", in G. Martinico and F. Fontanelli (eds), *The ECJ Under Siege: New Constitutional Challenges for the European Court* (Icfai University Press, 2009).

⁶³ L. Wildhaber, "The Coordination of the Protection of Fundamental Rights in Europe" (8 September 2005), *Address by the President of the European Court of Human Rights in Geneva*.

⁶⁴ E.F. Defeis, "Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights" (2001) 19 *Dickinson Journal of International Law* 301, 317.

⁶⁵ *Kadi and Al Barakaat Int'l Found. v Comm'n (Kadi I)* (C-402 and C-415/05P) [2008] E.C.R. I-6352.

⁶⁶ *Kadi I* (C-402 and C-415/05P) [2008] E.C.R. I-6352 at [322].

⁶⁷ *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC] (2005) 42 E.H.R.R. 1 at [45].

test in *Kadi I*, the ECJ found that the protection at the United Nations was manifestly deficient.⁶⁸ The *Kadi* cases then fed back into the Strasbourg jurisprudence, inspiring the Court to find for the applicants again in *Al-Dulimi v Switzerland*.⁶⁹ Thus, in *Al-Dulimi*, the Swiss courts were found to have failed to provide meaningful judicial review of the applicants' listing by the Sanctions Committee of the Security Council. The Grand Chamber discussed *Kadi I* and *Kadi II* at length as "relevant European case-law", quoting sections of each judgment at length.⁷⁰

Furthermore, there are multiple examples of the ECJ reconsidering its own case-law in light of developments at the European Court of Human Rights. In *Hoechst AG*, the ECJ had refused to follow the European Court of Human Rights' innovative interpretation of art.8 in *Niemietz v Germany*.⁷¹ Rejecting the Strasbourg Court's expansive reading of the word "domicile", the ECJ had concluded that the scope of art.8 is concerned with personal freedoms and cannot encompass business premises.⁷² Later, the ECJ reversed this position in *Roquette Frères*,⁷³ explaining that for the purposes of determining the scope of privacy in relation to business practices, "regard must be had to the case-law of the European Court of Human Rights".⁷⁴

Similarly, ECJ jurisprudence on the right against self-incrimination has been brought in line with that of Strasbourg. In *Orkem*, Luxembourg had limited the scope of the right against self-incrimination only to criminal investigations, not to administrative procedures.⁷⁵ Thirteen years later, in *LVM*,⁷⁶ the ECJ relied in part on "further developments in the case-law of the European Court of Human Rights" to find in favour of the applicants.⁷⁷ Here, the European Court of Human Rights' judgment in *Funke*—which held that the right to remain silent and against self-incrimination applies to any attempt to use pecuniary sanction—was particularly noted.⁷⁸ Another example is the ECJ's discussion of the European Court of Human Rights in *Goodwin v United Kingdom* when ruling in favour of the applicants in *KB*.⁷⁹ Interestingly, *KB* addressed discrimination in pension eligibility, while *Goodwin* was primarily about a transgender woman's access to marriage.⁸⁰ Nonetheless, *Goodwin* was an informative case for the ECJ in concluding that the UK had discriminated against the transsexual applicants in their access to pension; the judgment noted the European Court of Human Rights' earlier finding in a separate paragraph.⁸¹

Furthermore, it is probable that the spirit of complementarity between the two courts contributed to the gradual rise of importance of human rights in EU law.⁸² For one, the EU Charter itself "borrows fundamental rights from the ECHR".⁸³ In 1997, the revised Treaty of the European Union (Treaty of Amsterdam) included a new objective "to strengthen the protection of the rights and interests of the

⁶⁸ J. Malenovsky, "L'enjeu délicat de l'éventuelle adhésion de l'Union européenne à la Convention européenne des droits de l'homme: de graves différences dans l'application du droit international, notamment général, par les juridictions de Luxembourg et Strasbourg" (2009) 113 *Revue Générale de Droit International Public* 753.

⁶⁹ *Al-Dulimi and Montana Management Inc v Switzerland* [GC] (App. No.5809/08), judgment of 21 June 2016.

⁷⁰ *Al-Dulimi* [GC] (App. No.5809/08) at [59]–[65].

⁷¹ *Niemietz v Germany* (1992) 16 E.H.R.R. 97.

⁷² *Hoechst AG v Commission of the European Communities* (C-46/87 and C-227/88) 21 September 1989.

⁷³ *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* (C-94/00) [2002] E.C.R. I-9011.

⁷⁴ *Roquette Frères* (C-94/00) [2002] E.C.R. I-9011 at [29].

⁷⁵ *Orkem* (C-374/87) [1989] E.C.R. 3283.

⁷⁶ *Limburgse Vinyl Maatschappij (LVM) v Commission* (C-238/00P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P) [2002] E.C.R. I-8375.

⁷⁷ *LVM* (C-238/00P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P) [2002] E.C.R. I-8375 at [274].

⁷⁸ *Funke v France* (1993) 16 E.H.R.R. 297.

⁷⁹ *KB v The National Health Service and the Secretary of State for Health* (C-117/01) [2004] E.C.R. I-541.

⁸⁰ *Goodwin v United Kingdom* [GC] (2002) 35 E.H.R.R. 18. We qualify the characterisation of the case as "primarily" about marriage because there were also allegations of discrimination in employment, social security and pensions.

⁸¹ *KB* (C-117/01) [2004] E.C.R. I-541 at [33].

⁸² For a general discussion on how human rights came to be eminent in EU law, see N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff Publishers, 1995); P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999); K. Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union" (2000) 6 *Columbia Journal of European Law* 1.

⁸³ B. J-Z Fan, "European Pluralism on the Protection of Fundamental Rights: The European Convention on Human Rights vis-à-vis the EU Legal Order" (2016) 11 *National Taiwan University Law Review* 333, 342.

nationals of its Member States through the introduction of a citizenship of the Union” and “to maintain and develop the Union as an area of freedom, security and justice”.⁸⁴ This objective was reflected in the Treaty of Lisbon art.6(2), which explicitly obligated signatories to respect fundamental rights guaranteed by the ECHR. This requirement has real teeth since states can have their membership rights suspended if they engage in a serious and persistent breach of human rights.

However, the cautionary tale of cross-fertilisation is that it is a double-edged sword. Cross-fertilisation can just as easily lead to a “vicious cycle” of troublesome jurisprudence multiplied through mutual encouragement. For instance, in *Hans Åkeberg Fransson*, the Grand Chamber of the CJEU had held that the principle of *ne bis in idem* obligated states not to impose an administrative proceeding against an individual who already faced criminal charges (*Erledigungsprinzip* or “exhaustion-of-procedure principle”).⁸⁵ Three years later, in *A v Norway*, the European Court of Human Rights ruled differently, holding that duplicate proceedings are permissible if the penalties were proportionate and the proceedings were coordinated (*Anrechnungsprinzip* or “accounting principle”).⁸⁶ *A* thus represented a regression of the protection against double jeopardy. What is noteworthy is that the ECJ then followed this approach in *Luca Menci*, concluding that deviation from *ne bis in idem* is permissible if it “pursues an objective of general interest …, contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage [for the defendant] …, [and] provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary”.⁸⁷

Applying this caution to the present situation, cross-fertilisation could either be a way to shield EU laws on protection of fundamental freedoms from obliteration in the UK, or to diminish the impact of the ECHR. On the one hand, the European Court of Human Rights has the potential to be a mechanism through which the UK is still bound by the CFR and EU norms on human rights. Because Britain remains a party to the ECHR and may not contest European Court of Human Rights’ jurisdiction, Strasbourg can continue to hold the UK accountable to the CFR indirectly where there are comparable violations under the Convention. In other words, considering that the two courts are “jointly involved into the program to accelerate European integration and are dedicated to shaping a new European pluralism constitutional order”,⁸⁸ the European Court of Human Rights could be an enduring leverage of the European legal system.

But from a less optimistic view, the political pressure that led to a Brexit referendum could also be a source of trouble for the European Court of Human Rights. In this regard, it is not irrelevant that the Strasbourg Court has already been criticised for shying away in particularly sensitive or difficult cases.⁸⁹ It is unsurprising that politicians play at the very edge of respect for the Convention, or even beyond this limit, and resist the Convention values and the Court’s judgments in polemic, if not plainly demagogic, moves to gain political support from this or that constituency. If human rights have a basic purpose, it is precisely to be “trump cards” that protect individuals’ fundamental rights against the oppressive actions of ill-advised majorities. This is particularly true in the case of easily discarded minorities, such as prisoners or migrants. Politicians who are backed by these majorities should comply with international human rights in general and with the Convention in particular, since every state official is bound by human rights law and the Convention contributes to promoting a “joint European development of fundamental rights”

⁸⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (1997) art.2.

⁸⁵ *Åklagaren v Hans Åkerberg Fransson* [GC] (C-617/10) [2013] 2 C.M.L.R. 46.

⁸⁶ *A v Norway* [GC] (2017) 65 E.H.R.R. 4.

⁸⁷ *Luca Menci* [GC] (C-524/15), 20 March 2018 at [65].

⁸⁸ B. J-Z Fan, 11 *National Taiwan University Law Review* 333, 338–339.

⁸⁹ For instance, Judge O’Leary of Ireland argued in her dissent in *Ireland v United Kingdom* (App. No.5310/71), judgment of 20 March 2018 that the Court sought to “shelter itself” behind the legal certainty principle to avoid ruling on a political sensitive inter-state matter. See also O. Stiansen and E. Voeten, “Backlash and Judicial Restraint: Evidence from the European Court of Human Rights” (17 August 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166110 [Accessed 10 November 2018] (suggesting that the Court may have become more restrained in their rulings in order to maintain the support of traditional allies).

(*gemeineuropäische Grundrechtsentwicklung*).⁹⁰ What is truly disheartening is that constitutional and supreme courts all over Europe are also resisting the application of the Convention values and the Court's judgments, shifting their role from guarantors of the rule of law to facilitators of the exercise of power by politicians.⁹¹

As political scapegoating of the European legal order in recent years has demonstrated, the Convention is not immune from attacks on legitimacy, authority and desirability in a changing Europe.⁹² To emerge from these volatile times as a champion of individual freedoms and rights, the Court must brace for the coming attacks and make a renewed commitment to safeguarding the rule of law and human rights in Europe.

4. The future of human rights in the UK and in Europe—where do we go from here?

The preceding section has thus demonstrated that, contrary to the campaign's promises that the UK will be able to control immigration without accountability to EU laws and "make [their] own laws",⁹³ parliamentary sovereignty in the UK will not be left without external checks even if Brexit is finalised. Since the UK will still be under the jurisdiction of the European Court of Human Rights, national legislation will not be immune from challenges on the basis of incompatibility with the rights and freedoms guaranteed in the ECHR. The Human Rights Act 1998, which incorporated the Convention rights into domestic law, will also endure to keep the UK government accountable. Moreover, because of the influence of the ECJ on the European Court of Human Rights jurisprudence as discussed above, the UK will indirectly be bound by the general principles of European law and the CFR insofar as they have been incorporated in the Strasbourg case-law. Admittedly, the purposive approach adopted by the CJEU in interpreting these standards may not be followed by the British courts after their departure from the EU is complete. However, the philosophy and decisions of the European Court of Human Rights in treating the Convention as a living instrument will still have force, which will facilitate cross-fertilisation between the two courts.

In other words, there will fortunately be no human rights "vacuum" in the UK regardless of the final outcome on Brexit. This means that the two major promises that Brexit proponents had made to the British public—parliamentary "sovereignty" and curtailing immigration⁹⁴—will ring hollow. In particular, as the judgment in *Hirsi Jamaa* demonstrates, the European Court of Human Rights is a staunch guardian of human rights for all applicants, including immigrants and refugees.⁹⁵ If the xenophobic fears of asylum seekers and migrants motivated any part of the campaign, their supporters should reconsider the value of an EU exit to their objectives.

The ECHR will continue to impose standards for regulations and policies regardless of the political will of the incumbent party in London. Furthermore, regardless of attacks from discontent Member States at times, the European Court of Human Rights will persist in "reject[ing] a self-contained ... and sovereigntist convention interpretation".⁹⁶ The legal order established in Europe is "not a traditional international accord of juxtaposed national egoisms",⁹⁷ leaving no part of the Member States' legal order

⁹⁰ The expression was coined by the German Federal Constitutional Court (BVerfG 111, 307, § 62).

⁹¹ The image comes from Michael Bock and Sebastian Sobota, "Sicherungsverwahrung: Das Bundesverfassungsgericht als Erfüllungsgehilfe eines gehetzten Gesetzgebers?" (2012) *Neue Kriminalpolitik* 106.

⁹² See M. Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28 *European Journal of International Law* 763 ("[the Conservative Party] accused the European Court of Human Rights of 'mission creep' by expanding the ECHR into new areas beyond what the framers of the Convention had in mind and also of attempting to overrule 'decisions of our democratically elected Parliament and overturn the UK courts'").

⁹³ Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28 *European Journal of International Law* 763.

⁹⁴ See B.J.W. Eddington, "A Poorly Decided Divorce: Brexit's Effect on the European Union and United Kingdom" (2018) 41 *Suffolk Transnational Law Review* 101, 112 (noting immigration concerns as one of the primary motivations for Brexit supporters).

⁹⁵ See *Hirsi Jamaa* [GC] (2012) 55 E.H.R.R. 21.

⁹⁶ See Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 125.

⁹⁷ See Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 125.

outside of its jurisdictional scrutiny.⁹⁸ A Member State is “responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations”.⁹⁹ In other words, as the Strasbourg Court has repeatedly held in its judgments, the ECHR is not and will not be subordinate to domestic rules; it will remain the supreme law of the European continent.¹⁰⁰ This means that the above-explored complementarity between the Strasbourg and Luxembourg Courts, as well as the former’s adoption of EU law, will continue to make the European legal standards relevant in the UK, regardless of its membership in the EU.

5. Conclusion

In short, in the face of any Brexit-like attacks on the European human rights system, the European Court of Human Rights will serve as a “constitutional instrument of European public order”¹⁰¹ with a “peremptory character”.¹⁰² This gives the Court an exceptionally important role to play in Europe, since leaving the EU has proven to be a more feasible political exercise than disavowing the ECHR. In addition, the Strasbourg and the Luxembourg Courts have worked and will continue to work together “in a spirit of complementary” in the protection of human rights¹⁰³ and the former will continue to be an open-minded recipient of the case-law of the latter. Under this light, the two main arguments to leave (regaining parliamentary sovereignty and controlling immigration law) are nothing but false trump cards.

While this article primarily discussed the potential implications for human rights in the UK if Brexit is finalised through the lens of cross-fertilisation between the CJEU and the European Court of Human Rights, the lessons or warnings from this analysis are applicable beyond a single nation. Today, European countries have a clear choice: either to endorse the cosmopolitan view of universal human rights as a justifiable and desirable limit on state sovereignty, or to embrace the parochial view of domestic legal supremacy. The Brexit referendum is indeed a proxy fight, and could be the first of many, between supporters and opponents of international law and human rights. And regardless of which side wins, whether the European Court of Human Rights will continue to succeed as a final guardian of individual rights and freedoms in Europe will depend on the collective effort and commitment by the entire European community.

⁹⁸ See *Bosphorus* [GC] (2005) 42 E.H.R.R. 1 at [153]; *Nada v Switzerland* [GC] (App. No.10593/08), judgment of 12 September 2012 at [168].
⁹⁹ *Anchugov v Russia* (App. Nos 11157/04 and 15162/05), judgment of 4 July 2013 at [108].

¹⁰⁰ See Pinto de Albuquerque, “Plaidoyer for the European Court of Human Rights” [2018] E.H.R.L.R. 119, 125 at fn.26.

¹⁰¹ *Loizidou v Turkey* (preliminary objections) [GC] (1995) 20 E.H.R.R. 99 at [75].

¹⁰² *Bosphorus* [GC] (2005) 42 E.H.R.R. 1 at [154].

¹⁰³ *Avotins* (2017) 64 E.H.R.R. 2 at [116].

Decision of the Russian Constitutional Court on Enforcement of the *Yukos* Judgment: the chasm becoming deeper

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✉ Constitutionality; Enforcement; European Court of Human Rights; Just satisfaction; Russia

Abstract

On 19 January 2017, the Constitutional Court of the Russian Federation (hereinafter the Court) decided that the judgment of the European Court of Human Rights in the 31 July 2014 case of Neftyanaya Kompaniya Yukos v Russia is non-executable.¹ This decision follows more than 10 years of tensions between the Russian Federation and the Council of Europe, and the European Court of Human Rights in particular, and is certainly a milestone in Russian juridical practice regarding the jurisprudence of international courts. This article is an attempt to explore the sources of the competence of the Constitutional Court, to provide an overview of the key arguments of the decision, and to put the decision into historical context of the relationships between the Russian Federation and the European Court of Human Rights.

1. Yukos—raise and fall of a business empire

Yukos was one of the largest Russian oil companies in the 1990s and early 2000s. The rise of Yukos was very similar to most success stories in the Russian big business scene of the 1990s: very attractive state assets were privatised under President Boris Yeltsin for a fraction of the market price in semi-legal or even criminal ways. After the election of President Vladimir Putin, not all of these Yeltsin-era oligarchs managed to save their business empires. One of the classical examples was Mikhail Khodorkovsky—the main owner and top manager of Yukos.²

In 2003, many legal proceedings were launched against Yukos and its affiliates in the Russian Federation, including proceedings against Khodorkovsky personally and some of his partners (e.g. Platon Lebedev). Yukos faced multiple tax claims amounting to billions of euros. As a result of the proceedings, the most important assets of Yukos were seized and Yukos became insolvent. The management of the company as well as Khodorkovsky and other stakeholders repeatedly declared that all of proceedings were orchestrated with the sole goal of destroying the company. They filed various claims with different international jurisdictions trying to eliminate the results of the proceedings in the Russian Federation.

2. The European Court of Human Rights judgment

The disputes around Yukos are breaking all records of international dispute settlement history. Not only are the amounts awarded by the European Court of Human Rights and an investment arbitration tribunal

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¹ Decision of the Constitutional Court of Russia I-II of 19 January 2017, http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_I-P.pdf [Accessed 10 November 2018].

² See, e.g. M. Sixsmith, *Putin's Oil: The Yukos Affair and the Struggle for Russia* (Continuum, 2010), pp.45 et seq.

under the UNCITRAL Rules superlative (€1.86 billion and US\$50 billion respectively); the impact of the proceedings on the political and legal landscape is also unprecedented.

The European Court of Human Rights, in its principal judgment of 20 September 2011, held the Russian Federation liable for:

(1) **a violation of art.6(1) and (3)(b):**

the time period provided for the preparation for a case regarding the 2000–2001 tax assessment before the lower courts was too short;

(2) **a violation of art.1 of Protocol 1 to the ECHR:**

retrospective amendment of art.113 Tax Code of the Russian Federation by the interpretation of the Constitutional Court of the Russian Federation³ and its application to the 2000–2001 tax assessment proceedings, which resulted in the imposition and calculation of penalties; and

(3) **a violation of art.1 of Protocol 1 to the ECHR:**

disproportionate enforcement fee.⁴

In the judgment on just satisfaction of 24 June 2014, the Chamber ruled that the Russian Federation must pay €1,866,104,634 to the shareholders of Yukos.⁵

Both judgments were made by a majority. Judge Bushev (ad hoc Russia) issued a dissenting opinion, Judge Hajiyev (Azerbaijan) partly joined to the dissent of Judge Bushev, and Judge Jebens (Norway) filed a concurring opinion.

It is notable that after the liability proceedings in 2011, it was not Russia but Yukos that tried to challenge the judgment before the Grand Chamber. The Russian Federation has claimed the 2011 judgment as its victory, because the majority of claims were rejected by the Chamber.⁶

The Russian Ministry of Justice even communicated the Action Plan on the enforcement of the 2011 judgment, in which it accepted the position of the Chamber.⁷ However, after the Ukrainian Crisis and the following decision of the arbitral tribunal in the *Yukos* case,⁸ all “western judgments” were considered “political” and the European Court of Human Rights judgment on just satisfaction, which provided for payment of €1.9 billion, was seen as another “politicized decision from Europe”.⁹

3. Historical context

The denial of the Constitutional Court shall be seen in the context of the debates on the European Court of Human Rights jurisprudence that took place in Russia during the last 10–15 years. The first officially articulated tensions came up with the *Ilascu* decision.¹⁰ The European Court of Human Rights held Russia

³ Decision of the Russian Constitutional Court 9-II 14 July 2005, http://www.consultant.ru/document/cons_doc_LAW_54516/ [Accessed 10 November 2018].

⁴ *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 E.H.R.R. 19.

⁵ *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 E.H.R.R. SE12.

⁶ Vice-Minister of Justice of the Russian Federation: “The decision is de facto in favor of Russia. It is possible, that the European Court of Human Rights will impose on us of some compensation, but payment of billions of dollars is out of the question”, see Court of Strasbourg did not find a political component in *Yukos* case [*Strasburgskij sud ne nashel politicheskoy sostavljajushhej v dele JuKOSa*] (21 September 2011), *Vedomosti.ru*, https://www.vedomosti.ru/politics/articles/2011/09/21/sud_zanyal_obe_storony [Accessed 10 November 2018].

⁷ Action Plan on the enforcement of the judgment of the European Court of Human Rights in *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 E.H.R.R. 19, was rectified on 17 January 2012 under r.81 of the Rules of Court, final on 8 March 2012, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063cf2e> [Accessed 10 November 2018].

⁸ *Veteran Petroleum Ltd (Cyprus) v Russian Federation*, PCA Case No.AA 228, Final Award of 18 July 2014, <https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf> [Accessed 10 November 2018].

⁹ A. Ispolinov, “Constitutional Court of RF and European Court of Human Rights Judgment in Yukos case” [KS RF i reshenie ESPCh po delu JuKOS] (30 January 2017), *Zakon.ru*, https://zakon.ru/blog/2017/1/30/ks_rf_i_reshenie_espc_po_delu_yukos [Accessed 10 November 2018].

¹⁰ *Ilascu v Moldova* (2005) 40 E.H.R.R. 46.

liable for detention of the Moldovan citizens Ilia Ilascu, Andrei Ivantoc, Alexandru Lesco and Tudor Petrov Popa by the non-recognised separatist government of the Moldavian Republic of Transnistria. The Court stated that Transnistria was established with substantive support of the Russian Federation and was under the effective authority, or at least decisive influence, of the Russian Federation. The State Duma (lower house of the Russian Parliament)¹¹ and the Minister of Foreign Affairs, Sergey Lavrov,¹² qualified the judgment as a political but not a legal one. Although the Russian Federation has paid the awarded just satisfaction of €180,000, the government refused to release Ilascu, alleging that Russia does not have sovereignty over the territory of Transnistria.

The adoption of the Protocol 14 to the ECHR was the second conflict between the Russian Federation and the European Court of Human Rights. The consultations took years and were vividly discussed in the Russian mass media.¹³

However, it was in the *Markin* case that the Russian Federation, for the first time, elaborated on the impossibility of enforcement of the European Court of Human Rights' judgments.¹⁴ *Markin* served as an officer of the Russian Army and after a divorce he took care of his three children alone. He applied for parental leave until his youngest child was three years old. This kind of parental leave is provided by law for the servicewomen of the Russian Military, but not for men. The Constitutional Court of the Russian Federation decided that such differentiation is justified based on two arguments: First, unlike women, men serve on the frontline, and as such, the possibility of leave for the servicemen would undermine the military readiness of the Russian Army; and second, traditionally women take care of children.

Both arguments were presented by the Russian Federation in the proceedings before European Court of Human Rights and rejected by the Chamber. The judgment in favour of *Markin* triggered a high level discussion on the jurisprudence of the European Court of Human Rights and sovereignty of the Russian Federation. The Chairman of the Constitutional Court of the Russian Federation, Valeriy Zorkin, published an article "The Limit of Pliability" in the official newspaper *Rossiyskaya Gazeta*.¹⁵ In his contribution, Judge Zorkin broadly discusses the general differences between the European societies and concludes that national courts should have a possibility to decide in the last instance. With regard to the *Markin* case, Zorkin stipulates that such a judgment contradicts the basis of the constitutional system of the Russian Federation, and therefore, cannot be accepted. Only a few days after the article was published, President Medvedev held a meeting with the Judges of the Constitutional Court in which he emphasised that the Russian Federation has never transferred its sovereign right to amend its legislation to any international court.

It is notable that Judge Zorkin refers in the mentioned article, as well as in his later public presentations, to the *Görgülü* decision of the German Constitutional Court,¹⁶ which provides for primacy of the German Basic Law. However, Judge Zorkin neither mentioned the fact that the German Constitutional Court in fact set aside the decision of the Oberlandesgericht Naumburg to deny the execution of the European Court of Human Rights' judgment, nor the severe criticism in academic papers on the rather weak

¹¹ "State Duma does not recognize European court of human rights' ruling on Ilashku case" (10 July 2004), Sputniknews.com, <https://sputniknews.com/onlinenews/2004071039764812/> [Accessed 10 November 2018].

¹² "Sergey Lavrov: Judgment in Ilascu case is not a legal, but a political one" [Sergej Lavrov: Reshenie suda po "delu Ilashku"—ne pravovoe, a politicheskoe] (22 May 2006), Newdaynews.ru, <https://newdaynews.ru/pmr/68018.html> [Accessed 10 November 2018].

¹³ See, e.g. A. Burkov, "Ratification of the Protocol 14 to the Convention for the Protection of Human Rights" [Ratifikacija Protokola 14 k Konvencij o zashchite prav cheloveka] (28 February 2010), Sutyajnik.ru, <http://sutyajnik.ru/articles/349.html> [Accessed 10 November 2018].

¹⁴ *Markin v Russia* (2013) 56 E.H.R.R. 8.

¹⁵ V. Zorkin, "The limit of pliability" [Predel ustupchivosti] (29 October 2010), Rossiyskaya Gazeta, <https://rg.ru/2010/10/29/zorkin.html> [Accessed 10 November 2018].

¹⁶ BVerfG, Order of the Second Senate of 14 October 2004—2 BvR 1481/04, http://www.bverfg.de/e/rs20041014_2bvr148104en.html [Accessed 10 November 2018].

re-statement of the binding character of the European Court of Human Rights' jurisprudence for the national courts by the German Constitutional Court in the *Görgülü* decision.¹⁷

The position of the Russian Government and the Parliament had thereafter become more and more entrenched. In 2011, a Draft Law initiated in the State Duma (Lower House of the Russian Parliament) provided for a new competence of the Constitutional Court to block the judgments of interstate bodies for the protection of human rights and freedoms, including those of the European Court of Human Rights. The Minister of Foreign Affairs, Lavrov, and President Putin on many occasions named some European Court of Human Rights' judgments political, and even invoked the possibility of withdrawing Russia from the jurisdiction of the European Court of Human Rights.¹⁸

The European Court of Human Rights' judgment awarding €1.8 billion to the Yukos shareholders was the last straw.

The judgment became final on 15 December 2014. Just a few days before the 15 June 2015 deadline for the submission of the comprehensive plan, on 11 June 2015, 93 deputies from all factions of the State Duma requested the Constitutional Court to clarify the constitutionality of the provisions of the Law on Accession of the Russian Federation to the ECHR,¹⁹ requiring that the European Court of Human Rights' judgments should be respected in the territory of the Russian Federation even if they contradict the Constitution of the Russian Federation. The Ministry of Justice informed the European Court of Human Rights that it would suspend execution of the *Yukos* judgment due to the pending case before the Russian Constitutional Court. Notably, the Constitutional Court referred in the decision,²⁰ not to the *Yukos* case, but to the *Anchugov* judgment of the European Court of Human Rights,²¹ which obliged the Russian Federation to remove the blanket ban on voting imposed on prisoners. The ban is provided in art.32(3) of the Russian Constitution,²² and therefore the *Anchugov* judgment revealed a more obvious contradiction between the European Court of Human Rights jurisprudence and the Russian Constitution than the *Yukos* case. Furthermore, the *Anchugov* case touches upon the similar problems as the *Hirst v United Kingdom* (No.2) judgment.²³ The Court directly refers to this case alongside the *Maggio*²⁴ and *Görgülü* cases.²⁵ The Constitutional Court decided that the Law on Accession of the Russian Federation to the ECHR was constitutional, and the courts of the Russian Federation must interpret the Constitution in a Convention-friendly manner. However, the Court stated that a judgment of the European Court of Human Rights can only be executed if it is in line with the Constitution of the Russian Federation.

The decision of the Constitutional Court was published on 14 July 2015. Shortly thereafter, on 18 November 2015, a Draft Law providing for the new competence of the Constitutional Court to declare the impossibility of execution of the European Court of Human Rights' judgments in the territory of the

¹⁷ Ch. Tomuschat, "The Effects of the Judgments of the European Court of Human Rights According the German Constitutional Court" (2010) 11 German L.J. 513; J. Frowein, "Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte", in Dicke and Hobe et al. (eds), *Weltinnersrecht: liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005), pp.279 et seq.

¹⁸ "Putin has not ruled out that Russia opts-out from the jurisdiction of the European Court of Human Rights" [Putin ne iskljuchil vozmozhnost' vyhoda RF iz-pod jurisdikcii ESPCh] (14 August 2014), Interfax.ru, <http://www.interfax.ru/russia/391379> [Accessed 10 November 2018].

¹⁹ Federal Law 54 of 30 March 1998 "On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto" (Russia) [O ratifikaci Konvencii o zashchite prav cheloveka i osnovnyh svobod i Protokolov k nej No.54-FZ], <http://pravo.gov.ru/proxy/ips/?docbody=f&rsDoc=I&lastDoc=I&nd=102052320> [Accessed 10 November 2018].

²⁰ Decision of the Constitutional Court of Russia No.21-II of 14 July 2015 [Postanovlenie Konstitucionnogo suda Rossijskoj Federacii No.21-P], <http://doc.ksrf.ru/decision/KSRFDecision201896.pdf> [Accessed 10 November 2018]. For a critical revision of this decision see, e.g. L. Mälksoo, "Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-II/2015" (2016) 2 *European Constitutional Law Review* 12, 377; A. Blankenagel and I. Levin, "In principle forbidden, but allowed! Constitutional Court and the case about the binding authority of European Court of Human Rights judgments" [V principe nel'zja, no mozhno! Konstitucionny Sud Rossii i delo ob objazatel'nosti reshenij Evropejskogo suda po pravam cheloveka] (14 February 2016), Lexandbusiness.ru, <http://lexandbusiness.ru/view-article.php?id=6726> [Accessed 10 November 2018].

²¹ *Anchugov v Russia* (App. Nos 11157/04 and 15162/05), judgment of 4 July 2013.

²² Constitution of the Russian Federation (as amended up to Federal Constitutional Law No.11-FKZ of 21 July 2014), http://www.wipo.int/wipolex/en/text.jsp?file_id=441970 [Accessed 10 November 2018].

²³ *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41.

²⁴ *Maggio v Italy* (App. No.46286/09), judgment of 31 May 2011.

²⁵ Decision of the Constitutional Court of Russia No.21-II of 14 July 2015 [Postanovlenie Konstitucionnogo suda Rossijskoj Federacii No.21-P], <http://doc.ksrf.ru/decision/KSRFDecision201896.pdf> [Accessed 10 November 2018], para.4.

Russian Federation was brought to the Parliament. In a record-breaking three weeks, the Draft Law passed three readings in the State Duma, including consultations in the Law Commission and the Council of Federation (higher House of the Russian Parliament). It was signed by President Putin on 14 December and entered into force on the same date with publication on the online Legal Portal of the Russian Federation.²⁶ The direct link between the speedy proceedings and *Yukos* judgment was vividly discussed in the Russian media.²⁷

Nevertheless, the Constitutional Court used this new competence for the first time in the aforementioned *Anchugov* case, deciding that the European Court of Human Rights' judgment contradicts the Constitution and therefore cannot be executed by the authorities of the Russian Federation. The decision on the impossibility of enforcement of the *Yukos* judgment followed only a month later.

4. Decision of the Russian Constitutional Court on the *Yukos* judgment

The Constitutional Court launched proceedings upon the request of the Ministry of Justice of the Russian Federation. The Ministry of Justice requested that the following be rejected:

- the execution of the European Court of Human Rights' judgment regarding compensation for pecuniary damage caused by the retroactive application to the applicant company of art.113 of the Tax Code of the Russian Federation on a three-year limitation period for tax offences;
- the execution of the European Court of Human Rights' judgment regarding the amount of the enforcement fee, which constituted 7% of the entire amount of its debts in payment of taxes, fines and penalties; and
- the execution of the European Court of Human Rights' judgment regarding the payment of €300,000 compensation for costs and expenses of the proceedings.²⁸

The Court refused to review the third request, stating that the compensation of costs and expenses was outside of its competence; it could not decide on the possibility of enforcement of decisions of international courts in human rights issues provided in arts 3(1) and 104(1)–(3) of the Federal Constitutional Law “On Constitutional Court of the Russian Federation”.²⁹

a. General elaborations

The Court launched its elaborations with a very general discussion on the relationship of the European Court of Human Rights judgments and the Russian Constitution. It referred to earlier judgments, repeatedly stating that under art.15(4) of the Russian Constitution the ECHR, as every other international treaty of the Russian Federation, is an integral part of Russia's legal system and therefore the Russian Federation is obliged to execute European Court of Human Rights' judgments. The Court underlines that it accepts the European Court of Human Rights' judgments, respects the ECHR as a living instrument for the protection of human rights, and accepts that the European Court of Human Rights' case-law can change the interpretation of the Treaty. Notably, the Court sees an example of such an acceptance and respect in

²⁶ Federal Constitutional Law of Russia 7 of 14 December 2015 “On Amendments to the Federal Constitutional Law ‘On Constitutional Court of the Russian Federation’” [Federal’nyj konstitucionnyj zakon № 7-FKZ “O vnesenii izmenenij v Federal’nyj konstitucionnyj zakon ‘O Konstitucionnom Sude Rossijskoj Federacii’”], <http://publication.pravo.gov.ru/Document/View/0001201512150010> [Accessed 10 November 2018].

²⁷ See, e.g. “State Duma permitted Russia not to comply with the international courts' judgments” [Gosduma razreshila Rossii ne ispolnjat' reshenija mezhdunarodnyh sudov] (4 December 2015), *Vestnikcivitas.ru*, <http://vestnikcivitas.ru/news/3901> [Accessed 10 November 2018].

²⁸ Decision of the Constitutional Court of Russia No.1-II of 19 January 2017, <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf> [Accessed 10 November 2018].

²⁹ Federal Constitutional Law of Russia 1 of 21 July 1994 “On Constitutional Court of the Russian Federation” (last revision 28 December 2016) [Federal’nyj konstitucionnyj zakon No. 1-FKZ “O Konstitucionnom Sude Rossijskoj Federacii”], http://www.consultant.ru/document/cons_doc_LAW_4172/ [Accessed 10 November 2018].

its own unsuccessful attempts to identify a possibility to execute the *Anchugov* judgment in line with the Constitution.

Nevertheless, the Court emphasises the priority of the Russian Constitution over the ECHR. This statement is supported by references to arts 26, 31(1) and 46(1) of the Vienna Convention on the Law of Treaties (VCLT).³⁰ In the Court's understanding, the above-mentioned provisions leave room for non-execution of European Court of Human Rights' judgments when the European Court of Human Rights' judges deviate from the *ordinary meanings to be given to the terms* of the ECHR or the judgment "attributed meaning diverging from generally binding provisions of international public order (*jus cogens*)", the object and purpose of the ECHR as a whole and the national legal order: "A State in whose respect the judgment in this case has been delivered is entitled to refuse to execute it as going beyond the obligations, voluntarily taken upon itself when ratifying the Convention". The general reference of the Court to the above-mentioned provisions of the VCLT is very difficult to follow.³¹ In particular, art.46(1) of the VCLT is devoted to the issues of ultra vires conduct of state authorities concluding an international treaty. The decision contains no indication as to how this provision could be applicable to the issue in question. Additionally, the Court's other arguments are very diffuse. In one passage the Court refers to the objectives of the ECHR and the national legal order cumulatively; in another one to the *jus cogens* and the national legal order. Finally, it refers to the national legal order only without explanation why another two criteria were skipped. However, none of the named articles of the VCLT refers to national laws or constitutions.

It is not clear why the Constitutional Court makes no distinction between its right to deny the execution of a European Court of Human Rights' judgment under Public International Law (including the VCLT) and under the Russian Constitution. Legal argumentation of the Russian Constitutional Court has already been critically scrutinised,³² and the discussed decision provides interesting material for further analysis.

The Court concludes that, in exceptional cases, it cannot support the European Court of Human Rights' interpretation of the ECHR, if this interpretation contradicts the provisions of the Russian Constitution pertaining to human and civil rights and freedoms, as well as to the basis of Russia's constitutional system.

In Part 3 of the decision, the Court gives a very general overview of the correlation between the right of ownership and freedom of entrepreneurial and other economic activity, and the obligation to pay legally established taxes and levies, with an obvious conclusion that the limitation of this right is in line with the Constitution, provided that such limitation is necessary and proportionate.

b. Retroactive application of art.113 of the Tax Code

Part 3 is an introduction to the elaborations of the Court on whether the European Court of Human Rights' judgment on just satisfaction for exaction of penalties against *Yukos* for the years 2000 and 2001 is executable.

The European Court of Human Rights decided by a majority of four votes to three that the imposed tax penalty violated art.1 Protocol 1 to the ECHR. The Chamber found that the Constitutional Court changed the legislation by re-defining the three-year limitation period provided in art.113 of the Tax Code by deciding not to apply it, if a taxpayer opposed tax control and tax checkup, or an act of a tax checkup was registered.³³

³⁰ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol.1155, p.331.

³¹ About the Court's own approach to *jus cogens* see I. Marchuk and M. Aksanova, "The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Rights", *Osservatorio Costituzionale*, Fasc. 1/2017, 6 April 2017, <http://www.osservatoriocaic.it/the-tale-of-yukos-and-of-the-russian-constitutional-court-s-rebellion-against-the-european-court-of-human-rights.html> [Accessed 10 November 2018].

³² A. Nußberger, "Entwicklung der Verfassungsrechtsprechung in Russland", in: Nußberger, Schmidt and Morščakova (eds), *Verfassungsrechtsprechung in der Russischen Föderation* (Kehl am Rhein: N.F. Engel, 2009), pp.43 et seq.

³³ Decision of the Russian Constitutional Court 9-II of 14 July 2005, http://www.consultant.ru/document/cons_doc_LAW_54516/ [Accessed 10 November 2018].

The Court disagreed with the Chamber and stated that its 2005 decision involved the only possible interpretation of the limitation period provision of art.113 of the Tax Code in accordance with the Russian Constitution: “Any other, unconstitutional, interpretation of its provisions … based on the exclusively formal understanding of the norm” would violate the principle of equal treatment and proportionality provided in arts 17(3), 19(1) and (2) as well as 55(3) of Constitution. The Constitutional Court strived “to secure their reasonable and fair application” of these rules to conscientious taxpayers. At the same time, the Court stressed that a professional participant of entrepreneurial activity could not rely on any other interpretation of art.113 of the Tax Code that would favour a fraudulent taxpayer.

The Constitutional Court briefly clarified that it was not art.57 of the Russian Constitution which was referred to by the European Court of Human Rights,³⁴ but art.54 of the Constitution that should be applied. Article 54 states:

- “1. A law introducing or aggravating responsibility shall not have retrospective effect.
2. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied.”

By contrast, art.57 states:

“Everyone shall be obliged to pay the legally established taxes and dues. Laws introducing new taxes or deteriorating the position of taxpayers may not have retroactive effect.”

Article 57 prohibits only retrospective application of laws that change the property status of a taxpayer and directly influence the order of his fulfilment of the tax duty. The 2005 decision dealt only with the time limitation of responsibility already provided in art.113 of the Tax Code and did not introduce a new sanction for the hindrance to a tax checkup. In the discussed case, OAO Neftyanaya Kompaniya Yukos was already aware of the tax authority’s position, because an order was issued within the three-year limitation period. Therefore, in the Court’s view, only art.54 of the Constitution, which provides a general prohibition to aggravate the responsibility retrospectively, should apply.

The Court concludes by stating that the decision of the Constitutional Court of 2005 has not changed the decisions of other courts regarding *Yukos*, and therefore, there was no violation of the legal predictability guarantee, without any further discussion of the Chamber’s position.

Interpretation of law in historical context

The Court also argued that the specific historical context of the development of tax regulation should be taken into account by evaluation of its 2005 decision on art.113 of the Tax Code. In the Court’s view, the Russian Federation received an opportunity to launch meaningful tax reforms only in the 2000s, after a decade of political and economic instability. At that time, it was important to take all possible measures to improve the tax system of the Russian Federation. In the Court’s view, even the retrospective change of the settled jurisprudence was admissible under the specific historical circumstances. The Court especially emphasises that the interpretation of art.113 of the Tax Code provided in the 2005 decision was the only possible one; any other interpretation would have been “comfortable for realization of unlawful goals and diverging from its constitutional meaning”. The Court stresses that a big company such as Yukos, which had employed many high-profile lawyers, “could and had to” expect that the settled jurisprudence on art.113 of the Tax Code would be changed and reinterpreted in the constitutionally only possible way that the Constitutional Court did in its 2005 decision.

³⁴ *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 E.H.R.R. 19 at [307].

The Court's approach to use "the historical context" as an excuse for a retrospective change of the settled jurisprudence triggered a wave of criticism in the legal blogs.³⁵ Many legal professionals saw high risks for the rule of law and legal predictability if the courts could retrospectively change their jurisprudence due to "changes of historical dimension". Indeed, the criteria of "historical context" is anything but clear and concerns of the legal community are plausible. Notably, the concept of "historical context" was not referred to in the jurisprudence after.

Law-ruining effect

Another very broad and highly controversial concept developed by the Court in the decision is the concept of the "law-ruining effect".³⁶ The Court stresses that the "malicious" unprecedented tax-evasion mechanisms developed by Yukos caused billions in losses for the state budget and had a "law-ruining effect, hindering stabilization of constitutional-law regime and public legal order", which could not be disregarded. Any payment of compensation would promote the erosion of the public legal order. However, the Court does not clarify the notion of the term "law-ruining effect". It remains to be seen, whether and how this concept will be developed in the future.

Substance of Yukos activities and the role of the shareholders

The Court also introduces the concept of "unjust substance of activities", which is derived from the concept of the "law-ruining effect". The Court states that the very substance of Yukos and its shareholders' activities was so unjust that the payment of the awarded satisfaction would contradict the principles of equality and justice provided in the Constitution. In particular, the payment of compensation to the former shareholders of Yukos, their heirs, and legal successors, would violate these principles. The Court admits that not all shareholders were involved in the illegal activities, but stipulates that their losses were a result of the failure to exercise corporate rights "reasonably and conscientiously in their own interests and in the interests of the legal person" and to impose control over the management.

The argumentation of the Court has far-reaching implications for subsequent case-law. The Court declares that shareholders of a public stock company can be held liable (or at least lose some of their rights to compensation) for activities of the company's management if the "substance of the company's activities was unjust". Based on the aforementioned arguments, the Court concludes that the execution of the European Court of Human Rights' judgment on payment of just satisfaction for the tax penalties would contradict the Constitution of the Russian Federation and is therefore impossible.

The Court did not even analyse whether the shareholders participated in Yukos' fraudulent activity. Such reasoning does not establish a rebuttable presumption, but rather, an automatic liability of shareholders. At least in the present case, shareholders were not given a chance to present their position effectively and make use of their right to effective judicial protection.

c. Disproportional enforcement fee

The Court continues with an examination of the possibility to execute the European Court of Human Rights' judgment on just satisfaction of €566,780,436 for a disproportionately high enforcement fee.

The judgment of the Chamber in this issue was formulated quite vaguely. One looks in vain for an explanation of why 7% of the exacted sum or value of a debtor's property enforcement fee was

³⁵ See, e.g. S. Sulakshin, "Constitutional Court against European Court" [Konstitucionnyj Sud protiv Evropejskogo Suda] (23 January 2017), <https://cont.ws/@sulakshin/499607> [Accessed 10 November 2018].

³⁶ Some legal bloggers have severely criticised the concept, e.g. S. Ivanov, "The doctrine of relativity in law" [Teoriya otnositel'nosti v prave] (21 January 2017), Zakon.ru, https://zakon.ru/blog/2017/1/21/teoriya_otnositelnosti_v_prave [Accessed 10 November 2018].

disproportionate; there is no calculation justifying the decision to reduce the fee by almost 50%.³⁷ The Chamber admits that the enforcement fee is an administrative penalty and is not related to the actual amount of the enforcement expenses borne by the bailiffs,³⁸ but just a couple of lines later, the Chamber refers to the factual expenses. The Chamber also does not explain why the enormous tax evasions at issue should not justify the maximum fee, in particular regarding the fact that the reduction of the fee is exceptional. Nevertheless, in general, the message of the Chamber is clear: the authorities applying any measures shall regard their overall effect. This effect was devastating in the *Yukos* case.

The Court starts with a brief restatement of its 2001 decision on the constitutionality of the enforcement fee. In that case, the Court decided that the enforcement fee is not a fee, but an administrative penal sanction (fine),³⁹ which is in line with the Constitution. As an administrative penalty the enforcement fee shall be imposed in a justified and proportionate manner, and 7% “represents only the admissible maximum … the upper border” of such a penalty. In the Court’s perspective, systematic, large-scale and long-lasting offences on the company’s part, connected with the criminal tax evasion schemes of Yukos, as well as active hindrance to tax checkup, justified application of the highest enforcement fee rate to Yukos. The Court does not counter the arguments of the Chamber on the overall effect of applied measures, or a need to give Yukos a chance to survive. The Court concludes that the just satisfaction in this case also contradicts the Constitution of the Russian Federation and therefore cannot be executed.

d. Conciliatory messages

It is quite clear that in denying the enforcement of the judgment, the Court tries not to slam the door. In doing so, it refuses to review some issues raised by the Ministry of Justice. For example, has Yukos exhausted local remedies in regard to enforcement fee, since the appeal claim was withdrawn? May Yukos shareholders be beneficiaries of the judgment? How should the shareholders be identified if they were not named in the judgment? The Court stresses that this kind of review would mean an appraisal of the European Court of Human Rights’ judgment in procedural matters and the Court regards it as appropriate to evade such evaluation because it is not necessary in the present case. Another conciliatory statement made was that there would be a possibility to compensate losses of shareholders resulting from the criminal activity of Yukos and its management if new property of the liquidated Yukos is revealed. The symbolic character of this statement is evident because Yukos owes billions to the Russian Federation and the Court sets the priority for budgetary claims.

5. Dissents

The decision of the Court was not unanimous. There were two dissenting opinions from Judge Yaroslavtsev and Judge Aranovskiy. Both dissents are construed as decisions on inadmissibility of the request of the Ministry of Justice. This allowed addressing all issues raised in the request, even those which were ignored by the Court.

³⁷ The answer on this question is quite prosaic: the Russian Ministry of Justice has mentioned 4% as acceptable enforcement fee during the communications on enforcement. *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 E.H.R.R. SE12 at [32].

³⁸ *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 E.H.R.R. SE12 at [655].

³⁹ In the Court’s narrative: “it has fixed monetary expression established by law, is exacted in a compulsory way, is legally registered by a resolution of a competent official, is levied in the event of the commission of an offence and is entered to the budget and to non-budgetary fund, the resources of which are State property”.

a. Judge Yaroslavtsev

First of all, Judge Yaroslavtsev disagreed with the position of the Court and stated that the interpretation given in the decision of the Constitutional Court from 2005 on art.113 of the Tax Code was an implicit change of law.

Furthermore, he especially pointed out the very poor case management of the Ministry of Justice. The Ministry of Justice did not appeal the Chambers 2011 judgment and even communicated an Action Plan for its enforcement.⁴⁰ Judge Yaroslavtsev stresses that, in general, the judgment follows the Russian position and the Chamber denied the vast majority of claims raised by Yukos. Even the severely criticised reduction of the enforcement fee from 7% to 4% was obviously proposed by the Russian Federation.⁴¹ Furthermore, the Russian Federation did not raise the issue of whether shareholders could be regarded as beneficiaries of the just satisfaction in the European Court of Human Rights' proceedings. Since all provided opportunities to challenge the issues in the European Court of Human Rights were missed, the request should be inadmissible.

In the view of Judge Yaroslavtsev, the only proper way out for Russia was to use the mechanism provided in art.46(3) of the ECHR, that is, to request the Committee of Ministers to refer the case to the Court for interpretation.

The dissent of Judge Yaroslavtsev is written in a very enjoyable and ironic manner, and he elaborates on many points of argumentation that are missing in the majority decision. However, it is unclear what kind of effect Judge Yaroslavtsev expects from the proceedings under art.43(3) of the ECHR, which provides a mere possibility to refer the judgment for interpretation. Neither the 2011 judgment on the merits nor the 2014 judgment on just satisfaction contain any *prima facie* ambiguities.

b. Judge Aranovskiy

Judge Aranovskiy agreed with Judge Yaroslavtsev (using different arguments) that the request of the Ministry is inadmissible, and he also severely criticised the case management by the Ministry. However, the argumentation he offers differs substantially both from the position of the majority and from those of Judge Yaroslavtsev. Judge Aranovskiy stipulates that the just satisfaction judgment of the Chamber contradicts the *jus cogens*, because the European Court of Human Rights had no competence to decide in favour of persons which were not present in the court proceedings. In general, Judge Aranovskiy follows the position of the dissenting opinion of Judges Bushev and Hajiyev to the 2014 just satisfaction judgment.

6. Conclusion

It is obvious that the situation around the *Yukos* case had a very strong political dimension. Two decisions of the Russian Constitutional Court denying the enforceability of the European Court of Human Rights' judgments within a few months cannot be understood otherwise than a sign of deep crisis. A retrospective analysis shows that the recent denials of execution were anything else but surprising. In past years Russia has severely criticised the European Court of Human Rights' jurisprudence many times and de facto disregarded its judgments (e.g. after the *Lebedev* judgment,⁴² new criminal proceedings were launched against the applicant and the European Court of Human Rights' judgment was de facto thwarted).

⁴⁰ Action Plan on the enforcement of the judgment of the European Court of Human Rights in case *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 E.H.R.R. 19, was rectified on 17 January 2012 under r.81 of the Rules of Court, final on 8 March 2012, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063cf2e> [Accessed 10 November 2018].

⁴¹ The Russian Ministry of Justice admitted in the hearings that some statement was made, but it was misunderstood by the European Court of Human Rights. The full recording of the Constitutional Court hearing 15 December 2016 on the case No.1-II is available at <https://www.youtube.com/watch?v=pxX46p2Xuyc> [Accessed 10 November 2018].

⁴² *Lebedev v Russia* (2008) 47 E.H.R.R. 34.

On the positive side, one can see attempts from the both Courts not to escalate the conflict to the point of no return. The Constitutional Court repeatedly mentions its respect for the European Court of Human Rights' jurisprudence and the necessity of a dialogue. As the Court puts it: "Russia is entitled *as an exception* to deviate from fulfilment of the obligations imposed thereon, if such deviation is *the only possible way* to avoid violation of the Constitution of the Russian Federation" (emphasis added). On the other side, the conflict between the Russian Constitutional Court and the European Court of Human Rights is just part of a larger conflict between the Russian government and the European institutions, in particular with the Council of Europe (e.g. PACE suspended the voting rights of the Russian delegation⁴³). This indicates that tensions in other issues could strongly affect legal discussions. Today, almost two years after the decision of the Constitutional Court the political situation is deteriorating even further. The Heads of both Chambers of the Russian Parliament publicly discuss the option to withdraw from the Council of Europe.⁴⁴ The Secretary General of the Council of Europe, Thorbjørn Jagland, named the Russian withdrawal from the Convention a "disaster" for Russians and "a major problem for Europe".⁴⁵

The negative impact of the crisis is much deeper than non-enforcement of one or another of hundreds of European Court of Human Rights' judgments against Russia. The Russian Federation is not the only Contracting State of the ECHR which has denied or at least not excluded the possibility to deny the execution of the European Court of Human Rights' decisions.⁴⁶ The main problem in the *Yukos* case is not the non-execution as such, but rather formalisation of a special proceeding for denial of execution and the political dimension of the *Yukos* case. Therefore, the decision of the Constitutional Court to deny the execution of the *Yukos* judgment is much more problematic than for the *Anchugov* judgment. The latter decision was based on very clear wording of the Russian Constitution and a denial to accept a different interpretation of the European Court of Human Rights and can be regarded as an integral part of the ongoing legal discussions between the European Court of Human Rights and the national courts of Contracting States on the interpretation of sovereignty, which is inherent for every dualistic system.⁴⁷ On the contrary, the *Yukos* decision of the Constitutional Court had a very transparent political background and was coupled with a substantial economic value, which is exceptional for European Court of Human Rights' judgments. The Court's reasoning is based on several new and rather unclear concepts, such as "law-ruining effect" or "unjust substance of activities". Such a utilitarian approach causes a general decrease of acceptance of the ECHR and the European Court of Human Rights' jurisprudence in particular. Even if the Russian Federation will remain in the Council of Europe, references to the European Court of Human Rights' jurisprudence in the national courts and even in academic papers will be less persuasive. There is a general consensus that the European Court of Human Rights' jurisprudence gave very important impulses to the modernisation of the Russian legal framework in many areas. It remains hopeful that lawyers will be able to avoid the political dimension, at least as much as possible.

⁴³ See Parliamentary Assembly Resolution 1990 (2014) "Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation", <http://website-pace.net/documents/10643/110596/20140410-Resolution1990-EN.pdf/57ba4bca-8f5f-4b0a-8258-66ca26f7117b> [Accessed 10 November 2018].

⁴⁴ "Volodin assumed that Russia can exit Council of Europe" [Volodin ne iskluchil vkhod Rossii iz Soveta Evropy] (13 October 2018), Rbc.ru, <https://www.rbc.ru/bcfree/news/5bc1c4db9a79470b801d346b> [Accessed 10 November 2018].

⁴⁵ T. Jagland: "Would be disastrous if Russia pulls out of Council of Europe" (24 April 2018), France24.com, <https://www.france24.com/en/20180421-talking-europe-jagland-secretary-general-council-europe-russia-human-rights-women-turkey> [Accessed 10 November 2018].

⁴⁶ E.g. *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41; *Maggio v Italy* (App. No.46286/09), judgment of 31 May 2011.

⁴⁷ V. Tolstykh, "'Principled resistance' against European Court of Human Rights judgments in the light of critical theory" (2018) 1(25) "Meždunarodnoe pravosudie" (International Justice) Journal 79.

Mass Surveillance and the European Court of Human Rights

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Communications data; Covert surveillance; Freedom of expression; Interception of communications; Investigatory powers; National security; Right to respect for private and family life; Terrorism

Abstract

Since Edward Snowden released classified NSA documents exposing mass surveillance practices we have awaited the response of human rights law. The European Court of Human Rights has long played a vital role in ensuring that state surveillance practices are governed by law and are compatible with the European Convention on Human Rights. The Court has once more held that the UK's surveillance practices violate arts 8 and 10 of the Convention, but it has also confirmed that states can legitimately choose to engage in mass surveillance. Moreover, its approach raises significant concerns about its long-term role as guardian of the right to privacy.

Introduction

In 2013 Edward Snowden released classified NSA documents exposing a vast network of global surveillance programs. The files suggested that the UK intelligence agencies are engaged in bulk collection of internet and international communications data and that cooperative information sharing relationships have formed between our agencies and other governmental intelligence agencies.¹ In *Big Brother Watch v United Kingdom* the European Court of Human Rights found that some of these practices violated arts 8 and 10 of the ECHR.² This was significant but it will not lead to radical reform. Moreover, there are a number of reasons why we should be concerned about the long-term implications for the right to privacy. First, the Court has given states a wide margin of appreciation to determine what type of surveillance to use, including mass surveillance.³ Second, whilst the Court seeks to ensure that states satisfy a series of minimum safeguards it declined to expand those safeguards to respond to changes in surveillance capabilities.⁴ Third, whilst deference was to be expected there was a lack of engagement with the ramifications of mass surveillance for the right to privacy.⁵ Privacy and private life barely feature in any substantive sense and there are scant acknowledgements of the threat that secret surveillance poses to democracy. Instead, the

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¹ The Snowden files suggest that the UK intelligence agency GCHQ uses a program named TEMPORA to intercept data flowing through underwater transatlantic fibre optic cables landing in the UK. The British Government has consistently adopted a neither confirm, nor deny approach to this allegation but legal proceedings have assumed that the allegations are true. The Snowden files also revealed that through a programme called PRISM the NSA collects data from the servers of US internet companies (Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube and Apple) and through a program called UPSTREAM it collects data directly from cables and infrastructure. The US Government acknowledged the existence of PRISM and GCHQ has since acknowledged that it acquired information from the US that had been obtained via PRISM. For information on the NSA files see the *Guardian* coverage at <https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1> [Accessed on 12 November 2018].

² *Big Brother Watch v United Kingdom* (App. Nos 58170/13, 62322/14 and 24960/15), judgment of 13 September 2018.

³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [314].

⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [316]–[320].

⁵ See discussion below at “Final Reflections—Where was the Right to Privacy?”.

threat of terrorism is presented as the justification for mass surveillance.⁶ This is deeply troubling for the right to privacy and the Court's long-term role as a guardian of that right.

The three applications

Big Brother Watch originated in three applications challenging the compatibility of the practices revealed in the Snowden files with art.8 of the ECHR, as well as arts 10, and 14 of the ECHR. The first and second applicants did not bring proceedings in the UK before lodging their application with the European Court of Human Rights, whereas the third applicants had brought proceedings in the Investigatory Powers Tribunal (IPT).⁷

Proceedings before the IPT

The IPT investigates complaints of unlawful use of covert techniques by public authorities and claims against the intelligence agencies.⁸ It is the only forum in the UK in which human rights claims can be brought against the intelligence agencies.⁹ In 2014 the third applicants argued that: (i) accessing or otherwise receiving intercepted communications and communications data from the US Government; and (ii) intercepting, inspecting and retaining communications and communications data violated arts 8, 10, and 14 ECHR.¹⁰ The IPT held a public hearing, as well as a closed hearing, which enabled it to consider GCHQ's unpublished internal arrangements.¹¹ On 9 October 2014 the Government agreed to disclose some of those arrangements. This material, known as the "9th October disclosure", set out further details of intelligence agencies practices.

In December 2014 the IPT declared that the practices did not violate the Convention.¹² It also determined that the 9 October disclosure provided a clear and accurate summary of evidence which should be disclosed and that the rest of the closed hearing was too sensitive for disclosure.¹³

In its second judgment in February 2015 the IPT held that prior to the 9 October disclosure intelligence sharing was not sufficiently transparent and thus violated arts 8 and 10 of the ECHR.¹⁴ This was the IPT's first ever determination that the intelligence agencies had acted unlawfully. It was, however, seriously limited by the fact that the IPT went on to determine that following the disclosure the regime was transparent and now complies with the Convention.¹⁵

The European Court of Human Rights

In September 2018 the European Court of Human Rights held by five votes to two that the bulk interception regime violated art.8 of the ECHR; by six votes to one that the regime for acquiring communications data violated art.8 of the ECHR; by five votes to two that the intelligence sharing regime did not violate art.8 of the ECHR; and six votes to one that there had been a violation of art.10 of the ECHR in respect of both bulk interception and acquiring communications data. The Court unanimously held that the arts 6 and 14 ECHR applications were inadmissible as manifestly ill-founded.¹⁶

⁶ See discussion below at "Final Reflections—Where was the Right to Privacy?".

⁷ *Liberty v GCHQ* [2014] UKIPTrib 13_77-H (5 December 2014); [2015] UKIPTrib 13_77-H (26 February 2015).

⁸ Regulation of Investigatory Powers Act 2000 s.65.

⁹ Regulation of Investigatory Powers Act 2000 s.65(2)(a).

¹⁰ *Liberty* [2014] UKIPTrib 13_77-H (5 December 2014 judgment).

¹¹ *Liberty* [2014] UKIPTrib 13_77-H (5 December 2014 judgment).

¹² *Liberty* [2014] UKIPTrib 13_77-H (5 December 2014 judgment).

¹³ *Liberty* [2014] UKIPTrib 13_77-H (5 December 2014 judgment) at [11].

¹⁴ *Liberty* [2015] UKIPTrib 13_77-H (26 February 2015 judgment) at [23].

¹⁵ *Liberty* [2015] UKIPTrib 13_77-H (26 February 2015 judgment) at [32].

¹⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15).

Exhaustion of domestic remedies

The Court first had to consider whether the first and second applicants' cases were inadmissible as they had not brought proceedings before the IPT.¹⁷ The applicants argued that they had not brought proceedings as they had relied on the Court's determination in *Kennedy v United Kingdom* that the IPT is not an effective remedy.¹⁸ The Court revisited *Kennedy* and determined that the IPT jurisprudence had developed vastly since then such that its earlier concerns were no longer valid.¹⁹ It thus declared that failure to bring IPT proceedings renders applications inadmissible unless there are special circumstances. Applying this to the facts, however, it held that there were special circumstances as the applicants had been entitled to rely on *Kennedy* at the point at which they lodged their applications.²⁰ Yet whilst these applications proceeded, in the future applicants will have to go to the IPT and the esteem that the Court expressed for the tribunal suggests that it is likely to be deferential to its decisions.²¹

Article 8 of the ECHR

Turning to the merits, the Court considered whether art.8 of the ECHR was violated by: (i) the regime for bulk interception of communications by the UK intelligence agencies; (ii) the receipt of information via the intelligence sharing regime; and (iii) the regime for the acquisition of communications data.

(i) Regime for bulk interception

The applicants argued, first, that the regime governing bulk interception lacked the quality of law because it was so complex as to be inaccessible and vast parts of the regime were based on arrangements that were not available to the public.²² Second, that it did not comply with the minimum safeguards identified in *Weber v Germany*.²³ The *Weber* safeguards examine the scope and application of the regime by reference to: (i) the nature of offences; (ii) the categories of persons affected; (iii) duration; (iv) the procedure to be followed for storing, accessing, examining and using intercepted data; (v) the procedure to be followed for communicating intercepted data to other parties; and (vi) the circumstances in which intercept material must be erased or destroyed.²⁴ The applicants' third argument was that the *Weber* safeguards were no longer sufficient and additional safeguards were needed, in particular the applicants argued for: (i) a requirement of reasonable suspicion; (ii) judicial authorisation; and (iii) a requirement that states notify subjects after the surveillance has ended.²⁵ Finally, the applicants argued that the regime was disproportionate as it contravened the principles against blanket approaches established in *S v United Kingdom* and *MK v France*.²⁶

The Government responded by shifting the focus from legality to the critical need to combat terrorism.²⁷ As the hearing took place in November 2017 after the attack on Westminster Bridge (March 2017), the Manchester Arena bombing (22 May 2017) and the attack on London Bridge (June 2017), as well as further terrorist attacks elsewhere in Europe, these monstrosities were at the forefront of considerations.²⁸ The Government thus argued for deference by asserting that it was "for States to judge what was necessary

¹⁷ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [237]–[268].

¹⁸ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [241]–[242].

¹⁹ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [253].

²⁰ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [268].

²¹ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [256]–[257].

²² Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [273].

²³ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [274]–[279].

²⁴ Weber v Germany (2008) 46 E.H.R.R. SE5.

²⁵ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [280].

²⁶ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [281].

²⁷ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [282].

²⁸ Big Brother Watch (App. Nos 58170/13, 62322/14 and 24960/15) at [283].

to protect the general community from such threats” and that the Court must afford states a “broad margin of appreciation in this field so as not to undermine the effectiveness of systems for obtaining life-saving intelligence that could not be gathered any other way”.²⁹ Having made it clear that judicial interference would risk tying the hands of states tackling terrorism, the Government then turned to legality and asserted that bulk surveillance was governed by law as it was contained in primary legislation, supplemented by codes, and had been further clarified by the reports of the Interception of the Communications Commissioner.³⁰ When it came to safeguards the Government argued that the regime governing content data satisfied *Weber* and that the regime relating to communications data did not need to satisfy the *Weber* safeguards.³¹ As for the latter it argued that the test should simply be whether the law indicated the scope of discretion and manner of its exercise with sufficient clarity, a test that the UK satisfied.³² The Government also opposed updating the *Weber* safeguards.³³ It asserted that any requirement of reasonable suspicion would preclude the operation of bulk interception and that the oversight provided by the IPT removed any need for prior judicial authorisation.³⁴ Finally, the Government argued that a notification requirement would undermine the work of intelligence agencies, which could threaten lives, and that it would be impractical as many targets are overseas and details may not be known.³⁵ The Government did not return to the question of proportionality, perhaps because it had already argued that the regime was “critical to the protection of the United Kingdom from national security threats”,³⁶ a position that the Court ultimately accepted.³⁷

From the outset the Court confirmed that states have a wide margin of appreciation, which includes the use of bulk interception.³⁸ This was a major concession that culled the role of the Convention and the Court. Indeed, whilst the Court purported that the margin extended only to the type of surveillance and not its operation in practice it limited the safeguards that the Court was willing to mandate and the Court’s engagement with proportionality analysis. In fact, the Court rejected two of the three proposed minimum safeguards on the basis that they would undermine its acceptance of bulk interception.³⁹

The third additional safeguard contemplated in *Big Brother Watch* was judicial authorisation.⁴⁰ There was some hope following *Zakharov v Russia*⁴¹ and *Szabo v Hungary*⁴² that the Court was moving towards, if not judicial authorisation, then a more rigorous independent authorisation requirement. In *Zakharov* the Court declared that “it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure”,⁴³ but that non-judicial authorities can authorise surveillance provided that they are “sufficiently independent from the executive”.⁴⁴ Moreover, in *Szabo* the Court declared that a non-judicial body is compatible only if it is “sufficiently independent of the executive”, noting that “the political nature of the authorisation and supervision increases the risk of abusive measures”.⁴⁵ The Court in *Szabo* went on to emphasise that the “rule of law implies *inter alia* that an interference by the executive authorities with an individual’s rights should be subject to effective control which should normally be assured by the judiciary” and that “control by an independent

²⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [283].

³⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [285].

³¹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [286]–[293].

³² *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [292].

³³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [294].

³⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [294].

³⁵ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [294].

³⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [282].

³⁷ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [384]–[386].

³⁸ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [314].

³⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [317].

⁴⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [318]–[320].

⁴¹ *Zakharov v Russia* (2016) 63 E.H.R.R. 17.

⁴² *Szabo v Hungary* (2016) 63 E.H.R.R. 3.

⁴³ *Zakharov* (2016) 63 E.H.R.R. 17 at [233].

⁴⁴ *Zakharov* (2016) 63 E.H.R.R. 17 at [258].

⁴⁵ *Szabo* (2016) 63 E.H.R.R. 3 at [77].

body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny".⁴⁶ Thus the Court declared in *Szabo* that "supervision by a politically responsible member of the executive ... does not provide the necessary guarantees".⁴⁷ All of this suggested that a system of authorisation based purely on executive oversight would fall short of the requirements of Convention. The Court's position was, however, weaker in *Big Brother Watch* where it reasoned that judicial authorisation is not necessary,⁴⁸ and that states can operate without it provided that there is an adequate system of independent oversight.⁴⁹

Underlying the Court's approach was a legitimate concern that judicial oversight may not always provide an effective independent check; indeed the Court highlighted Russia, Turkey and Bulgaria as three cases in which it had found that judicial authorisation was ineffective in preventing abuse.⁵⁰ There is an obvious risk of stereotypes emerging regarding particular states, but in general the Court is right to question whether oversight truly is independent and effective. Indeed, the Court should look carefully at substance as opposed to form in assessing safeguards. Nevertheless, the dissenting judges were right to note that "the fact that a given safeguard would not be sufficient is not enough to support a conclusion that it should not be considered necessary".⁵¹ Thus the fact that judicial authorisation is not always effective does not mean that it should not be required at all.

Legality and *Weber* safeguards

Having declined to expand minimum safeguards, the Court proceeded to consider whether the regime satisfied legality and the existing *Weber* safeguards. The Court determined that it would examine the legal framework, not at the point at which the applicants lodged their applications but at the date of the hearing.⁵² This meant that the Court did not look at whether the regime *had* been operating on the basis of a clear, accessible and foreseeable legal framework, but rather whether in November 2017 it met the requirements of legality. This allowed it to take into account changes that followed the Snowden revelations and disclosures in the IPT proceedings.⁵³ The Court also narrowed the scope of its inquiry by focusing not on whether the legal framework was "accessible" (which would have entailed considering the applicants' argument that the scheme was too complex,⁵⁴ a failing that the Anderson report had highlighted),⁵⁵ but rather whether it was "foreseeable".⁵⁶ The Court thus proceeded to examine the regime vis-à-vis the six minimum safeguards set out in *Weber*. It found that many of these safeguards were satisfied, but that the regime fell short in a few important respects.⁵⁷

First, it held that whilst the legislation gave citizens an adequate indication of the circumstances and the conditions on which a warrant may be issued, the scope of the measures was broad and the only independent oversight was *ex post facto*.⁵⁸ The Court concluded that this was not enough in a bulk interception regime where the discretion to intercept was not significantly curtailed by the terms of the warrant.⁵⁹ The Court thus determined that the safeguards governing selection of bearers for interception

⁴⁶ *Szabo* (2016) 63 E.H.R.R. 3 at [77].

⁴⁷ *Szabo* (2016) 63 E.H.R.R. 3 at [77].

⁴⁸ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [320].

⁴⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [318].

⁵⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [319].

⁵¹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15), Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, joined by Judge Turkovic at [25].

⁵² *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [325].

⁵³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [325].

⁵⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [273].

⁵⁵ Independent Reviewer of Terrorism, "*A Question of Trust*": Report of the Investigatory Powers Review by the Independent Reviewer of Terrorism Legislation (June 2015).

⁵⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [327].

⁵⁷ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [358]–[374].

⁵⁸ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [328]–[347].

⁵⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [328]–[347].

and selection of intercepted material for examination were not sufficiently robust,⁶⁰ and that there was an absence of robust independent oversight of the selectors and search criteria used to filter intercepted communications.⁶¹

The Court then proceeded to consider whether communications data should be subject to the same safeguards as content data. In earlier cases the Court had clearly accepted that communications data is less intrusive, a distinction that is erroneous as communications data can be highly intrusive and more intrusive than content data.⁶² In *Big Brother Watch* there were some signs of progress on this issue, but the overall position remained somewhat ambiguous. The Court commenced its analysis by noting that thus far it had declined to apply minimum safeguards where there was no interception of communications.⁶³ It determined, however, that it did not need to decide on these facts whether the minimum safeguards should apply to communications data because the domestic regime treats the two in the same way except for in relation to the s.16 safeguards. The Court therefore focused on whether the Government's justification for exempting communications data from the s.16 safeguards was proportionate.⁶⁴ In making that assessment the Court indicated that it was not convinced that communications data is necessarily less intrusive suggesting that it may be willing to finally overturn the content/communications data distinction.⁶⁵ Indeed it went on to determine that the UK did not strike a fair balance by exempting the regime entirely from the safeguards applicable to content data.⁶⁶

Proportionality

Having found that the regime failed on the basis of legality the Court swiftly determined proportionality in three brief paragraphs. First, it noted that the Independent Reviewer of Terrorism Legislation had concluded that no alternative or combination of alternatives would be sufficient.⁶⁷ Second, it noted that the Venice Commission has acknowledged the intrinsic value of bulk surveillance.⁶⁸ Third, it determined that there was no reason to disagree with these bodies.⁶⁹ Having deferred to their expertise it concluded that "it is clear that bulk interception is a valuable means to achieve the legitimate aim pursued, particularly given the current threat level from both global terrorism and serious crime".⁷⁰ There was no discussion of the impact on the right to privacy, nor the standard that the Court was applying in determining proportionality. Indeed, whilst the report of the Independent Reviewer of Terrorism may have led the Court to accept that there is no viable alternative which could pursue the legitimate aim of preserving national security, its acceptance of surveillance as "a valuable means" of achieving that aim suggests that the bar may be somewhat lower than "no viable alternative".⁷¹

(ii) Intelligence sharing regime

This was the first time that the Court has considered whether an intelligence sharing regime complies with the Convention. Given the political nature of this task it was not surprising that the Court emphasised that

⁶⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [328]–[347].

⁶¹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [347].

⁶² *Uzun v Germany* (2011) 53 E.H.R.R. 24.

⁶³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [351].

⁶⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [352].

⁶⁵ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [356].

⁶⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [357].

⁶⁷ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [384].

⁶⁸ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [385].

⁶⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [386].

⁷⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [386].

⁷¹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [384] and [386].

it was not considering the interception itself (which was an act of the US), but rather the receipt of the data and its subsequent storage, examination and use by the intelligence services.⁷²

As noted above, the Court determined that it would examine the relevant legal framework at the date of the 2017 hearing.⁷³ This was critical to the intelligence sharing application because large parts of the regime were not publicly available at the time of the Snowden revelations. Indeed, the second IPT decision held that prior to the disclosures made in the IPT proceedings the regime contravened arts 8 or 10 of the ECHR.⁷⁴ Thus if the Court had examined the regime earlier it presumably would have found a violation. The applicants argued, however, that even following the 9 October disclosure there was no adequate basis in law. The argument that the disclosure did not provide an adequate legal basis seemed a compelling one, but by the time the Court heard the case the 9 October disclosure had been incorporated into the Interception of Communications Code of Practice, and thus the Court concluded that there “is now a basis in law” and the issue fell away entirely.⁷⁵

The next challenge related to the application of safeguards. The applicants argued that *Weber* must apply to intelligence sharing otherwise states would simply get around the limits by getting other states to intercept and leaving the Contracting States free to use the data without being constrained by minimum safeguards. For these reasons the Court agreed that *Weber* must apply to data received from intelligence sharing arrangements.⁷⁶ It went on, however, to find that the regime satisfied the *Weber* safeguards. Moreover, when it came to determining whether the measures were proportionate the Court found once more that the threat of terrorism meant that these practices did not violate art.8 of the ECHR.⁷⁷

(iii) Acquisition of communications data under Chapter II of the RIPA

Finally, the applicants argued that acquiring communications data was incompatible with art.8 of the ECHR as the regime permitted acquisition in a wide range of circumstances that were ill-defined with few limitations. Engaging with this substantively would have required the Court to consider whether different standards apply to content and communications data. The Court touched on this when it noted that in *Ben Faiza v France* it had distinguished between methods of investigation that made it possible to identify the geographical position of a person in the past or in real time and that real time was more likely to violate private life.⁷⁸ This is a further sign that the Court may be willing to break down the division between content and communications data, however, it also suggests that it may operate a second level distinction between transmission of existing communications data and transmission of real-time communications data such as ongoing monitoring or a tracking device on a vehicle. Whilst breaking down the communications/content data divide is a welcome move, the invocation of a temporal element raises its own difficult questions, in particular whether real-time really is more intrusive than historical data, and at what point does real-time data become historical data? Ultimately, however, the Court did not need to determine these issues as the conflict between EU law (which restricts measures to those that are intended to tackle serious crime) and the domestic legal framework (which did not limit the measures to tackling

⁷² *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [419]–[421].

⁷³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [325].

⁷⁴ *Liberty* [2015] UKIPTrib 13, 77-H (26 February 2015 judgment) at [32].

⁷⁵ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [427].

⁷⁶ If the situation were one in which the UK were seeking to avoid these limits by imploring the US to engage in surveillance on its behalf then this would appear to run contrary to the analogous principles expressed in the Court’s case-law as to whether an act of a private party is imputable to the state. In cases where the state has relied upon the acts of private agents in carrying out surveillance the Court has not been willing to accept the argument that it was ultimately the third party “who was in control of events”. Indeed, the Court has recognised that “to accept such an argument would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents”, *MM v Netherlands* (2004) 39 E.H.R.R. 19 at [40]. Where another state is concerned, however, the relevance of “control” under both the ECHR imputation approach and the attribution of acts to states in international law causes difficulties, see *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [420].

⁷⁷ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [445]–[446].

⁷⁸ *Ben Faiza v France* (App. No.31446/12), judgment of 8 February 2018, as cited in *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [460]–[462].

serious crime) meant that there was no clear legal basis for the measure.⁷⁹ Thus having found a violation on this basis the Court did not have to determine the substantive matters.

Articles 10, 6 and 14 of the ECHR

In addition to the two art.8 ECHR violations the Court also held that the bulk interception of data and the acquisition of communications data under Chapter II of the RIPA violated art.10 of the ECHR. It rejected, however, both the art.6 and art.14 ECHR applications as manifestly ill-founded. The art.6 ECHR complaint was rejected on the basis that the closed proceedings did not call into question the independence and impartiality of the IPT.⁸⁰ Whilst the Court rejected the art.14 ECHR claim on the grounds that the applicants had not substantiated this claim, and that to the extent that there is a difference it is not based on nationality but on geographical location, this is not a personal characteristic and therefore does not amount to discrimination.⁸¹ In any event, the Court determined that a difference based on geographical location would be justified as the UK has considerable powers to investigate in the UK and does not have the same powers outside the UK.⁸²

Separate and partly dissenting opinions

Separate and dissenting opinions often offer important insight into division within the Court. Indeed, in *Big Brother Watch* it is evident that whilst the Finnish and Croatian judges were pushing for greater safeguards,⁸³ the UK and San Marino judges were pushing for a determination that the regimes were compatible with art.8 of the ECHR.⁸⁴ Given this 2:4:2 split within the Court, it is not surprising that a more tentative judgment emerged.

The dissenting opinion of the Finnish and Croatian judges is particularly valuable for its insight into the ramifications of bulk surveillance and the enormous risk of abuse that this entails, issues that were largely absent from the Court's analysis.⁸⁵ It warns that we have to be cautious as states can invoke the threat of terrorism loosely and opportunistically to legitimise interferences and that increasing degradation of respect for democratic standards and the rule of law necessitate heightened scrutiny on the part of the Court.⁸⁶ The dissent thus pulls towards an approach that would be more robust in safeguarding rights.

Final reflections—where was the right to privacy?

Having examined the substance of *Big Brother Watch* let us reflect on what this means for the Court's role as guardian of the right to privacy. For decades the European Court of Human Rights has played a vital role in ensuring that UK surveillance practices are governed by the rule of law. Until 1984 the UK conducted surveillance based entirely upon executive discretion with no legal framework establishing limits upon that discretion. This was successfully challenged in *Malone v United Kingdom*, which led to the enactment of the Interception of Communications Act 1985.⁸⁷ A further ruling in *Liberty v United*

⁷⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [463] and [466]–[468].

⁸⁰ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [501]–[513].

⁸¹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [514]–[519].

⁸² *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [518].

⁸³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15), Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, joined by Judge Turkovic.

⁸⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15), Joint Partly Dissenting and Partly Concurring Opinion of Judges Pardalos and Eicke.

⁸⁵ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15), Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, joined by Judge Turkovic.

⁸⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15), Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, joined by Judge Turkovic at [11]–[15].

⁸⁷ *Malone v United Kingdom* (1985) 7 E.H.R.R. 14.

Kingdom, found that the 1985 Act was also incompatible with the Convention.⁸⁸ The Court has also found legal safeguards to be lacking in many other European countries. There is simply no comparable supranational human rights court that has directly shaped the legal framework of state surveillance. The importance of the Court should thus not be underestimated.

Moreover, right from the outset the Convention jurisprudence was grounded in *Klass v Germany* in an awareness that “[p]owers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions”.⁸⁹ Indeed, in *Klass* the Court stressed that whilst states need to be able to respond to threats of terrorism “this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance”.⁹⁰ It also emphasised the danger that surveillance “poses of undermining or even destroying democracy on the ground of defending it” and thus states “may not in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”.⁹¹

The important role that the Court has played in holding states to account is undermined by the wide margin of appreciation granted to states in *Big Brother Watch* which allows states to use bulk surveillance and invoke the threat of terrorism seemingly without scrutiny. For example, when considering whether bulk interception was a proportionate interference the Court simply declared that “[i]t is clear that bulk interception is a valuable means to achieve the legitimate aims pursued, particularly given the current threat level from both global terrorism and serious crime”.⁹² Equally when it came to the intelligence sharing regime the Court went straight to the “difficulties faced by States in protecting their populations from terrorist violence”⁹³ and “the very real threat that Contracting States currently face on account of international terrorism”.⁹⁴ Before concluding that “[f]aced with such a threat, the Court has considered it legitimate for Contracting States to take a firm stand against those who contribute to terrorist acts”⁹⁵ and that “taking such a stand—and thus preventing the perpetration of violent acts endangering the lives of innocent people—requires a flow of information between the security services of many countries in all parts of the world”⁹⁶ There is a distinct lack of acknowledgement throughout this that the right to privacy is sacrificed by accepting these measures.

It is worth pausing to consider whether this is simply the result of a rise in deference and the dominance of national security more generally. Deference and national security are certainly important factors, but if we do not engage with privacy and proportionality then this makes this all the more inevitable and problematic. This is evident if we compare the Court’s analysis of art.8 of the ECHR with its analysis of art.10 of the ECHR in *Big Brother Watch*, a right that equally came up against national security. When examining whether the measures constituted a proportionate interference with art.10 of the ECHR, the Court’s starting point was not national security, but rather the importance of freedom of expression. Reiterating its well-established position that “freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance”⁹⁷ Moreover, it emphasised that it subjects “the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to *special scrutiny*” and that “an interference cannot be compatible unless it is justified by an overriding requirement in the public interest”⁹⁸ Thus applying this approach it held that “in view of the potential chilling effect that any perceived interference might have

⁸⁸ *Liberty* (2009) 48 E.H.R.R. 1.

⁸⁹ *Klass v Germany* (1979–80) 2 E.H.R.R. 214 at [42].

⁹⁰ *Klass* (1979–80) 2 E.H.R.R. 214 at [49].

⁹¹ *Klass* (1979–80) 2 E.H.R.R. 214 at [49].

⁹² *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [386].

⁹³ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [445].

⁹⁴ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [445].

⁹⁵ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [446].

⁹⁶ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [446].

⁹⁷ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [487].

⁹⁸ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [488].

on the freedom of the press and given the absence of safeguards there was a violation of Article 10” (emphasis added).⁹⁹

The Court’s approach to the two rights is markedly different, as whilst art.10 of the ECHR is anchored by a clear conception of why the right is important and why interferences need to be justified, the art.8 ECHR right appears to lack a similar clearly articulated normative weight. This is despite the fact that there is no hierarchy between freedom of expression and privacy in the Convention, and that on numerous occasions the Court has stated that they are of equivalent status.¹⁰⁰ Part of the problem is perhaps that whilst freedom of expression has always been lauded as a socially beneficial right,¹⁰¹ the right to privacy has primarily developed in individualistic terms.¹⁰² Thus whilst “freedom of expression constitutes one of the essential foundations of a democratic society”, the societal functions of privacy are not as prominent in the Court’s analysis.¹⁰³ And yet privacy has important societal benefits, in particular it acts as a bulwark against totalitarianism,¹⁰⁴ it provides the space in which ideas (particularly controversial ideas) can be formed, developed, explored and expressed,¹⁰⁵ it fosters social relations,¹⁰⁶ and by protecting privacy we protect those that are typically subject to the most intrusive measures including ethnic and religious minorities, and those of low socio-economic status.¹⁰⁷ Thus privacy contributes to a democratic, intellectually vibrant, harmonious and egalitarian society. These features, although evidently not guaranteed by privacy alone, may be jeopardised by a loss of privacy.

There are inevitable difficulties associated with translating abstract rights and the intangible nature of human experiences into legal decision-making, but to evaluate rights we need to have the best possible understanding of what they entail. A way forward for the Court is to bring to the fore a stronger statement of the importance of privacy. Not simply a statement of abstract principles, but rather the foundation for the Court’s analysis, namely that privacy is valuable and that intrusions need to be justified. This should then feed into greater engagement with proportionality in the same way that the Court engages with other rights.¹⁰⁸ This does not mean that privacy will triumph, the Court might find that national security trumps privacy, but in making that determination we need to be clear that the right is being sacrificed. Human

⁹⁹ *Big Brother Watch* (App. Nos 58170/13, 62322/14 and 24960/15) at [495].

¹⁰⁰ See Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy as cited in cases such as *Von Hannover v Germany* (2012) 55 E.H.R.R. 15.

¹⁰¹ This is evident as far back as *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [49].

¹⁰² Those principles include: “physical and psychological integrity”; “the right to establish and develop relationships without interference, with other human beings and the outside world”; a “zone of interaction of a person with others, even in a public context, which may fall within the scope of private life”; “the notion of personal autonomy”; “that it includes a right to lead a ‘private social life’—that is the possibility for the individual to develop his or her social identity” and “the right to live privately away from unwanted attention”. For discussion of the principles underpinning art.8 of the ECHR see Nicole Moreham, “The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination” [2008] E.H.R.L.R. 44.

¹⁰³ This is not surprising to privacy scholars who have long been attune to the invisibility of the social value of privacy: Priscilla Reagan, *Legislating Privacy* (Chapel Hill: University of North Carolina Press, 1995); David Feldman, “Privacy-related Rights: Their Social Value” in P. Birks (ed.), *Privacy and Loyalty* (Oxford: Oxford University Press, 1997), pp. 5–50; Valerie Steeves, “Reclaiming the Social Value of Privacy” in Ian Kerr et al. (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press 2009), pp. 191–208; Kirsty Hughes, “The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse” in Beate Roessler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2015), pp.225–243.

¹⁰⁴ For example, Spiros Simitis claims that privacy is a “constitutive element of a democratic society” in “Reviewing Privacy in an Information Society” (1987) 135 *University of Pennsylvania Law Review* 707, 732, and Ruth Gavison writes that privacy is “essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy” in “Privacy and the Limits of the Law” (1980) 89 *Yale Law Journal* 421, 455.

¹⁰⁵ Neil Richards, *Intellectual Privacy* (New York: OUP, 2015).

¹⁰⁶ Kirsty Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012) *Modern Law Review* 806.

¹⁰⁷ As David Gray and Danielle Citron explain, “racial, ethnic, and religious minorities are particularly vulnerable to governmental suspicion and profiling, they are more likely to refrain from both exploring their own conceptions of the good life and participating robustly in public life when they are subjected to surveillance. The burden of self-censorship occasioned by a surveillance state is thus borne unequally” in “The Right to Quantitative Privacy” (2013) *Minnesota Law Review* 62, 79. See also Khia Bridges, *The Poverty of Privacy Rights* (Stanford, California: Stanford University Press, 2017).

¹⁰⁸ The conflation of legality and proportionality was developed in *Kennedy v United Kingdom* (2011) 52 E.H.R.R. 4. For discussion see Maria Helen Murphy, “A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: a Rejuvenation of Necessity?” [2014] E.H.R.L.R. 507; Maria Helen Murphy, “The Relationship Between the European Court of Human Rights and National Legislative Bodies: Considering the Merits and Risks of the Approach of the Court in Surveillance Cases” (2013) 3(2) *Irish Journal of Legal Studies* 65. See also Paul de Hert, “Balancing Security and Liberty within the European Human Rights Framework After 9/11” (2005) *Utrecht Law Review* 68.

rights should prompt us to stop and think, they provide us with a means of reflecting upon why they are important and whether we should sacrifice them for some other end and they require states to justify their actions. In *Big Brother Watch* the Court found the UK in violation of these rights, but if we do not engage with why privacy is important we close down the more substantive discourse.

The 2018 English Local Elections ID Pilots and the Right to Vote: A Vote of (No) Confidence?

Ben Stanford*

✉ Electors; Franchise; Identification; Local elections; Northern Ireland; Pilot schemes; Right to free elections

Abstract

With further pilots having already been announced for May 2019 and a national roll-out likely to take place in the future, this article evaluates the voter ID pilots conducted in the May 2018 English local elections from the perspective of the right to vote. Representing a first in England, eligible voters in five areas were required to produce some form of ID when voting in polling stations. This attracted much criticism amidst concerns that some individuals would be disenfranchised and denied their right to vote. Reflecting upon the conduct of the pilots and the official statistics subsequently published about them, as well as the author's own observations at polling stations and other stakeholder feedback, this article argues that the 2018 pilots were too limited and inconclusive to draw any support for voter identification laws in England, but should the Government proceed with its proposals, it must do so with the utmost caution to avoid disenfranchisement. Moreover, in order to uphold the right to free elections under art.3 of the First Protocol to the ECHR, it is imperative that further research is carried out and adequate safeguards are put in place before a nationwide roll-out is considered, especially given the UK's unusual position of lacking a Government-issued national identity card.

(1) Introduction

In the May 2018 local elections in England, a pilot scheme with the stated aim of combatting electoral fraud was carried out which required eligible voters in Bromley, Gosport, Swindon, Watford and Woking to present some form of identification before voting in polling stations.¹ In the run-up to the elections, the proposals attracted political criticism primarily from opposition parties, amidst concerns that some voters would be disenfranchised and that certain groups would be disproportionately affected by the introduction of compulsory identification requirements. For example, following an urgent question on the matter to the Minister for the Cabinet Office in April 2018, the Labour Party's Shadow Minister for Voter Engagement and Youth Affairs, Cat Smith, claimed that the pilot scheme would introduce "discriminatory measures that could disenfranchise legitimate voters who already face a multitude of barriers to democratic engagement".² Representatives of the Scottish National Party and the Liberal Democrats voiced similar

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¹ Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017), <https://www.gov.uk/government/news/voter-id-pilot-to-launch-in-local-elections> [Accessed 10 November 2018]. One of the areas originally due to participate, Slough, withdrew from the pilot and Swindon took its place.

² C. Smith, Shadow Minister for Voter Engagement and Youth Affairs, HC Deb 23 April 2018, vol.639, col.607.

concerns during the course of the debate.³ At the same time, numerous campaigning organisations and charities warned against the imposition of identification requirements at polling stations,⁴ with the Electoral Reform Society in particular claiming that mandatory voter ID “poses more problems than solutions”.⁵

Although the practice is now relatively uncontroversial and even welcomed by many in Northern Ireland as a means to improve voter confidence, where voter identification has been required since 1985 and photo identification since 2003,⁶ experience from the US persistently suggests that women, the young and elderly, ethnic minorities, as well as the least well-off in society face significant burdens in obtaining suitable identification.⁷ Whilst it may be tempting to point to Northern Ireland as a success story in respect of voter ID laws, as will be discussed later there are reasons to doubt its suitability as a comparator to England or indeed the rest of the UK. Despite these initial apprehensions, the voter ID pilots took place on 3 May 2018. Shortly after, the Cabinet Office pledged to hold further pilots in May 2019,⁸ owing to what the Government deemed to be a successful initial round of pilots.

The human rights implications of compulsory voter identification laws have already been discussed in depth elsewhere,⁹ insofar as art.3 of the First Protocol to the European Convention on Human Rights (ECHR) requires contracting parties 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”. Bearing in mind the principles underpinning art.3 of the First Protocol to the ECHR, the underlying purpose of this article is to evaluate the voter ID pilots, from conception to delivery, in light of the official statistics disseminated following the pilots as well as the author’s own observations and other stakeholder feedback.

In that respect, in addition to the data collated and disseminated by each respective council, the Electoral Commission produced a substantial report on the pilot scheme in July 2018 pursuant to the requirements of the Representation of the People Act (RPA) 2000,¹⁰ which provides much food for thought. Moreover, this article also draws upon the author’s own observations at polling stations in two of the participating areas on the day of the local elections in May 2018, each of which imposed different identification requirements.¹¹ This article also draws upon the comments and reflections of the Chief Electoral Officer of the Electoral Office for Northern Ireland (EONI), Virginia McVea, from an interview conducted in August 2018 for the purposes of this research. These experiences were invaluable to the task of attempting to better understand and appreciate the practicalities of voter identification requirements.

³ A. Thewliss, HC Deb 23 April 2018, vol.639, cols 608–609; S. Hosie, HC Deb 23 April 2018, vol.639, col.611; E. Reeves, HC Deb 23 April 2018, vol.639, col.612; G. Newlands, HC Deb 23 April 2018, vol.639, col.615.

⁴ Electoral Reform Society, “Civil Society Coalition Demand Rethink of ‘Risky’ Voter ID Plans”, Press Release (30 July 2018), <https://www.electoral-reform.org.uk/latest-news-and-research/media-centre/press-releases/civil-society-coalition-demand-rethink-of-risky-voter-id-plans/> [Accessed 10 November 2018].

⁵ Electoral Reform Society, “Voters Locked Out: The Flaws of Voter ID in England” (April 2018), <https://www.electoral-reform.org.uk/wp-content/uploads/2018/04/Defending-the-Right-to-Vote-Voter-ID-Briefing.pdf> [Accessed 10 November 2018].

⁶ Representation of the People Act 1983 Sch.1, r.37(1), as amended by the Elections (Northern Ireland) Act 1985 s.1(2); the Representation of the People (Northern Ireland) Regulations 1986 (SI 1986/1091) regs 2 and 13(b); and the Representation of the People (Northern Ireland) (Variation of Specified Documents and Amendments) Regulations 1991 (SI 1991/1674) reg.4. In respect of photo ID, the same provision in the 1983 Act was amended on numerous occasions in order to allow for a smooth transition and to gradually phase out non-photographic ID after 2002. See the Electoral Fraud (Northern Ireland) Act 2002 s.4(3); the Representation of the People (Northern Ireland) (Amendment) Regulations 2002 (SI 2002/1873) reg.9 and Sch.1; and the Representation of the People (Northern Ireland) (Variation of Specified Documents) Regulations 2003 (SI 2003/1156) regs 3(1)(2), 3(1)(3) and 3(1)(4).

⁷ American Civil Liberties Union, “Oppose Voter ID Legislation: Fact Sheet”, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (last updated May 2017) [Accessed 10 November 2018].

⁸ Cabinet Office, “Government Commits to New Round of Voter ID Pilots at Next Local Elections”, Press Release (19 July 2018), <https://www.gov.uk/government/news/government-commits-to-new-round-of-voter-id-pilots-at-next-local-elections> [Accessed 10 November 2018].

⁹ B. Stanford, “Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain” (2018) 23(1) E.H.R.L.R. 57.

¹⁰ Representation of the People (RPA) Act 2000 s.10(6); Electoral Commission, “May 2018 Voter Identification Schemes: Findings and Recommendations” (July 2018), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/244950/May-2018-voter-identification-pilots-evaluation-report.pdf [Accessed 10 November 2018]. The Commission also produced reports specific to each of the five participating areas; these are available via the Electoral Commission website.

¹¹ The author observed the voting process in various polling stations in Watford and Woking. The author is grateful to all polling station staff for their helpful assistance as well as the Electoral Commission for their authorisation to act as an accredited individual observer.

Following this Introduction, Section 2 outlines the way in which the voter ID pilots were authorised and conducted in each respective area. Section 3 then evaluates the success of the pilots in each participating area from the perspective of the right to vote, relying upon the official statistics subsequently published, as well as the feedback of other stakeholders and the author's own observations at polling stations. Finally, Section 4 concludes.

(2) The authorisation and conduct of the voter ID pilot scheme

On 14 January 2018, the Minister for the Cabinet Office made a series of Ministerial Orders authorising the voter ID pilots to take place in Bromley,¹² Gosport,¹³ Swindon,¹⁴ Watford¹⁵ and Woking respectively,¹⁶ pursuant to his powers under s.10 of the RPA 2000. The manner in which the pilots were legally authorised in each area has, however, been criticised, with some suggesting that the Minister acted ultra vires by making Orders to allow the local authorities to require identification, when Parliamentary approval should have been sought instead.¹⁷

In essence, s.10 of the RPA 2000 allows the Secretary of State to make an Order which authorises pilot schemes for local elections in England and Wales, following a proposal from a local authority and the Electoral Commission.¹⁸ The Act states that such a pilot scheme would allow for changes in respect of one or more of the following general ways: when, where and how voting at the elections is to take place; how the votes cast at the elections are to be counted; or the sending by candidates of election communications free of charge for postage.¹⁹ Although not limiting or proscribing exactly what requirements and processes could be authorised in a pilot, the Act states that a scheme could authorise voting to take place on more than one day and at places other than polling stations, or that postal charges incurred by candidates sending election communications could be paid by the authority concerned.²⁰

The Act's explanatory notes provide some further, helpful guidance on this matter, stating that the evaluations which must be published by the Electoral Commission after the elections must include "an assessment of the scheme in facilitating voting and (if relevant) the counting process or in encouraging voting or enabling voters to make informed decisions",²¹ and also "a statement as to whether in the local authority's opinion: turnout was higher than it would otherwise have been; voters found the new arrangements easy to use; the new procedures led to any increase in personation or other electoral fraud; the procedures led to an increase or to savings in expenditure".²² As such, this language might suggest at the outset that the purpose of s.10 of the RPA 2000 envisaged pilot schemes being authorised with a view to *enabling* wider participation, rather than *limiting* wider participation, as compulsory identification requirements may well do.

In that respect, a circular published and disseminated by the Home Office in 2000, which for the first time provided guidance to local authorities considering running a pilot scheme in an election, stated that the application to hold a pilot must give "an assurance that *no voter will be put at a disadvantage* by the proposed innovation".²³ Whilst this requirement seems to have mostly thwarted proposals that would have disadvantaged a particular religious group,²⁴ the imposition of additional barriers at the point of voting,

¹² London Borough of Bromley (Identification in Polling Stations) Pilot Order 2018.

¹³ Gosport Borough Council (Identification in Polling Stations) Pilot Order 2018.

¹⁴ Swindon Borough Council (Identification in Polling Stations) Pilot Order 2018.

¹⁵ Watford Borough Council (Identification in Polling Stations) Pilot Order 2018.

¹⁶ Woking Borough Council (Identification in Polling Stations) Pilot Order 2018.

¹⁷ P. Walker, "UK's Voter ID Trial in Local Elections Could be Illegal—Barristers", *The Guardian* (6 June 2018).

¹⁸ RPA 2000 s.10(1).

¹⁹ RPA 2000 s.10(2).

²⁰ RPA 2000 s.10(3).

²¹ RPA 2000 s.10(7).

²² RPA 2000 s.10(8); RPA 2000 Explanatory Notes s.40.

²³ G. Howarth, Parliamentary Under-Secretary of State for Northern Ireland, HC Deb 13 January 2000, vol.342, col.489 (emphasis added).

²⁴ Lord Bassam of Brighton, Parliamentary Under-Secretary of State for Northern Ireland, HL Deb 15 February 2000, vol.609, col.1072.

such as the identification requirements imposed in the May 2018 pilots, arguably has the potential to disadvantage certain voters in other ways.

Given the nature of the proposals and the potential implications, it is also pertinent to acknowledge the impact of the Public Sector Equality Duty (PSED) under the Equality Act 2010, which requires public authorities in the exercise of their functions to have due regard to the need to “eliminate discrimination”, “advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it”, and to “foster good relations between persons who share a relevant protected characteristic and persons who do not share it”.²⁵ In light of these overarching obligations, the Equality and Human Rights Commission (EHRC) contacted the Cabinet Office in April 2018, before the voter ID pilots took place, requesting any Equality Impact Assessment undertaken by the Government, whilst also emphasising that the voter ID pilot scheme and the underlying policy should be adequately considered with sufficiently detailed analysis to determine its potential impact on equality in a national context and prior to any pilots being run.²⁶ However, subsequent correspondence between the EHRC and the Cabinet Office in April and May 2018 revealed that the Government had *not* undertaken an Equality Impact Assessment before the voter ID pilots took place. Rather, the participating local authorities had carried these out instead, which has drawn some criticism owing to the specific, continuous and ongoing duty upon Government departments and ministers to comply with the PSED.²⁷

Insofar as the actual conduct of the voter ID pilot scheme is concerned, the five participating areas in the 2018 voter pilots—Bromley, Gosport, Swindon, Watford and Woking—each had particular identification requirements that eligible voters were required to satisfy to vote on 3 May 2018. Given the UK’s unusual position of lacking a Government-issued national identity card, the varying councils were afforded greater discretion about the acceptable identification than they might otherwise have been given. Individuals in Watford and Swindon were required to produce their polling cards which contained a unique barcode.²⁸ Where voters had forgotten or lost their polling cards, or in situations when the cards could not be verified, other photographic identification was accepted.²⁹ The requirements in Bromley, Gosport and Woking were more complex, as voters were required to produce a specific form of identification.

First, voters in Bromley were required to produce either a UK, Commonwealth or EU passport; a UK, Crown Dependency or EU photocard driving licence; a Northern Ireland Electoral Identity Card (EIC); a biometric immigration document issued in the UK; a European Economic Area (EEA) identity card; an Oyster 60+ London Pass; a London Freedom Pass; or a PASS scheme card (national proof of age standards scheme).³⁰ If voters did not possess one of these forms of identification, they could produce a combination of two alternative forms of identification, one of which had to show their registered address.³¹

²⁵ Equality Act 2010 s.149.

²⁶ Letter from Clare Collier (Senior Principal: Legal, Equality and Human Rights Commission) to David Lidington MP (Minister for the Cabinet Office) (11 April 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707429/20180411_EHRC_letter_to_Cabinet_Office.pdf [Accessed 10 November 2018].

²⁷ Letter from Chloe Smith MP (Minister for the Constitution) to David Isaac (Chair, Equality and Human Rights Commission) (23 April 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707137/Letter_to_David_Isaac_CBE_2.pdf [Accessed 10 November 2018]; Letter from David Isaac (Chair, Equality and Human Rights Commission) to Chloe Smith MP (Minister for the Constitution) (14 May 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707681/20180514-EHRC-letter-to-CO.pdf [Accessed 10 November 2018]; Letter from Chloe Smith MP (Minister for the Constitution) to David Isaac (Chair, Equality and Human Rights Commission) (16 May 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707726/MFC1307-response.pdf [Accessed 10 November 2018].

²⁸ Electoral Commission, “May 2018 Voter Identification Schemes: Findings and Recommendations” (July 2018), Appendix A.

²⁹ Voters in Watford whose polling cards could not be verified were required to produce any of the following alternative forms of photographic identification: Valid British, European or Commonwealth passport; UK or EU photo-card driving licence (full or provisional); Valid credit or debit card; Biometric Residence Permit; EEA Identity Card; or a Northern Ireland Electoral Identity Card. Voters in Swindon whose polling cards could not be verified were required to produce any of the following alternative forms of photographic identification: Passport (UK, EU, Commonwealth) (can be expired or unexpired); Photocard driving licence including a provisional licence (UK, Crown Dependency or EU); Northern Ireland Electoral Identity Card; Biometric Immigration Document; EEA Identity Card. Alternatively, voters in Swindon who lacked appropriate identification could have their identities attested by two residents who vote at the same polling station, one of whom must have already voted and had their ID verified.

³⁰ Electoral Commission, “May 2018 Voter Identification Schemes: Findings and Recommendations” (July 2018), Appendix A.

³¹ Specifically, these were: a valid bank or building society debit card or credit card; a poll card for the poll; a driving licence (including a provisional licence) which is not in the form of a photocard; a birth certificate; a marriage or civil partnership certificate; an adoption certificate; a firearms certificate

The requirements in Gosport were slightly different, as voters were required to produce either a UK, Commonwealth or EU passport; a UK, Crown Dependency or EU photocard driving licence; a Northern Ireland EIC; a biometric immigration document; an EEA identity card; a Disclosure and Barring Service certificate showing a registered address; a Ministry of Defence (MoD) photographic identity card; a MoD Defence Privilege Card; or a photographic travel pass from any Hampshire council.³² Like in Bromley, if voters did not possess one of these forms of identification, they could produce a combination of two alternative forms of identification, one of which had to show their registered address.³³

Lastly, the requirements in Woking were arguably the strictest of all, as voters were required to produce either a UK, Commonwealth or EU passport; a UK or EU driver's licence; an EEA photographic identity card; a UK biometric residence permit; a Northern Ireland EIC; a Surrey Senior Buss Pass; a Surrey Disabled People's Bus Pass; a Surrey Student Fare Card; a 16–25 Railcard; a Rail Season Ticket Photocard; or, if the individual did not possess one of the principal forms of identification, a Local Elector Card.³⁴ Unlike Bromley and Gosport, however, other non-photographic forms of identification were not permitted.

(3) Evaluating the success of the voter ID pilot: a vote of (no) confidence?

When confronted with applications concerning the right to vote under art.3 of the First Protocol to the ECHR, the European Court of Human Rights has stressed that a number of requirements must be met for any restrictions upon the right to be lawful under the Convention.³⁵ The measures taken by contracting parties such as the UK must not curtail the right to vote in a way that impairs its essence and effectiveness; the conditions imposed must be proportionate and pursue a legitimate aim; the free expression of the people must not be thwarted; the requirement must be concerned with the integrity and effectiveness of the election process; and, if relevant, the exclusion of any group of the public must be reconcilable with the purpose of art.3 of the First Protocol.³⁶ Furthermore, although voter identification is, on the face of it, a neutral policy that would concern all eligible voters, the European Court of Human Rights has made it clear that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, although couched in neutral terms, discriminates against a group".³⁷

Whilst there are numerous ways to measure the success of an election from a human rights perspective, arguably the most relevant and quantifiable way of doing so amidst concerns of potential disenfranchisement concerns voter turnout, confidence in the security of the voting process, and crucially, the amount of eligible voters prevented from voting and effectively disenfranchised for failing to produce the required identification to polling station workers. In light of the fundamental principles that underpin the right to vote under art.3 of the First Protocol to the ECHR outlined above, it is essential to examine these three issues in particular in order to reach a grounded conclusion. They will help to shed some light upon the direct consequences of voter identification laws in England in a number of ways, not least of all whether

granted under the Firearms Act 1968; the record of a decision on bail made in respect of the voter in accordance with s.5(1) of the Bail Act 1976; a bank or building society cheque book; a mortgage statement dated within 3 months of the date of the poll; a bank or building society statement dated within 3 months of the date of the poll; a credit card statement dated within 3 months of the date of the poll; a utility bill dated within 3 months of the date of the poll; a council tax demand letter or statement dated within 12 months of the date of the poll; a Form P45 or Form P60 dated within 12 months of the date of the poll.

³² Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), Appendix A.

³³ Specifically, these were: a driving licence without photo; a birth certificate; an adoption certificate; a marriage or civil partnership certificate; a bank or building society debit/credit card. Subject to it being issued within 12 months of voting day, voters could also produce a financial statement such as a bank or mortgage statement; a council tax demand letter or statement; a utility bill; a P2, P6, P9, P45 or P60 form; or a statement of benefits or entitlement to benefits.

³⁴ Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), Appendix A.

³⁵ B. Stanford, "Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain" (2018) 23(1) E.H.R.L.R. 57.

³⁶ See, in particular, *Mathieu-Mohin v Belgium* (1988) 10 E.H.R.R. 1; *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41; *Yumak v Turkey* (2009) 48 E.H.R.R. 4; *Sitaropoulos v Greece* (2013) 56 E.H.R.R. 9; *Scoppola v Italy* (2013) 56 E.H.R.R. 19.

³⁷ *Biao v Denmark* (2017) 64 E.H.R.R. 1 at [103]; *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [184]; *Adami v Malta* (2007) 44 E.H.R.R. 3 at [80].

such laws might impair the essence and effectiveness of the right to vote, as well as the question of whether voter identification requirements are proportionate and pursue a legitimate aim.

(a) Voter turnout

First, the factors that generally affect voter turnout at any given election are obviously complex, rendering a comprehensive assessment of such an issue beyond the scope of this article. Nevertheless, before exploring the results of the voter ID pilots in more detail, it will be useful to briefly consider some of the most significant and immediate factors that may have accounted to some extent for the fluctuations in turnout in the 2018 local elections when compared to the 2014 elections, when the seats were last contested.

Whilst the local elections in May 2014 were held simultaneously with the last European Parliament elections, the May 2018 polling day only covered local elections, so a higher voter turnout in 2014 might be expected when more was at stake. On a different note, there are growing concerns that so-called “voter fatigue” may be contributing to a decrease in voter turnout.³⁸ Looking at the electoral history across the five participating areas since 2014, voters have been regularly polled, on a yearly basis in some areas, in various local, county and mayoral elections³⁹; the 2014 European Parliament elections; the 2015 and 2017 General Elections; the 2016 Police and Crime Commissioner elections⁴⁰; and the 2016 EU Referendum. As a result, voter fatigue might have contributed to a decrease in voter turnout in 2018 when compared to 2014.

On the other hand, the publicity drive to raise awareness about the identification requirements in the five areas was commendable and extremely visible, prompting the managing director and returning officer of Watford Borough Council to assert, quite fairly, that there had been “good advertising” for the elections.⁴¹ In that respect, according to the Electoral Commission, 86% of people who voted in polling stations in the five participating areas were aware of the need to bring identification.⁴² As such, the enhanced efforts to inform voters about the voter ID requirements, and therefore of the election itself by default, may have accounted for a small increase in voter turnout in the 2018 local elections.⁴³

In terms of the actual voter turnout in each of the five areas that participated in the 2018 voter ID pilots, turnout *increased* in Swindon and Watford where voters were required to produce their polling cards, when compared to the 2014 local elections when the seats were last contested.⁴⁴ However, turnout marginally

³⁸ P. Duncan and P. Scruton, “Voter Fatigue: Have we ever been Polled so Often?”, *The Guardian* (21 April 2017); K. Devlin, “Experts Warn Voter Fatigue Could Lead to Lower Turnout”, *The Sunday Herald* (18 April 2017).

³⁹ In Bromley, local elections were held in 2014 and 2018, whilst the London Mayoral and Greater London Authority elections were held in 2016. See London Borough of Bromley, “Past Election Results”, http://www.bromley.gov.uk/info/200033/elections_and_voting/1107/past_election_results [Accessed 10 November 2018]. In Gosport, local elections were held in 2014, 2017 and 2018. See Gosport Borough Council, “Election Results”, <https://www.gosport.gov.uk/sections/your-council/council-services/electoral-services/election-results/> [Accessed 10 November 2018]. In Swindon, local elections were held in 2014, 2015, 2016 and 2018. See Swindon Borough Council, “Councillors, Democracy and Elections”, https://www.swindon.gov.uk/downloads/20021/councillors_democracy_and_elections [Accessed 10 November 2018]. In Watford, local elections were held in 2014, 2015, 2016, 2017 and 2018, whilst mayoral elections were held in 2014 and 2018. See Watford Borough Council, “Elections Results”, <https://www.watford.gov.uk/electionresults> [Accessed 10 November 2018]. Lastly, in Woking, local elections were held in 2014, 2015, 2016, 2017 and 2018. See Woking Borough Council, “Past Election Results”, <https://www.woking.gov.uk/council/election/elections> [Accessed 10 November 2018].

⁴⁰ With the exception of Bromley which is within the jurisdiction of the Metropolitan Police. Voters were instead invited to vote in the 2016 London Mayoral election. The London Mayor is considered to be the Police and Crime Commissioner for the Metropolitan Police District.

⁴¹ R. Cusack, “Turnout up in Polling Card Pilot Areas and Down for ID Cards”, *Local Government Chronicle* (10 May 2018), <https://www.lgcplus.com/politics-and-policy/governance-and-structure/turnout-up-in-polling-card-pilot-areas-and-down-for-id-cards/7024398.article> [Accessed 10 November 2018].

⁴² Electoral Commission, “May 2018 Voter Identification Schemes: Findings and Recommendations” (July 2018), para.1.17.

⁴³ A postal survey carried out by two academics across the five pilot areas and three non-pilot areas revealed that the turnout of respondents in pilot areas was 75%, compared to 70% of respondents in non-pilot areas. Furthermore, 70% of respondents in pilot areas were contacted by a political party before the elections, compared to 68% of respondents in non-pilot areas. See L. Testa and S. Banducci, “Local Elections and Voter ID Pilots”, *Exeter Q-Step Centre* (2018).

⁴⁴ In Swindon turnout increased from 33% to 40%, whereas in Watford turnout increased from 37% to 39.3%. See R. Cusack, “Turnout up in polling card pilot areas and down for ID cards”, *Local Government Chronicle* (10 May 2018); N. Dempsey, “Local Election 2018”, *House of Commons Library*, CBP 8306 (14 May 2018), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8306#fullreport>, p.18 [Accessed 10 November 2018].

decreased in Bromley, Gosport and Woking where specific forms of identification were required.⁴⁵ Given the complexity of the factors that invariably influence voter turnout, only some of which have been acknowledged above, it is important to treat these results with caution and avoid making any definitive conclusions about the impact of voter ID at elections. Nevertheless, given what is at stake with the risk of widespread disenfranchisement, caution is all the more necessary if attempting to point to these results as evidence that voter identification would have a minimal impact upon the turnout at more significant elections such as general elections or referendums.

As voter turnout is traditionally poor in UK local elections in comparison to general elections and referendums,⁴⁶ it could be safely assumed that individuals who vote in local elections are more likely to be politically engaged than those who only vote in general elections and referendums. According to the Electoral Commission and their voter survey in 2017, those who claim to “always vote” at elections are likely to have comprised the majority of voters at the local government and combined authority mayoral elections in May 2017.⁴⁷ Moreover, the Electoral Commission concluded that “‘always voters’ are more likely to view voting as a civic duty compared to ‘sometimes voters’, whose motivations change depending on the context of the poll”⁴⁸

As such, it might be reasonable to expect that individuals who consistently vote at local elections, as well as other elections deemed to be less significant than general elections and referendums, are more conscientious about the rules and regulations of voting than those who *only* vote in general elections and referendums. These voters might therefore be more likely to ensure that they satisfied whatever the voting requirements were well in advance of polling.

Caution is also necessary when confronted with the issue of representation in the 2018 voter ID pilots, given the obvious lack of diversity in the five participating areas when compared to the overall electorate in the UK. In addition to the clear geographical limitation of the five participating areas, i.e. the fact that all five areas are located in the South of England and three had a close proximity to London, questions can also be asked about the diversity of the areas in other more subtle ways.

For example, in respect of unemployment rates, the five participating areas all had below-average percentages compared to the national average of 4.2%, with Woking being the furthest afield at 2.4%.⁴⁹ Furthermore, the Electoral Commission 2017 voter survey revealed that “always voters” who were, as discussed earlier, likely to have comprised the majority of voters at the local government elections in May 2017, were “more likely to be over 35 years old, white and from socio-economic group AB”⁵⁰ According to the National Readership Survey of social grades in 2016, this particular combined socio-economic group comprises just 27% of the population in the UK.⁵¹

Although now slightly outdated, the 2011 Census revealed that whereas 23% of all individuals in England belonged to the AB social grade, Bromley, Watford and Woking all had a much higher percentage of individuals in the highest social grades at that time, whereas Swindon had a marginally smaller percentage, and only Gosport had a significantly lower percentage.⁵² Voters in the AB social grade are

⁴⁵ In Bromley turnout decreased from 41% to 40%, in Gosport turnout decreased from 33.5% to 33%, and in Woking turnout decreased from 38.7% to 37.8%. See N. Dempsey, “Local Election 2018”, *House of Commons Library*, CBP 8306 (14 May 2018), p.18.

⁴⁶ See, e.g. A. Dar, “Elections: Turnout”, *House of Commons Library*, SN/SG/1467 (3 July 2013), ch.6, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01467#fullreport> [Accessed 10 November 2018]; Electoral Commission, “Voting in 2017: Understanding Public Attitudes Towards Elections and Voting” (October 2017), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/234893/Voting-in-2017-Final.pdf [Accessed 10 November 2018].

⁴⁷ Electoral Commission, “Voting in 2017: Understanding Public Attitudes Towards Elections and Voting” (October 2017), para.2.12.

⁴⁸ Electoral Commission, “Voting in 2017: Understanding Public Attitudes Towards Elections and Voting” (October 2017), para.2.13.

⁴⁹ The figures were 4.1% in Swindon and Watford, 4% in Gosport, 3.8% in Bromley and 2.4% in Woking. See M. Palese and C. Terry, “A Sledgehammer to Crack a Nut: The 2018 Voter ID Trials”, *Electoral Reform Society* (September 2018), <https://www.electoral-reform.org.uk/wp-content/uploads/2018/09/2018-Voter-ID-Trials.pdf>, p.21 [Accessed 10 November 2018].

⁵⁰ Electoral Commission, “Voting in 2017: Understanding Public Attitudes Towards Elections and Voting” (October 2017), para.2.13.

⁵¹ National Readership Survey, “Social Grade”, <http://www.nrs.co.uk/nrs-print/lifestyle-and-classification-data/social-grade/> [Accessed 10 November 2018].

⁵² According to the 2011 Census, the figures were as follows: Bromley (30.8%), Gosport (16.6%), Swindon (21.9%), Watford (27.1%) and Woking (37.1%). See Office for National Statistics, “2011 Census”, <https://www.ons.gov.uk/census/2011census> [Accessed 10 November 2018].

also much more likely to vote for the Conservative Party, as demonstrated in the three most recent General Elections in 2017,⁵³ 2015,⁵⁴ and 2010.⁵⁵ More troubling, however, the Electoral Commission revealed that 18% of voters in the C2DE social grades in the pilot areas in May 2018 said they were not aware of the voter ID requirements in their respective areas, compared to only 9% of voters in the ABC1 social grade.⁵⁶

As such, serious questions can be asked as to whether the five areas were adequately representative of the different socio-economic groups that comprise the electorate in England, in order to draw any definitive support for a wider implementation of voter ID laws. At this stage it is also necessary to recognise the importance of art.14 of the ECHR which provides that the enjoyment of human rights, such as the right to vote under art.3 of the First Protocol, must be secured without unlawful 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.⁵⁷ Given the low unemployment rates and lack of diversity in the five participating areas in terms of socio-economic status, and the lack of awareness about the identification requirements amongst the lower C2DE social grades, more evidence is plainly needed to demonstrate that stringent identification requirements would not have a discriminatory impact in areas with higher unemployment rates or areas with a greater proportion of voters who fall into the lower socio-economic grades.

In terms of ethnic diversity, the five participating areas were slightly more representative of the overall electorate in the UK. The 2011 Census revealed that whereas 79.8% of all individuals in England were white (English/Welsh/Scottish/Northern Irish/British), the percentages were slightly lower in Bromley and Woking, and significantly lower in Watford than England overall, meaning that there was greater ethnic diversity in those three areas, whereas the figures were much higher in Gosport and Swindon, meaning that there was less ethnic diversity in those areas.⁵⁸

Bearing these issues in mind, it is perhaps surprising that the decrease in turnout was not more prevalent in the three areas with the more stringent identification requirements, where some voters faced the extra burden, however small, of obtaining acceptable identification. In comparison, eligible voters in Swindon and Watford were not required to do anything other than produce their polling cards posted directly to their address. Whilst this would obviously pose a challenge to voters without a fixed address, such as the homeless or travellers in particular, the process of registering to vote still requires eligible individuals to identify a location or address with which they have some connection, and so these voters would be more likely to face the risk of disenfranchisement at the point of registration rather than actual voting. Voters in Swindon and Watford, therefore, were not subject to the same burden as voters in Bromley, Gosport and Woking. As such, unless adequate measures are put in place, there is a real concern that stringent voter identification requirements could exacerbate the difficulties that individuals with no fixed address such as the homeless or travellers already face, and could perhaps even be discriminatory against such individuals owing to their property status.

Ultimately, given the complexities of voter turnout and the lack of diversity in the five participating areas, the statistics concerning voter turnout in the five participating areas do not tell us enough about the impact of voter identification laws upon the right to vote to draw any definitive conclusions. Nonetheless,

⁵³ Ipsos MORI, "How Britain Voted in the 2017 Election" (20 June 2017), <https://www.ipsos.com/ipsos-mori/en-uk/how-britain-voted-2017-election> [Accessed 10 November 2018].

⁵⁴ Ipsos MORI, "How Britain Voted in 2015" (26 August 2015), <https://www.ipsos.com/ipsos-mori/en-uk/how-britain-voted-2015> [Accessed 10 November 2018].

⁵⁵ Ipsos MORI, "How Britain Voted in 2010" (21 May 2010), <https://www.ipsos.com/ipsos-mori/en-uk/how-britain-voted-2010> [Accessed 10 November 2018].

⁵⁶ Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), para.1.18.

⁵⁷ The European Court of Human Rights has accepted that placing restrictions upon who can vote may be necessary, for example, when imposing a minimum age in order to ensure the maturity of the electorate, or when restricting voter eligibility to individuals with continuous or close links to the country concerned. See *Melnichenko v Ukraine* (2006) 42 E.H.R.R. 39; *Luksch v Germany* (App. No.35385/97), decision of 21 May 1997; *Pv v France* (2006) 42 E.H.R.R. 26; *Hilbe v Liechtenstein* (App. No.31981/96), decision of 7 September 1996.

⁵⁸ According to the 2011 Census, the figures were as follows: Bromley (77.4%), Gosport (94.5%), Swindon (84.6%), Watford (61.9%) and Woking (74.9%).

whilst it is encouraging that voter turnout in Swindon and Watford actually *increased* when compared to the 2014 local elections, the fact that voter turnout *decreased*, even marginally, in all three areas where specific forms of identification were required should not be ignored, and must be taken into account when evaluating the impact of voter identification.

(b) Confidence in the security of the voting process

The results in respect of confidence in the security of the voting process are, on the face of it, the strongest argument in favour of voter identification. However, to paint the full picture it is crucial to consider the views of those who voted but also those who administered the elections. In terms of voter confidence, the Electoral Commission's public opinion survey in the May 2018 local elections suggested that just 15% of respondents in pilot areas thought that there had been "a lot" or "a little" electoral fraud or abuse on 3 May, whereas 37% of respondents in non-pilot areas thought the same.⁵⁹ In contrast, 43% of respondents in pilot areas thought there had been "hardly any" electoral fraud or abuse, or "nothing at all", whereas 34% of respondents in non-pilot areas thought as such.⁶⁰ More generally, 63% of respondents in Bromley and 57% of respondents in Gosport said that an identification requirement would make them more confident in the security of the voting system, whereas the majority of people in Swindon, Watford and Woking said it would make no difference.⁶¹

Given that combatting electoral fraud was the stated aim for the voter ID pilots,⁶² which is obviously a legitimate aim and one essential to the task of ensuring the integrity and effectiveness of the election process, the voter ID pilots in May 2018 appear to have been a success and the strongest argument in support of voter identification laws from a human rights perspective.

However, other findings suggest that polling station workers are unconvinced that electoral fraud is a significant problem. Based upon a survey of polling station workers conducted in 42 local authorities which *did not* participate in the voter ID pilots in May 2018, just 1% of over 2,000 respondents reported at least one suspected case of electoral fraud.⁶³ Suspected electoral fraud was, in fact, only the eighth most commonly reported problem, after much more pronounced issues such as individuals not being on the voting register and disabled voters having difficulties completing ballot papers.⁶⁴ Interestingly, based upon the responses of polling station workers in local authorities that *did* participate in the voter ID pilots, an identical percentage (1%) of workers reported suspected electoral fraud.⁶⁵

To put these views into perspective, there were 28 allegations of personation at a polling station across all elections in the UK in 2017, of which just one resulted in a successful prosecution and conviction.⁶⁶ This actually represents an improvement from 2016 when there were 44 allegations which also resulted in just one successful prosecution and conviction.⁶⁷

⁵⁹ Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), Chart 2.

⁶⁰ Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), Chart 2.

⁶¹ Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), para.1.77.

⁶² Cabinet Office, "Voter ID Pilot to Launch in Local Elections", Press Release (16 September 2017).

⁶³ T. James and A. Clark, "Voter ID: Our First Results Suggest Local Election Pilot was Unnecessary and Ineffective", *The Conversation* (1 August 2018), <https://theconversation.com/voter-id-our-first-results-suggest-local-election-pilot-was-unnecessary-and-ineffective-100859> [Accessed 10 November 2018].

⁶⁴ T. James and A. Clark, "Voter ID: Our First Results Suggest Local Election Pilot was Unnecessary and Ineffective", *The Conversation* (1 August 2018).

⁶⁵ Electoral Commission, "Polling Station Staff Survey Results" Q.17E, <https://www.electoralcommission.org.uk/find-information-by-subject/electoral-fraud/voter-identification-pilot-schemes> [Accessed 10 November 2018]; T. James and A. Clark, "Voter ID: Our First Results Suggest Local Election Pilot was Unnecessary and Ineffective", *The Conversation* (1 August 2018).

⁶⁶ Electoral Commission, "Analysis of Cases of Alleged Electoral Fraud in the UK in 2017: Summary of Data Recorded by Police Forces" (2018), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/239973/Fraud-allegations-data-report-2017.pdf, paras.2.9 and 2.19 [Accessed 10 November 2018]. Section 60 of the Representation of the People Act 1983 states that a person is guilty of personation if he votes as someone else (whether that person is living, dead or is a fictitious person), either by post or in person at a polling station as an elector or as a proxy.

⁶⁷ Electoral Commission, "Analysis of Cases of Alleged Electoral Fraud in the UK in 2016" (March 2017), https://www.electoralcommission.org.uk/_data/assets/pdf_file/0020/223184/Fraud-allegations-data-report-2016.pdf, para.1.3 [Accessed 10 November 2018].

At this stage, it is important to note that the perception of electoral fraud in Northern Ireland has historically been much more prevalent than in the rest of the UK. For example, at the 1983 UK General Election, nearly 1,000 tendered ballots had to be issued to eligible voters in Northern Ireland, as someone had already voted in their name.⁶⁸ At the same election, the then Royal Ulster Constabulary made 149 arrests for personation, resulting in 104 prosecutions.⁶⁹ Following the introduction of compulsory photographic identification in 2003, just 55 tendered ballots were issued in Northern Ireland at the 2005 UK General Election which represented a “94% reduction compared to 1983”.⁷⁰ These figures stand in stark contrast to the 2017 General Election when, as already discussed, there was just 28 allegations of personation in the entire UK, resulting in just one successful prosecution.⁷¹ Although the introduction of voter ID reforms in Northern Ireland in the 1980s may well have been a justified and proportionate response to the problem of electoral fraud, the situation in the rest of the UK today is radically different and it is much harder to justify stringent identification requirements as a proportionate response.⁷²

Even so, whilst confidence in the integrity of the election process in Northern Ireland improved significantly following the introduction of photographic identification,⁷³ the amount of people who thought that “a lot” or “a little” electoral fraud took place in the 2017 Northern Ireland Assembly elections was, surprisingly perhaps, no less than comparable regional elections in the rest of the UK. The exact figure, 28%, was precisely the same as the proportion of people who thought “a lot” or “a little” electoral fraud took place in the English local government elections that year, and it was in fact marginally *higher* than the proportion of people who thought that “a lot” or “a little” fraud took place in the Scottish local council and Welsh local government elections.⁷⁴

Ultimately, whilst the *aim* of combating electoral fraud appears to be relatively unproblematic from a human rights perspective and, in reality, it is the strongest argument in favour of voter identification laws, the fact remains that fraud and personation at polling stations is of a very low concern in the rest of the UK, both in terms of anecdotal feedback from polling station workers but also insofar as there are minimal allegations and almost zero successful convictions of the crime. Whereas the perception of electoral fraud in Northern Ireland was undoubtedly a serious problem in the past which may have justified the introduction of identification requirements, the problem has been mostly confined to that country.

Bearing in mind that one of the fundamental legal principles underpinning the right to free elections under art.3 of the First Protocol to the ECHR is that the conditions imposed upon the right to vote must be proportionate, the next section illustrates that whilst combatting electoral fraud may well be a legitimate objective, the potential consequences of harsh identification requirements when compared to the relatively insignificant problem of electoral fraud outside of Northern Ireland may be too significant to ignore.

(c) Rejection at polling stations

The most controversial and arguably the most significant set of statistics from a human rights perspective concerns the number of eligible voters refused a ballot paper for failing to produce the required

⁶⁸ Lord Elton, HL Deb 19 December 1983, vol.446, col.575; S. Wilks-Heeg, “Voter ID at British Polling Stations—Learning the Right Lessons from Northern Ireland”, *Manchester Policy Blogs* (1 March 2018), <http://blog.policy.manchester.ac.uk/posts/2018/03/voter-id-at-british-polling-stations-learning-the-right-lessons-from-northern-ireland/> [Accessed 10 November 2018].

⁶⁹ D. Mellor, HC Deb 18 December 1984, vol.70, col.87; S. Wilks-Heeg, “Voter ID at British Polling Stations—Learning the Right Lessons from Northern Ireland”, *Manchester Policy Blogs* (1 March 2018).

⁷⁰ S. Wilks-Heeg, “Voter ID at British Polling Stations—Learning the Right Lessons from Northern Ireland”, *Manchester Policy Blogs* (1 March 2018).

⁷¹ Electoral Commission, “Analysis of Cases of Alleged Electoral Fraud in the UK in 2017: Summary of Data Recorded by Police Forces” (2018), paras 2.9 and 2.19.

⁷² M. Palese and C. Terry, “A Sledgehammer to Crack a Nut: The 2018 Voter ID Trials”, *Electoral Reform Society* (September 2018), p.18.

⁷³ As Stuart Wilks-Heeg noted, “In the early 2000s, 66% of Northern Irish electors believed electoral fraud was commonplace in some areas. By 2017, the proportion who thought at least some fraud took place was 28%, in line with the rest of the UK”. See House of Commons Northern Ireland Affairs Committee, “Electoral Registration in Northern Ireland” (2004–05, HC 131), para.7; Electoral Commission, “Post-Poll Public Opinion” (2017), <https://www.electoralcommission.org.uk/our-work/our-research/public-opinion-surveys/post-poll-public-opinion> [Accessed 10 November 2018].

⁷⁴ Electoral Commission, “Post-Poll Public Opinion” (2017).

identification. Whilst these individuals were not denied their right to vote at the stage of registration, or when entering the polling station, they were effectively disenfranchised nonetheless for failing to comply with the requirements at the point of requesting a ballot paper in order to cast their vote. Initially, the non-governmental organisation Democracy Volunteers revealed that its observers at various polling stations in the five areas had witnessed 1.67% of voters being initially turned away for failing to produce the correct form of identification.⁷⁵ Based upon this figure, the Electoral Reform Society subsequently estimated that almost 4,000 voters in total across the five areas had been turned away at polling stations.⁷⁶

These estimates have, however, been doubted by the Association of Electoral Administrators and several Members of Parliament in a recent debate.⁷⁷ Moreover, these figures have not been supported by the official statistics subsequently released by the five participating councils and the Electoral Commission. Whilst the statistics compiled by the various councils suggest that nearly 700 voters were initially turned away from polling stations for failing to produce the required identification, just under half later returned with the correct documentation.⁷⁸ Ultimately, in the areas where voters were required to produce their polling cards, 25 voters were turned away at polling stations in Swindon, representing 0.06% of all who voted,⁷⁹ whereas in Watford the figure was estimated at 42–66, representing approximately 0.2% of all who voted.⁸⁰ In the areas where a specific form of identification was required, 154 voters were turned away in Bromley, representing 0.2% of all who voted,⁸¹ whereas the figures were 54 in Gosport,⁸² and 51 in Woking,⁸³ representing 0.4% and 0.3% of all who voted respectively.

As such, around 350 eligible voters who attempted to vote were unable to in the five areas for failing to produce the required identification. According to the Parliamentary Secretary to the Cabinet Office, this represented “just 0.06% of the electorate and 0.14% of votes cast”.⁸⁴ These figures do not, of course, account for those voters who simply stayed away from polling stations on the day due to their lack of appropriate identification in the first place.

On the face of it, these figures may seem trivial and dispel some doubts about the potential risk of widespread disenfranchisement. However, these results are more alarming if a similar proportion of voters were, hypothetically speaking, rejected when attempting to vote in the 2016 Referendum on the UK’s membership of the EU, in which 28,455,402 votes were cast in England alone.⁸⁵ Taking the official statistics from the voter ID pilot scheme at face value, assuming at best that 0.06% of all voters would have been unable to present the required identification and did not return, this would mean that over 17,000 individuals in England may have been rejected at polling stations in the Referendum. At worst, assuming that 0.4% of all voters would have been unable to present identification and did not return, almost 114,000 individuals in England may have been rejected.

⁷⁵ J. Ault, “Voter ID Pilot Councils: (Bromley, Gosport, Swindon, Watford and Woking) Special Report”, *Democracy Volunteers* (3 May 2018), <https://democracyvolunteersdotorg.files.wordpress.com/2018/05/voter-id-pilot-areas-special-report-20181.pdf> [Accessed 10 November 2018].

⁷⁶ Electoral Reform Society, “Thousands of Voters Turned Away from Polling Stations in Mandatory ID Trials”, Press Release (4 May 2018), <https://www.electoral-reform.org.uk/latest-news-and-research/media-centre/press-releases/thousands-of-voters-turned-away-from-polling-stations-in-mandatory-id-trials/> [Accessed 10 November 2018].

⁷⁷ See the contributions of several MPs during the “Voter ID Pilot Schemes” debate on 6 June 2018, vol.642, cols.179WH–196WH.

⁷⁸ N. Dempsey, “Local Election 2018”, *House of Commons Library*, CBP 8306 (14 May 2018), p.17.

⁷⁹ Electoral Commission, “Swindon May 2018 Voter Identification Pilot Evaluation” https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/244957/Voter-identification-pilot-Swindon-evaluation.pdf, Table 1.1 [Accessed 10 November 2018].

⁸⁰ Electoral Commission, “Watford May 2018 Voter Identification Pilot Evaluation”, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/244958/Voter-identification-pilot-Watford-evaluation.pdf, Table 1.1 [Accessed 10 November 2018].

⁸¹ Electoral Commission, “Bromley May 2018 Voter Identification Pilot Evaluation”, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/244954/Voter-identification-pilot-Bromley-evaluation.pdf, Table 1.1 [Accessed 10 November 2018].

⁸² Electoral Commission, “Gosport May 2018 Voter Identification Pilot Evaluation”, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/244956/Voter-identification-pilot-Gosport-evaluation.pdf, Table 1.1 [Accessed 10 November 2018].

⁸³ Electoral Commission, “Woking May 2018 Voter Identification Pilot Evaluation”, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/244959/Voter-identification-pilot-Woking-evaluation.pdf, Table 1.1 [Accessed 10 November 2018].

⁸⁴ C. Smith, Parliamentary Secretary to the Cabinet Office, WH Deb 6 June 2018, vol.642, col.194WH.

⁸⁵ BBC News, “EU Referendum Results”, https://www.bbc.co.uk/news/politics/eu_referendum/results [Accessed 10 November 2018].

Looking at it another way, the total registered electorate for the 2017 General Election was just over 46.8 million in the UK,⁸⁶ meaning that if 0.06% of eligible voters were unable to vote due to a lack of identification, over 28,000 of the electorate would have been effectively disenfranchised. Although at one extreme it is interesting to note that the smallest majority currently enjoyed by a sitting Member of Parliament is just two votes.⁸⁷ In that respect, 54 people were unable to vote in Gosport, which is itself also a parliamentary constituency. As noted elsewhere, this figure is more than the winning majority in eight parliamentary seats at the 2017 General Election.⁸⁸

(d) A vote of (no) confidence in voter identification? Lessons from Northern Ireland

Given that the European Court of Human Rights has stated that the right to vote is not a privilege,⁸⁹ and that the presumption in democratic states “must be in favour of inclusion”,⁹⁰ any reforms which might challenge universal suffrage must always be subject to careful scrutiny. Whilst the Court has afforded a wide margin of appreciation to states when it comes to organising and running electoral systems,⁹¹ each must still comply with certain fundamental principles that underpin the right.

On the one hand, the increase in voter confidence in the security of the voting process is certainly the strongest argument in favour of voter identification laws, and it would appear to satisfy the requirement under the ECHR that the conditions imposed upon the right to vote must pursue a legitimate aim. Such an aim is also inherently connected to the task of ensuring the integrity and effectiveness of the election process.⁹²

However, the impact upon voter turnout remains a grey area in need of further research to ensure that the essence and effectiveness of the right to vote for eligible voters in the UK is not impaired.⁹³ More importantly, the fact that around 350 individuals were unable to vote in the May 2018 voter ID pilots may, quite justifiably, prompt suggestions that strict identification requirements do not comply with the fundamental principle that the conditions imposed upon the right to vote must be proportionate.⁹⁴ The risk of disenfranchisement is even more difficult to defend in light of the fact that personation at polling stations in Great Britain is, relatively speaking, of very little concern.

Although Government ministers have been quick to herald the pilot scheme as a success and pledged to facilitate further pilots in 2019,⁹⁵ the doubts expressed in this article about the appropriateness of drawing any definitive support from the 2018 pilots for a national roll-out in the future have been reinforced elsewhere. The primary recommendation from the Electoral Commission’s recent evaluation is that the Government should ensure that a wider range of local councils run pilot schemes in the 2019 local elections, due to the lack of diversity in the five areas that participated in the 2018 pilots.⁹⁶ In that regard, it is imperative that the next round of pilots includes areas in Northern England, the Midlands and Wales⁹⁷; areas with a greater proportion of voters in low socio-economic groups; areas with a greater proportion of ethnic minorities; as well as university towns and cities and areas with high unemployment rates, which the Electoral Reform Society has also advocated.⁹⁸

⁸⁶ Electoral Commission, “Voting in 2017: Understanding Public Attitudes Towards Elections and Voting” (October 2017), para.2.2.

⁸⁷ In North East Fife. See P. Gallagher, “General Election 2017: The Smallest Majorities of the Night”, *iNews* (9 June 2017), <https://inews.co.uk/news/politics/general-election-smallest-majorities-constituencies/> [Accessed 10 November 2018].

⁸⁸ FullFact, “Has the Government’s Voter ID Scheme Been a Success?” (27 July 2018), <https://fullfact.org/crime/voter-id-scheme/> [Accessed 10 November 2018].

⁸⁹ *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [59].

⁹⁰ *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [59].

⁹¹ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Labita v Italy* (2008) 46 E.H.R.R. 50 at [201]; *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [60]–[61].

⁹² *Yumak* (2009) 48 E.H.R.R. 4 at [109]; *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [62]; *Scoppola* (2013) 56 E.H.R.R. 19 at [84].

⁹³ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos* (2013) 56 E.H.R.R. 9 at [64].

⁹⁴ *Mathieu-Mohin* (1988) 10 E.H.R.R. 1 at [52]; *Hirst (No.2)* (2006) 42 E.H.R.R. 41 at [62]; *Sitaropoulos* (2013) 56 E.H.R.R. 9 at [64].

⁹⁵ Cabinet Office, “Government Commits to New Round of Voter ID Pilots at Next Local Elections”, Press Release (19 July 2018).

⁹⁶ Electoral Commission, “May 2018 Voter Identification Schemes: Findings and Recommendations” (July 2018), para.1.96.

⁹⁷ Section 10 of the RPA 2000 only allows for pilots in England and Wales to be authorised.

⁹⁸ Electoral Reform Society, “Voters Locked Out: The Flaws of Voter ID in England” (April 2018).

Going forward, given the fact that voter identification is now mostly a matter of routine in Northern Ireland, it may be tempting to point to the organisation and conduct of elections there as a model of good practice to replicate. Given the likelihood that compulsory identification laws will be rolled out nationwide, it is pertinent to briefly consider some of the practical lessons that can be learned from Northern Ireland. For example, it is extremely likely, and arguably *essential* from a human rights perspective, that the Government would consider the creation of a voter identification card for those eligible voters in Great Britain who might otherwise lack appropriate identification. It is also likely that such an identification card would be issued free of charge, given that one minister confirmed that individuals voting in the May 2018 voter ID pilots would not have to spend any money,⁹⁹ and the fact that the council with the most stringent requirements in the 2018 voter ID pilot, Woking, issued a “Local Elector Card” free of charge.

Such a process would be a considerable administrative and financial undertaking. In 2003–2004, when photographic identification was first required in Northern Ireland, over 89,000 Electoral Identity Cards (EICs) were issued in Northern Ireland.¹⁰⁰ Bearing in mind that the total electorate in Northern Ireland in 2003 for parliamentary elections was a little over 1 million,¹⁰¹ the issuing of over 89,000 EICs represented approximately 9% of the electorate. If a similar percentage of the total electorate in England, Scotland and Wales requested a Government-issued voter identity card for the parliamentary election in 2017, when the combined electorate was 45.6 million,¹⁰² this would mean that approximately 4 million cards might have been needed.

Clearly, if a national roll-out of voter identification does take place, adequate resources and infrastructure would be needed to ensure that these applications could be processed in a reasonable time to ensure that no eligible voter was disenfranchised. In light of the recent experience in Northern Ireland, and also in the US where the courts have not looked favourably upon voter ID laws which create real or hidden financial hurdles,¹⁰³ the Cabinet Office would have to bear the entirety of this cost in the UK, creating obvious financial consequences in a time of significant budgetary constraint.

(4) Conclusions

This article has attempted to evaluate the success of the voter ID pilots that were conducted in five areas in the English local elections in May 2018. Bearing in mind the concerns discussed in this article, should the Government proceed to consider a national roll-out of compulsory identification requirements, it cannot credibly do so by pointing to the success of the 2018 pilot scheme alone. Despite the legitimate rationale provided by the Government for reform and the demonstrable increase in voter confidence in the five participating areas, voter identification laws are open to accusations of being disproportionate given the potential risk of a drop in voter turnout and the fact that several hundred eligible voters were effectively denied the right to vote in the May 2018 pilots. Owing to the lack of diversity in the five participating areas, further research is also needed to ensure that stringent identification requirements do not discriminate against certain individuals.

The Government must demonstrate that it has considered and adequately responded to the fundamental concerns discussed in this article and elsewhere, before contemplating a full nationwide roll-out. In that respect, it is imperative that the voter ID pilots in May 2019 involve a wider range of local councils, as

⁹⁹ C. Skidmore, Minister for the Constitution (26 October 2017) Written Answer No.108103.

¹⁰⁰ These figures were obtained from the Electoral Office of Northern Ireland directly.

¹⁰¹ The exact figure according to the Office for National Statistics was 1,067,564. See Office for National Statistics, “Electoral Statistics for UK, 2003”, <http://webarchive.nationalarchives.gov.uk/20160119115815/http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A477-46199> [Accessed 10 November 2018].

¹⁰² In 2017, the total electorate in England, Scotland and Wales for parliamentary elections was, respectively, 39,302,175; 3,991,372 and 2,299,189. See Electoral Commission, “2017 General Election Results”, <https://www.electoralcommission.org.uk/our-work/our-research/electoral-data/2017-uk-general-election-results> [Accessed 10 November 2018].

¹⁰³ See *Common Cause/Georgia League of Women* 439 F.Supp. 2d 1294 (N.D. Ga. 2006); *Weinschenk* 203 S.W. 3d 201 (Mo. banc 2006).

both the Electoral Commission and the Electoral Reform Society have suggested,¹⁰⁴ and that a comprehensive Government-led Equality Impact Assessment is undertaken beforehand, to better understand the impact of voter identification upon certain types of individuals and groups and to ultimately eliminate the risk of unlawful discrimination. Given that the very purpose of a pilot is to test potential reforms, the participating councils should also consider the possibility of allowing provisional ballots, as practised in some US states, which would further reduce the risk of disenfranchisement. Ultimately, whilst the Government's stated rationale for voter identification reforms in the UK remains sound, the case for a national roll-out at this moment in time remains far from convincing.

¹⁰⁴Electoral Commission, "May 2018 Voter Identification Schemes: Findings and Recommendations" (July 2018), p.2; Electoral Reform Society, "Voters Locked Out: The Flaws of Voter ID in England" (April 2018).

Case Analysis

Taking Religious Minorities Seriously: *Hamidovic v Bosnia and Herzegovina*

Kaushik Paul*

✉ Bosnia and Herzegovina; Contempt of court; Dress codes; Freedom to manifest one's religious belief; Witnesses

Abstract

On 5 December 2017, the European Court of Human Rights gave a ruling in Hamidovic v Bosnia and Herzegovina, ultimately finding that the applicant's charge of contempt of court for refusing to remove a religious skullcap was a disproportionate interference with his right to freedom of religion under art.9 of the European Convention on Human Rights. The seven-panel Court issued four opinions in this judgment: two concurring opinions as well as one dissenting opinion alongside the majority opinion. From the perspective of Muslims' religious freedom in Europe, this is a significant case because almost all of the complaints as to the prohibition on wearing Islamic dress were previously rejected by the European Court of Human Rights. The aim of this article is to offer a critical analysis of the Court's judgment in Hamidovic v Bosnia and Herzegovina from the perspective of religious liberty.

Introduction

On 5 December 2017, the European Court of Human Rights (hereinafter the Strasbourg Court) issued a significant judgment against the government of Bosnia and Herzegovina in *Hamidovic v Bosnia and Herzegovina*¹ (hereinafter *Hamidovic*), a case concerning the prohibition on wearing a skullcap, a religious symbol, in the courtroom. The Strasbourg Court held, by six votes to one, that there had been a violation of his right to freedom of religion under art.9 of the European Convention on Human Rights (hereinafter the Convention or the ECHR). In this case, the Strasbourg Court re-emphasised the need for pluralism and tolerance in a liberal democratic society and confirmed that Member States' wide margin of appreciation in the field of religious freedom is not unlimited. This article aims to offer a systematic analysis of the Strasbourg Court's judgment in *Hamidovic* from the perspective of religious liberty.

The background of the case

The applicant, Mr Husmet Hamidovic, was a national of Bosnia and Herzegovina. This case concerned his refusal to remove his skullcap while giving evidence before a criminal court which was examining a case about the attack on the US embassy in Sarajevo in 2011. This attack was committed by a member of a local group advocating the Wahhabi/Salafi version of Islam who opposed the concept of secular state and recognised only Allah's judgment. In this criminal trial, all of the three defendants showed wilful disrespect for the authority of the court.

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¹ *Hamidovic v Bosnia and Herzegovina* (App. No.57792/15), judgment of 5 December 2017.

In September 2012, Mr Hamidovic, who also belonged to the same Wahhabi/Salafi community, was summoned to testify as a witness during the criminal trial. He appeared, as summoned, but refused to remove his skullcap, despite an order of the president of the trial chamber to do so. The judge explained that wearing a skullcap was contrary to the dress code for judicial institutions and that no religious symbols or clothing were permitted in court under r.20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina. However, Mr Hamidovic maintained that “it was his religious duty to wear a skullcap at all times”² as the prophet Muhammad had also worn one.³ The presiding judge then expelled him from the courtroom, convicted him of contempt of court and sentenced him to a fine of 10,000 convertible marks (BAM). In October 2012, an appeal chamber of the same court reduced the fine to BAM 3,000, but upheld the remainder of the first-instance decision holding that “the requirement to remove any and all headgear on the premises of public institutions was one of the basic requirements of life in society”⁴ and “that in a secular State such as Bosnia and Herzegovina, any manifestation of religion in a courtroom was forbidden”.⁵ He failed to pay the fine and as a consequence the fine was subsequently converted into 30 days’ imprisonment. Mr Hamidovic duly served the prison sentence. In 2015, the Constitutional Court of Bosnia and Herzegovina fully endorsed the reasoning of the domestic courts, finding in particular that fining Mr Hamidovic for contempt of court had been lawful and did not breach his right to manifest his religion within the meaning of art.9 of the Convention.

Mr Hamidovic then decided to bring a claim against the government of Bosnia and Herzegovina before the Strasbourg Court. He complained that punishment for refusing to remove his skullcap while giving evidence during the criminal trial infringed his rights under art.9 (right to freedom of religion) and art.14 (prohibition of discrimination) of the ECHR.

Findings of the Strasbourg Court

The Strasbourg Court accepted that punishing Mr Hamidovic for wearing a skullcap in the courtroom constituted a limitation on his right to manifest religion or belief within the meaning of art.9 of the ECHR.⁶ It took the view that, although the wearing of the skullcap did not constitute a strong religious obligation, its firm rooting in tradition led many people in Bosnia and Herzegovina to consider it as such.⁷ As to whether the sanction imposed on him was “prescribed by law”, the Strasbourg Court opined that “[t]he Court has no strong reasons to depart from the finding of the Constitutional Court”, and therefore the Strasbourg Court concluded that, “there was a legal basis in law for restricting the wearing of the skullcap in the courtroom”.⁸ With regard to whether there was a “legitimate aim”, it held that “an aim to uphold secular and democratic values can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’ within the meaning of art.9(2)”.⁹ As to whether the interference was “necessary in a democratic society”, the Strasbourg Court found that there was “no reason to doubt that the applicant’s act was inspired by his sincere religious belief that he must wear a skullcap at all times, without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance”.¹⁰ His punishment only for refusing to take off his skullcap was therefore unnecessary in a democratic society¹¹ and the national authorities overstepped the wide margin of appreciation afforded to

² *Hamidovic* (App. No.57792/15) at [37].

³ *Hamidovic* (App. No.57792/15) at [28].

⁴ *Hamidovic* (App. No.57792/15) at [8].

⁵ *Hamidovic* (App. No.57792/15) at [8].

⁶ *Hamidovic* (App. No.57792/15) at [30].

⁷ *Hamidovic* (App. No.57792/15) at [30].

⁸ *Hamidovic* (App. No.57792/15) at [33].

⁹ *Hamidovic* (App. No.57792/15) at [35].

¹⁰ *Hamidovic* (App. No.57792/15) at [41].

¹¹ *Hamidovic* (App. No.57792/15) at [42].

them.¹² The Strasbourg Court held, by six votes to one, that there had been a violation of Mr Hamidovic's right to freedom of religion under art.9 of the Convention. Having found an infringement of art.9, the Strasbourg Court decided not to examine the complaint from the viewpoint of art.14 of the ECHR. It is worth noting that two judges (Vincent A. De Gaetano and Marko Bosnjak) filed concurring opinions and one judge (Carlo Ranzoni) gave a dissenting opinion in *Hamidovic*.

The reasoning of the majority: a critical analysis

It is argued that the Strasbourg Court's ruling in *Hamidovic* is admirable from the perspective of minority's religious freedom. The Strasbourg Court, for the first time, has accepted that in order to count as a religious manifestation within the meaning of art.9, a religious practice, namely the wearing of a skullcap in this case, need *not* be a strong religious duty. It would suffice to show that the religious practice in question has such "strong traditional roots that it is considered by many people to constitute a religious duty".¹³ Indeed, as the European societies continue to become increasingly multicultural and diverse, there is a degree of disagreement on whether certain controversial religious practices such as veiling by Muslim women, wearing turbans by Sikh men, male circumcision, and ritual slaughter are mandatory or voluntary. Since the Strasbourg Court has taken a generous approach in *Hamidovic* by stating that a religious practice need *not* be a strong religious duty, one may argue that many religious practices, which are not widely recognised as a compulsory religious obligation, will still qualify for protection within the meaning of art.9 of the Convention.

It is unclear why the presiding judge of Bosnia and Herzegovina required Mr Hamidovic to remove his skullcap in the courtroom during the criminal trial. In the context of judicial institutions, judicial officials such as judges, prosecutors and court officers were prohibited from wearing symbols of religious affiliation in the course of their duties. However, such dress code was not applicable to witnesses and parties.¹⁴ The Strasbourg Court correctly characterised Mr Hamidovic as a "private citizen"¹⁵ and took the view that he was not under an obligation to wear dress in a specific manner in court premises. Arguably, as a private citizen (as opposed to a public official or judicial officer) he had the right to dress as he deemed appropriate. As such, Mr Hamidovic did not owe a duty of neutrality and impartiality unlike the court officials. Therefore, the Strasbourg Court concluded that punishment for refusing to remove his skullcap in the courtroom amounted to a disproportionate interference with his right to freedom of religion.

In *Hamidovic*, the applicant was punished by the domestic courts simply because he chose to manifest his religion through the wearing of a skullcap which, in his view, must be worn at all times. As far as the criminal trial is concerned in which Mr Hamidovic was a witness, there is nothing to suggest that he was disrespectful towards the court or the judge. He appeared as summoned and stood up while addressing the court, thereby clearly submitting to the laws and courts of Bosnia and Herzegovina. He did not use any offensive language during the course of the trial. Indeed, the presiding judge was responsible to maintain order and to ensure the integrity of the trial in which Mr Hamidovic was a witness. However, he completely failed to describe how Mr Hamidovic's behaviour prevented the proper functioning of the court. Judge Bosnjak observed that the trial judge did not give "any valid reason" for prohibiting the wearing of a skullcap in the courtroom.¹⁶ As Judge De Gaetano put it in his concurring opinion:

"[i]t is difficult to conceive how the applicant's behaviour, in merely keeping his skullcap on as a manifestation of his deeply held religious belief, can be regarded as being either disrespectful towards the court or as engendering disorder or a lack of decorum in the courtroom. If the applicant had been

¹² *Hamidovic* (App. No.57792/15) at [43].

¹³ *Hamidovic* (App. No.57792/15) at [30].

¹⁴ *Hamidovic* (App. No.57792/15) at [14].

¹⁵ *Hamidovic* (App. No.57792/15) at [40].

¹⁶ *Hamidovic* (App. No.57792/15) Concurring Opinion of Judge Bosnjak at [6].

a Catholic bishop, would he have been prevented from appearing in court wearing the pectoral cross? Or if he had been an Orthodox bishop, would he have been compelled to remove the black headdress?¹⁷

It is argued that this statement can be an important quotation for the Strasbourg Court in future to examine whether a ban on wearing religious symbols or clothing by religious minorities infringes art.9 of the ECHR.

There is no doubt that, unlike Mr Hamidovic, the members of the same religious group to which he belonged had shown a degree of disrespectful behaviour during the trial. It is clear from the background of the case that the defendants of the criminal trial disrespected the trial judge by refusing to stand up, by stating that they would not “take part in rituals acknowledging man-made judgement”,¹⁸ by failing to explain why they were wearing a skullcap, by refusing to enter into the courtroom on some occasions, and most importantly, by publicly stating that they had no intention of showing any respect for the court which they did not recognise.¹⁹ However, Mr Hamidovic’s behaviour “differed considerably”²⁰ from the defendants: he only refused to remove his skullcap on account of his genuinely held belief that it was his religious duty to wear a skullcap at all times. One can argue that the presiding judge of the criminal trial was influenced to take a harsh decision against the applicant by fining him because of the disrespectful behaviour of other members of the Wahhabi/Salafist group. As Judge Bosnjak put it in his concurring opinion, “the judge’s decision was motivated more by those other overt signs of disrespect than by the applicant’s own behaviour”.²¹ If we accept the principles of human rights law, then we must acknowledge that, in a free and liberal democratic society, one is responsible only for his own action or inaction, he must not be punished for the conduct of other members of the group to which he belongs. In this sense, the Strasbourg Court’s finding—the imposition of punishment on Mr Hamidovic on the sole ground of his refusal to take off his skullcap was disproportionate—is absolutely correct and admirable.

Indeed, it is hard to argue that the wearing of a skullcap by the applicant in itself undermined the order in the courtroom or caused harm to the court proceedings or impaired the neutrality of the court. If a court wants to maintain its impartial and neutral image, then the judges and other court officials should/can remove their religious symbols if they wear any. The wearing of religious clothing by a witness may not impede a court’s reputation as a neutral state organisation. Rather, the expulsion from the courtroom and subsequent punishment on a practising Muslim for wearing religious headgear during the proceedings might have the effect of undermining the court’s reputation as a neutral arbitrator. Therefore, taking into account “the overall context at the time of the trial”²² in the criminal court, the majority held in *Hamidovic* that:

[u]nlike some other members of his religious group, the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society.²³

It can be argued that the Strasbourg Court should/could have addressed two particular matters in *Hamidovic*. First, the majority could have concluded that Mr Hamidovic’s refusal to remove the skullcap in the courtroom was a conscientiously based objection. His refusal to take off the headgear derived from

¹⁷ *Hamidovic* (App. No.57792/15) Concurring Opinion of Judge De Gaetano at [2].

¹⁸ *Hamidovic* (App. No.57792/15) at [6].

¹⁹ *Hamidovic* (App. No.57792/15) at [6].

²⁰ *Hamidovic* (App. No.57792/15) Concurring Opinion of Judge Bosnjak at [5].

²¹ *Hamidovic* (App. No.57792/15) Concurring Opinion of Judge Bosnjak at [5].

²² *Hamidovic* (App. No.57792/15) at [39].

²³ *Hamidovic* (App. No.57792/15) at [42].

his genuinely held religious belief that he must wear a skullcap at all times. When the trial court summoned him to give evidence, he had no choice but to appear before the court; a failure to do so would have exposed him to a risk of punishment under the Criminal Code of Bosnia and Herzegovina. In this sense, the summons of the court in relation to the criminal proceedings had the effect of putting him in a dilemma: either give evidence by wearing the headgear and avoid criminal sanctions or refuse to appear before the court and face criminal sanctions. He had chosen the first option. Therefore, it is submitted that his objection to take off his skullcap while giving evidence in the criminal court could have been regarded by the majority as conscientious objection.²⁴ In this context it is worth noting that the United Nations Human Rights Committee, a body that monitors the implementation of the International Covenant on Civil and Political Rights (hereinafter the Covenant), has stated that criminal prosecution and subsequent conviction for refusing to perform compulsory military service contravenes art.18 (right to freedom of religion) of the Covenant because the “right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion”²⁵ within the meaning of this article. It also held that the right to conscientious objection “entitles [an] individual to an exemption from compulsory military service if this cannot be reconciled with that individual’s religion or beliefs”.²⁶ One may correctly argue that the majority should have transported this line of reasoning in *Hamidovic*.

Secondly, in *Hamidovic*, the Strasbourg Court did not comment on the government’s submission that by imposing punishment on the applicant “the trial judge had simply enforced a generally accepted rule of civility”²⁷ or the appeal chamber’s findings that “the requirement to remove any and all headgear on the premises of public institutions was one of the basic requirements of life in society”.²⁸ One can argue that the Strasbourg Court technically refrained from commenting on this in the present case because they previously upheld the French criminal ban on wearing Islamic full-face veils in *SAS v France* on the ground that covering one’s face in public spaces by wearing a full-face veil “falls short of the minimum requirement of civility”.²⁹ The *SAS v France* ruling caught huge media attention and many academic scholars criticised the Strasbourg Court’s reasoning.³⁰ One can also argue that, in order to avoid such criticism again, in *Hamidovic* the Strasbourg Court intentionally did not answer how the wearing of a skullcap, which covers only part of the hair but leaves the face, neck, and forehead completely visible, contravenes the basic requirements of life in society. The *SAS v France* ruling is problematic because the restrictions on the right to manifest one’s religion cannot and should not be based on behavioural norms (e.g. face-to-face communication, bareheaded appearance) of the society. This is because the right to freedom of religion, guaranteed in art.9 of the Convention, is a “precious asset” for everyone and “one of the foundations of a ‘democratic society’ within the meaning of the Convention”.³¹ It is submitted that, in *Hamidovic*, the Strasbourg Court had an opportunity to change its previous stance as to the effect of

²⁴ Although this point was omitted by the majority of the judges, in giving his Concurring Opinion Judge Bosnjak stated, “[w]hile it is true that the applicant disobeyed the order to remove the skullcap, this disobedience can be considered similar to conduct motivated by conscientious objection and cannot in itself be considered as a sign of contempt of court” (*Hamidovic* (App. No.57792/15) Concurring Opinion of Judge Bosnjak at [6]).

²⁵ *Shadurdy Uchetov v Turkmenistan*, Communication No.2226/2012, UN Doc.CCPR/C/117/D/2226/2012 (2016) at [7.6]; *Min-Kyu Jeong v Republic of Korea*, Communication Nos 1642–1741/2007, UN Doc.CCPR/C/101/D/1642–1741/2007 (2011) at [7.3]; *Akmurad Nurjanov v Turkmenistan*, Communication No.2225/2012, UN Doc.CCPR/C/117/D/2225/2012 (2016) at [9.3].

²⁶ *Shadurdy Uchetov v Turkmenistan*, Communication No.2226/2012, UN Doc.CCPR/C/117/D/2226/2012 (2016) at [7.6]; *Min-Kyu Jeong v Republic of Korea*, Communication Nos 1642–1741/2007, UN Doc.CCPR/C/101/D/1642–1741/2007 (2011) at [7.3]; *Akmurad Nurjanov v Turkmenistan*, Communication No.2225/2012, UN Doc.CCPR/C/117/D/2225/2012 (2016) at [9.3].

²⁷ *Hamidovic* (App. No.57792/15) at [29].

²⁸ *Hamidovic* (App. No.57792/15) at [8].

²⁹ *SAS v France* (2015) 60 E.H.R.R. 11 at [141].

³⁰ See, e.g. S. Juss, “Burqa-bashing and the Charlie Hebdo Cartoons” (2015) 26(1) *King’s Law Journal* 27; J. Adenitire, “Has the European Court of Human Rights Recognised a Legal Right to Glance at a Smile” (2015) *Law Quarterly Review* 43; E. Daly, “Fraternism as a Limitation on Religious Freedom: The Case of *SAS v France*” (2016) 11 *Religion and Human Rights* 140; M. Hunter-Henin, “Living Together in an Age of Religious Diversity: Lessons from Baby Loup and *SAS*” (2015) 4 *Oxford Journal of Law and Religion* 94; A. Steinbach, “Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights” (2015) *Cambridge Journal of International and Comparative Law* 3; E. Howard, “S.A.S. v France: Living Together or Increased Social Division” (7 July 2014), *EJIL:Talk*:<https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> [Accessed 10 November 2018].

³¹ *Kokkinakis v Greece* (1994) 17 E.H.R.R. 397 at [31].

wearing religious dress on the basic/minimum standards of civility by holding that the requirement to take off the skullcap, under any consideration, cannot be “one of the basic requirements of life in the society” as argued by the government of Bosnia and Herzegovina.

Despite some omissions, the Strasbourg Court’s ruling in *Hamidovic* is undoubtedly a turning point in art.9 jurisprudence. Before *Hamidovic*, the only case where they found a violation of art.9 as to the prohibition on wearing Islamic dress was *Ahmet Arslan v Turkey*³²: all other complaints were either declared inadmissible or unsuccessful. In *Hamidovic*, the Strasbourg Court confirmed that Member States do not have unlimited discretion to impose a ban or restriction on minorities’ religious practice arbitrarily and indiscriminately. Religious minorities across Europe, and Muslim minorities in particular, will welcome the Strasbourg Court’s ruling in *Hamidovic* because this case sent a clear and straightforward message to all European countries that restrictions on wearing religious symbols and clothing can only be imposed when such religious practice causes harm to the state and/or others. Indeed, a liberal state must not interfere with the actions of an individual until his conduct causes harm. John Stuart Mill, in his famous essay entitled “On Liberty”, stated that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”.³³

Judge Ranzoni’s dissents

As mentioned above, Judge Ranzoni expressed a dissenting opinion in *Hamidovic*. He disagreed with the majority decision. In his view, there was no violation of art.9 in this case because “national courts, which were afforded a wide margin of appreciation, made a careful and comprehensible assessment based on the particular circumstances of the present case”³⁴ and “struck a fair balance between the requirements of the protection of the applicant’s freedom of religion and the legitimate aim of protecting the rights and freedoms of others”.³⁵ It is argued that there are at least two reasons why his dissenting opinion is problematic in this case. These reasons are outlined below.

First, Judge Ranzoni’s explanation as to the doctrine of margin of appreciation is questionable. He said:

“the Court should not, primarily, examine the applicant’s situation and the facts of the case as such, but rather it should review the assessment made by the national courts. If this assessment was carried out by independent and impartial domestic courts on the basis of the Court’s principles, taking due account of the particular circumstances of the case and the competing interests, and if the national courts’ decision, as a comprehensible result of this assessment, remained within the margin of appreciation afforded to member States under the respective Convention right, then their decision must be accepted by our Court.”³⁶

It is submitted that there are some worrying features in this statement. The Strasbourg Court can only effectively carry out the proportionality analysis under art.9(2) when it seriously considers the situation of the complainant and the facts and surrounding circumstances of the case. How is it possible for the Strasbourg Court to examine whether the impugned measure is necessary in a democratic society without considering these matters? How is it possible for it to assess whether the state overstepped the margin of appreciation without taking into account these matters? Judge Ranzoni’s dissent opinion does not answer these questions.

³² *Ahmet Arslan v Turkey* (App. No.41135/98), judgment of 23 February 2010. In this case, the applicants complained that they had been convicted under criminal law for manifesting their religion through their distinctive clothing. The Strasbourg Court acknowledged that Turkey had not produced evidence that the applicants represented a threat to public security or public order through the wearing of religious dress which, in addition, did not jeopardise the identification of persons. The Strasbourg Court concluded that the conviction was not necessary for the protection of public safety and order. Therefore, a violation of art.9 was established.

³³ J.S. Mill, *On Liberty* (first published 1859, Kitchener: Batoche Books, 2001), p.13.

³⁴ *Hamidovic* (App. No.57792/15), Dissenting Opinion of Judge Ranzoni at [37].

³⁵ *Hamidovic* (App. No.57792/15), Dissenting Opinion of Judge Ranzoni at [37].

³⁶ *Hamidovic* (App. No.57792/15) Dissenting Opinion of Judge Ranzoni at [14].

The second reason for which Judge Ranzoni's dissents can be criticised is his explanation as to the role of the national courts. He stated, "judicial institutions, owing to the separation of religion from public life in the secular State of Bosnia and Herzegovina, had an obligation to support the values that brought people closer, and not those which separated them, and that the temporary restriction in this case had aspired to achieve this aim".³⁷ A question arises how preventing an individual, who is wearing a religious symbol, from entering the courtroom would bring people closer? It is argued that bans or restriction on wearing symbols of religious affiliation will exacerbate the polarisation between different communities and increase societal divisions. It is also arguable that if the courts exclude religious symbol wearing devout Muslims from the courtroom in order to protect secularism, then the courts' reputation as an impartial body will be at stake. Therefore, one may correctly come to the conclusion that the reasoning of Judge Ranzoni in the present case is unconvincing.

Concluding remarks

In *Hamidovic*, the Strasbourg Court held that domestic courts of Bosnia and Herzegovina violated the right to freedom of religion under art.9 of the Convention when it punished a Muslim man for refusing to remove a skullcap while giving evidence in a criminal trial. In light of the majority's finding that his art.9 rights were infringed, one can argue that its ruling in this case has sent a message to religious minorities that they are welcome in judicial institutions with their headgear on, and that they will not be arbitrarily punished for wearing a dress or symbol of religious affiliation if they enter the court premises. In previous landmark cases, such as *SAS v France*³⁸ and *Leyla Sahin v Turkey*,³⁹ concerning bans on wearing religious dress by devout Muslim women, the Strasbourg Court afforded wide margin of appreciation to the domestic authorities in assessing whether and to what extent restrictions on wearing Islamic dress is necessary, and thus in all⁴⁰ (except the previously-cited *Ahmet Arslan*) cases, no infringement of art.9 was found. Concerning the art.9 right, Leigh and Hamblen note:

"[i]f states are permitted a wide margin of appreciation, both in determining the means of protecting Convention rights and in balancing them the net result ... will be that the minimum protection guaranteed by the Convention to persons claiming conflicting rights will be severely diminished and the Strasbourg Court will be failing in its task of ensuring minimal supervision."⁴¹

The majority's conclusion in the present case that the national authorities of Bosnia and Herzegovina had "exceeded the wide margin of appreciation afforded to them"⁴² is a positive assertion, because the Strasbourg Court has now affirmed that it will override the domestic authority's decision if and when they overstep the margin. Therefore, it is argued that the majority's ruling in *Hamidovic* is very significant and represents a potentially important development in the approach of the Strasbourg Court to art.9. It is hoped that, after *Hamidovic*, the Strasbourg Court will be more prepared to find a violation of art.9 of the ECHR if and when a state prohibits the wearing of religious dress and symbols without any compelling reasons.

³⁷ *Hamidovic v egovina* (App. No.57792/15) Dissenting Opinion of Judge Ranzoni at [20].

³⁸ *SAS v France* (2015) 60 E.H.R.R. 11.

³⁹ *Leyla Sahin v Turkey* (2007) 44 E.H.R.R. 5. In this case, the applicant Ms Sahin was a medical student of Istanbul University. The Vice-Chancellor of the University issued a circular which stated that the students who wore the Islamic headscarf must not be admitted to lectures, courses or tutorials. Ms Sahin, a practising Muslim and *hijab*-wearing woman, had been denied access to a written examination, refused enrolment for a course, refused admission to a lecture and, finally, refused entrance to a further written examination. Relying on art.9, she submitted that the ban on wearing the headscarf constituted an unjustified interference with her right to freedom of religion, in particular her right to manifest her religion. The Grand Chamber, in upholding the ban on the wearing of headscarves, stated that the headscarf was "imposed on women by a religious precept that was hard to reconcile with the principle of gender equality". Accordingly, they held that there was no violation of art.9 in this case.

⁴⁰ These cases include *El Morsli v France* (App. No.15585/06), decision of 4 March 2008; *Kurtulmas v Turkey* (App. No.65500/01), decision of 24 January 2006; *Kose v Turkey* (App. No.26625/02), decision of 24 January 2006; *Dahlab v Switzerland* (App. No.42393/98) decision of 15 February 2001; *Ebrahimian v France* (App. No.64846/11), judgment of 26 November 2015; *Barik Edidi v Spain* (App. No.21780/13), decision of 26 April 2016; *Belcacemi and Oussar v Belgium* (App. No.37798/13), judgment of 11 July 2017.

⁴¹ I. Leigh and A. Hamblen, "Religious Symbols, Conscience, and the Rights of Others" (2014) 3(1) O.J.L.R. 2 at 20.

⁴² *Hamidovic* (App. No.57792/15) at [43].

This is because a truly free and liberal society should accommodate a wide range of customs, beliefs and codes of conduct, and must not eliminate pluralism from the social sphere by erasing the cultural or religious practices of religious minorities as “pluralism, tolerance and broadmindedness are hallmarks of a democratic society”.⁴³

⁴³ *Chassagnou v France* (1999) 29 E.H.R.R. 615 at [112]; *Young v United Kingdom* (1981) 4 E.H.R.R. 38 at [63].

Case and Comment

Selected decisions from the European Court of Human Rights for July and August 2018

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Note on Court judgments: European Court judgments can be delivered by a Grand Chamber of 17 judges, a chamber of seven judges from one of the Court's five sections or, where the issue is already the subject of well-established case-law, by a committee of three judges from one of the sections. Grand Chamber and committee judgments are final. Within three months of a chamber judgment either the applicant or the respondent government may request that the case be referred to the Grand Chamber. A chamber judgment becomes final when the parties confirm that they will not seek a referral to the Grand Chamber, when three months have elapsed from the date of the chamber judgment without any request for a referral, or, if there has been such a request, when a panel of the Grand Chamber rejects it.

Religious Publications

Banning religious books—extremist material—proselytism—freedom of religion—art.9—hate speech—freedom of expression—art.10

Books; Censorship; Freedom of expression; Freedom to manifest one's religious belief; Hate speech; Religions; Russia

Ibragim Ibragimov v Russia (Application Nos 1413/08 and 28621/11)

European Court of Human Rights (Third Section): Judgment of 28 August 2018

Facts

The first application (No. 1413/08) concerned the banning of Said Nursi's books from the *Risale-I Nur* Collection, which the applicants argued explained the foundations of the Islamic doctrine and provided a commentary on the Qur'an. The Koptevskiy District Court, however, considered the books extremist material. The decision of the court relied on a report from a panel of experts consisting of a philologist, a linguist psychologist, a social psychologist and a psychologist. In their report, the experts, among other concerns, concluded that the texts "encouraged religious discord between believers and non-believers". The applicants argued that the experts who drafted the report were not well-placed to comment on the texts in question and provided their own expert opinions by a panel consisting of a Doctor of Theology and a Doctor of Religious Philosophy. These opinions were rejected by the court who argued that only the experts appointed by the court were competent to establish the meaning of the contested texts. On appeal, the Moscow City Court upheld the judgment of the Koptevskiy District Court declaring that the decision had been "been lawful, well-reasoned and justified." The second application (No. 28621/11)

concerned the “The Tenth Word: The Resurrection and the Hereafter”, a book from the *Risale-I Nur* Collection by Said Nursi, and an application to the Zhelezhnodorozhniy District Court of Krasnoyarsk to confiscate the books and to declare them extremist material. The prosecutor relied on previous judicial decisions and a report, published on 24 December 2008, by a philologist, a psychologist and a Doctor of Philosophy in Religious Studies who argued that “[t]he book substantiates and justifies extremist activity.” The applicants challenged the report leading the District Court to appoint its own panel of experts consisting of two psychologists and a Doctor of Philosophy in Religious Studies from the Lomonosov Moscow State University. The report produced by the appointed experts concluded that “[t]he book does not contain any statements, appeals or declarations which could be definitely interpreted as incitement of social, racial, ethnic or religious discord...” among other supportive statements. Nevertheless, on 21 September 2010, the Zhelezhnodorozhniy District Court of Krasnoyarsk granted the prosecutor’s application, declared the book extremist and ordered the destruction of printed copies. In doing so, they rejected the report of the experts they appointed as not credible, and instead relied on the report from December 2008. On 29 November 2010, the Krasnoyarsk Regional Court rejected an appeal lodged by the applicants.

The applicants complained before the European Court of Human Rights (the Court) that their right to freedom of religion and freedom of expression had been violated because of the ban on publishing and distributing the books.

Held

- (1) The applications were joined and declared admissible (unanimous). When considering the admissibility of the applications, the Court rejected a claim by the respondent State that the application should be rejected under art.17 of the Convention. At the beginning of their assessment, the Court noted that the applications had been brought under both arts 9 and 10 of the Convention, with the Court declaring that in light of the facts of the case it will examine the present case under art.10, interpreted where appropriate in the light of art.9.
- (2) The complaints concerning the ban on publishing and distributing Islamic books were declared admissible and the remainder of application No. 1413/08 inadmissible (unanimous).
- (3) There had been a violation of art.10 (unanimous). Neither party contested that the respondent state’s actions had constituted an interference with the applicants’ right to expression under art.10, resulting in the Court seeking to determine whether the interference was prescribed by law, pursued one or more legitimate aims and was necessary in a democratic society. In assessing whether the interference was prescribed by law, the Court reiterated that this means the measure should be based on domestic law as well as be accessible to the person concerned and foreseeable as to its effects. The foreseeability of a measure’s effects needs not be with absolute certainty, but it should enable people to reasonably foresee the consequences which an act may entail. In the present case, the applicants challenged the precision and foreseeability of the domestic legislation’s definition of “extremist activity”. The Court noted that the Venice Commission had considered the definition of “extremist activity” as “too broad, lacking clarity and open to different interpretations”. Nevertheless, the Court considered that the applicants’ grievances were more appropriately examined with regards to the proportionality of the interference. The Court therefore decided to leave open the question as to whether the interference was prescribed by law.

With regards to the legitimate aim the measures of the respondent state sought to achieve, the Court agreed to go along with Russia’s submission that they pursued the legitimate aims of preventing disorder and protecting territorial integrity, public safety and the rights of

others. Subsequently, the Court sought to examine whether the measures would be considered necessary in a democratic society, with this being examined both under freedom of religion and freedom of expression. When examining the general principles of freedom of religion, the Court noted that it encapsulates “freedom to hold or not to hold religious beliefs and to practise or not to practise a religion” as well as implying the freedom to manifest one’s religion. States must act with neutrality and impartiality in ensuring the exercise of various religions, faiths and beliefs; but any attempts to assess the legitimacy of these beliefs or expressions of belief are incompatible with this duty. As a result, the Court asserted that “the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.” With regards to freedom of expression, the Court recognised that states have a margin of appreciation when seeking to regulate religious expression as in the present application. However, states must be able to show that such regulation corresponds to a pressing social need and that it was proportionate to the legitimate aim pursued. When assessing proportionality, the Court recognised that the interference must be seen as necessary in the specific circumstances. The relevant issue is therefore whether the contested statements could, when read as a whole and in their context, be seen as a call for violence, hatred or intolerance. In applying these principles to the present case, the Court noted that, as a result of the respondent state’s act of banning the publication and distribution of Said Nursi’s books, its examination should concern whether the banning was compatible with freedom of expression. Consequently, they aimed to examine whether the domestic courts had relevant and sufficient reasons for banning the books, which were acknowledged as having been widely published in many countries and had seemingly never before caused any interreligious tensions.

In assessing application No.1413/08, the Court found that the decision of the domestic courts was deficient because they failed to meaningfully assess the experts’ report; to conduct their own analysis of the texts; and to consider the impact of their judgment on the applicants’ rights under arts 9 and 10. It was also recognised that in rejecting evidence presented by the applicants in defence of the texts, the courts had hindered the applicants’ ability to support their position. Finally, as they failed to determine which parts of the texts they considered “extremist”, the decision prohibited the publishers from re-publishing an edited version of the books which amounted to an absolute ban on the texts.

The Court also analysed application No. 28621/11 and found that the decision of the domestic courts in that case suffered from the same deficiencies as the other application, although the Court noted that the domestic courts were more specific with certain quotes from the texts which they believed contained extremist language. In assessing whether the texts did contain hate speech, the Court reiterated that it depends on whether, when read as a whole and in their context, the texts can be seen as a call for violence, hatred or intolerance. The Court noted that the domestic courts had failed to consider the religious context of the texts. The Court finally rejected the concerns expressed by the domestic courts regarding the intent of the texts to influence readers into adopting the author’s ideology, with the Court recognising that it has previously accepted proselytism and that the intent of the texts was insufficient to justify banning the books. As a result, the Court held the domestic courts had not provided “relevant and sufficient” reasons for the interferences and had failed to justify why the books would incite violence, religious hatred or intolerance.

- (4) The respondent state was ordered to pay EUR 7,500 in respect of costs and expenses.
- (5) The remainder of the applicant’s claim for just satisfaction was dismissed.

Cases Considered

Aydin Tatlav v Turkey (App. No.50692/99), judgment of 2 May 2006
Castells v Spain (1992) 14 E.H.R.R. 445
Delfi AS v Estonia [GC] (2016) 62 E.H.R.R. 6
Editions Plon v France (2006) 42 E.H.R.R. 36
Kokkinakis v Greece (1994) 17 E.H.R.R. 397
Maestri v Italy [GC] (2004) 39 E.H.R.R. 38
Murphy v Ireland (2004) 38 E.H.R.R. 13
Perinçek v Switzerland [GC] (2016) 63 E.H.R.R. 6
S.A.S. v France [GC] (2015) 60 E.H.R.R. 11
Serif v Greece (2001) 31 E.H.R.R. 20

Commentary

This case is of particular importance for a number of reasons. First, the case firmly reiterated that it must be shown that an expression can “when read as a whole and in their context, be seen as a call for violence, hatred or intolerance” for such an expression to be deemed “hate speech”. In this regard, the Court recognised that even though the speech in question may “be perceived as offensive or insulting by particular individuals or groups”, domestic courts cannot regulate such speech through hate speech legislation without these specific criteria. Second, when domestic courts attempt to regulate such speech, it must be shown not only that they considered expert reports submitted in defence of and against the material, but also that the judges fully engaged with the material in question. The case highlights that the failure of national authorities and domestic courts to conduct a thorough examination of the material in question will lead the Court to conclude the domestic procedures were deficient. The judgment also contained interesting assessments of monotheistic faiths noting and accepting that they would each claim “that it was better than the others” and making it clear that these characteristics could not themselves justify the regulation of materials or speech promoting religion through extremism legislation. The judgment is also an important reminder that proselytism is protected under art.9 and only improper proselytism practices that attempt to convert people through the use of violence, brainwashing or taking advantage of those in distress or in need could justify the regulation of such speech under art.10.

Richard Costidell

Pussy Riot

Activism—glass cages—courtroom—inhuman and degrading treatment—art.3—pre-trial detention—art.5—effective legal assistance—right to a fair trial—art.6—artistic and political expression—criminal sanctions—banning on online material—art.10

↙ Freedom of expression; Inhuman or degrading treatment or punishment; Public order offences; Public performance; Religious premises; Remand; Right to fair trial; Right to liberty and security; Russia; Songs

Mariya Alekhina v Russia (Application No. 38004/12)

European Court of Human Rights (Third Section): Judgment of 17 July 2018

Facts

The three applicants are members of a Russian feminist punk band, Pussy Riot. The applicants founded Pussy Riot in late 2011. The group carried out a series of impromptu performances of their songs in various public areas in Moscow, such as a subway station, the roof of a tram, on top of a booth and in a shop window. They claimed that their performances were a response to the ongoing political process in Russia, to President Vladimir Putin's participation in the 2012 elections and to the support he had from the Russian Orthodox Church. In October 2011, some of the members were arrested and fined for organising and holding an unauthorised assembly. On 21 February five members of the band, including the three applicants, attempted to perform their songs at the Moscow's Christ the Saviour Cathedral, but they were arrested by the guards. The deputy director general of a private security company and the director of the Cathedral's Fund complained of a violation of public order by unidentified people. The police started an investigation, arrested the applicants and instituted criminal proceedings against them.

The applicants complained that the transport to and from the Courts and their placement in glass cages during the trial proceedings violated their right to be free from inhuman and degrading treatment under art.3. They also complained that there were no valid reasons to warrant remanding in custody in breach of art.5(3). They also complained that they could not effectively communicate with their lawyers during the trial which violated their right to a fair trial under art.6. Finally, they complained that their arrest and banning of music material was in breach of art.10.

Held

- (1) There had been a violation of art.3 (six votes to one).

The Court noted that it had relied in previous cases on the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the CPT"), which has considered that individual compartments measuring 0.4, 0.5 or even 0.8 square metres are unsuitable for transporting a person, no matter how short the journey. In this case, the compartments were even smaller and thus allowed less than one sq. m per person which meant that the transport conditions were incompatible with art.3.

The Court also noted that while glass cages are better than iron cages in which an individual might feel intimidated and humiliated, in this case the respondent state failed to prove that the cages were necessary for security reasons. The state had no reason to believe that the applicants posed any threats and the cages were used to keep watching the applicants rather than monitoring the safety of the courtroom. The use of the cage was therefore humiliating and intimidating for the applicants and violated their art. 3 rights.

- (2) There had been a violation of art.5(3) (unanimous).

The Court noted that between the time the applicants were arrested and the time they were brought before a Court five months had elapsed. It had no difficulty in finding that the pre-trial detention was excessive and in breach of art.5(3). The Court cited earlier cases against Russia in which a violation had been found because the domestic courts always justify pre-trial detention, relying essentially on the gravity of the charges and using stereotyped formulae without addressing a detainee's specific situation or considering alternative preventive measures.

- (3) There had been a violation of art.6(1) and (3)(c) (unanimous).

The Court examined the complaints under art.6 together. They first started by analysing the complaints of the applicants under art.6(3)(c) that they were not able to consult their lawyers during the trial. The Court reiterated the importance of the safety of a court room during criminal proceedings especially in public and sensitive cases. However, the Court agreed

- with the applicants that the glass cage in which they had to sit throughout the proceedings placed a physical barrier between them and their lawyers which deprived them of their right to receive effective legal assistance.
- (4) There was no need to examine the complaint under art.6(1) in view of the finding of a violation of art.6(3)(c) (unanimous).
- (5) There had been a violation of art.10 on account of the applicants' criminal prosecution (six votes to one).
The Court reiterated its principles that the right to freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment, but it can be subjected to restrictions. In this case, the applicants' rights to artistic and political expression was covered by art.10. Their arrest and institution of criminal proceedings also constituted a clear interference with the applicants' right. The Court paid due consideration to the fact that the applicants' last performance took place at a cathedral and therefore this could offend others' rights. However, the Court found that the criminal proceedings for hooliganism and incitement of hatred and religious violence was groundless. Given the severity of criminal sanctions, the Court concluded that the interference with the applicants' right to freedom of expression was disproportionate.
- (6) There had been a violation of art.10 in respect of the first and second applicants on account of declaring the video material available on the Internet as extremist and banning it (unanimous).
The Court had to examine whether the videos with the group's performances owned and made available online by the group were extremist under domestic legislation. Given the disagreement regarding what could be considered extremist under the Russian legislation, the Court decided to leave the question open and examine whether the interference pursued a legitimate aim and was necessary in a democratic society. It was concluded that the restriction was aimed at serving morals and the rights of others. However, the Court was not convinced that an absolute ban on the material was necessary in a democratic society.
- (7) The respondent state had to pay EUR 16,000 (sixteen thousand euros) to the first and second applicants each and EUR 5,000 to the third applicant in respect of non-pecuniary damage (unanimous).
- (8) The remainder of the applicant's claim for just satisfaction was dismissed (unanimous).

Cases Considered

- Idalov v Russia* [GC] (Application No.5826/03), judgment of 22 May 2012
Khudoyorov v Russia (2007) 45 E.H.R.R. 5
Mamedova v Russia (Application No.064/05), judgment of 1 June 2006
Müller and Others v Switzerland (1991) 13 E.H.R.R. 212
Oberschlick v Austria (no.2) (1998) 25 E.H.R.R. 357
Pshevecherskiy v Russia (Application No.28957/02), judgment of 24 May 2007
Sakhnovskiy v Russia [GC] (Application No.21272/03), judgment of 2 November 2010
Seher Karataş v Turkey (Application No.33179/96), judgment of 9 July 2002
Taranenko v Russia (Application no. 19554/05), judgment of 15 May 2014
Van Mechelen and Others v the Netherlands (1997) 25 E.H.R.R. 647

Commentary

The case concerning the Pussy Riot activities has attracted wide media attention. The music and performances of the band which included colorful clothes, balaclavas and lyrics aimed at criticising Vladimir Putin and the Russian Patriarch were found to fall within the scope of art.10 as artistic and political expression. The Court considered international standards and the importance of the right to freedom of expression as a cardinal right protected by the Convention and condemned Russia for imposing criminal sanctions on the applicants. The Court was also critical of the finding that the band's performance could incite hate and violence against a religious group. One regrettable outcome is that although the interpretation of the term 'extremist' under Russian law was raised twice before the Court, the latter decided not to engage with its meaning. Judge Elósegui, however, disagreed with the majority that the criminal prosecution of the applicants was incompatible with art.10. The judge argued that while the applicants had a right to artistic and political expression, the means they used were disproportionate. She specifically referred to the applicants' efforts to perform at the altar of the cathedral. In her dissenting opinion, the judge emphasised that such a performance could make churchgoers and believers feel humiliated and intimidated. She concluded that art.10 does not protect the invasion of churches and other religious buildings for political purposes, nor does it protect conduct comprising intimidation and hostility against Christian Orthodox believers. Judge Elósegui also disagreed with the majority on their conclusion that the placement of the applicants in glass cages violated art.3. The judge accepted that the applicants might have felt exposed, however, she noted that the applicants were public figures and had repeatedly sought publicity by posting their performances online or inviting journalists to their performances. Following the invasion of the pitch during the 2018 World Cup final in Moscow by the members of the band, which led to their arrest and detention, and the alleged poisoning of one of them during their trial in Moscow, it will not be surprising if another case reaches the Court regarding their activities and the criminal sanctions imposed by Russia.

Sofia Galani

Right to privacy and social media

Social media—online platforms—defamatory comments—freedom of expression—right to reputation—art.8

☞ Compensatory damages; Costs; Defamation; Freedom of expression; Iceland; Reputation; Right to respect for private and family life; Social media

Egill Einarsson v Iceland (No.2) (Application No.31221/15)

European Court of Human Rights (Second Section): Judgment of 17 July 2018

Facts

The applicant was a media personality who published, under pseudonyms, written pieces and had appeared on films and television. He was controversial in Iceland for his statements about women and sexual freedom and had been accused by some of claiming that some women should be subjected to sexual violence. In 2011 and 2012, accusations of sexual offences were brought against the applicant. These were investigated

by the police but were dismissed due to insufficient evidence. He then filed counter-claims against his accusers for falsely accusing him, but these were also dismissed.

The applicant was interviewed by a magazine, in which he repeatedly denied the accusations and claimed his accusers had ulterior motives and were part of a conspiracy. When the interview and the applicant's picture were published on the front page of the magazine, there was a strong protest on a Facebook page. An individual (X) posted a comment stating: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...". X was contacted by the applicant's lawyer requesting a withdrawal, public apology and damages for defamation. X's lawyer responded, informing the applicant that the statement had been removed from Facebook, but submitting that the statements were not defamatory. The applicant then lodged defamation proceedings against X with the District Court.

The District Court held that the statements by X were defamatory, and declared them null and void, but refused to award any further remedy, damages, or legal costs to the applicant. This damages assessment was based on the wide range of other comments available on the Facebook page, the relatively limited reach of the statements in question, and the ambiguous position of the applicant with reference to sexual violence based on his own published material. The applicant appealed, but the District Court's judgment was upheld by the Supreme Court.

The applicant complained before the European Court of Human Rights (the Court) that the failure of the domestic courts to grant him compensation and legal costs violated his right under art.8 of the Convention.

Held

- (1) The Court declared the application admissible (unanimous).
- (2) There had been no violation of art.8 (unanimous).

The applicant maintained that the Supreme Court's decision not to grant him compensation violated his art.8 right to privacy and family life, specifically his right to reputation, as he was unable to defend himself if anyone called him a rapist in speech or writing. He additionally claimed that he had not been granted an effective remedy to achieve the minimum protection expected under art.8. The Government contended that the domestic court's decision had been within the margin of appreciation offered under art.8, and the declaration that the offending statements were null and void was a sufficient legal remedy.

The Court determined that there was sufficient margin of appreciation afforded to member states in their protection of reputation, which is protected under art.8, as long as the decision not to grant him compensation did not empty the right of its effective content. They determined that the decision to declare the statements null and void was an effective and sufficient remedy based on the national courts' analysis of the nature and gravity of the case. The decision not to grant the applicant his legal costs was also proportionate on the facts, given that the domestic courts did not accept all of the applicant's claims.

Cases considered

A v Norway (App. No.28070/06), judgment of 9 April 2009

Airey v Ireland (1979) 2 E.H.R.R. 305

Axel Springer AG v Germany (2012) 55 E.H.R.R. 6

Bédat v Switzerland (2016) 63 E.H.R.R. 15

Biriuk v Lithuania (App. No.23373/03), judgment of 25 November 2008

Egill Einarsson v Iceland (App. No.24703/15), judgment of 7 November 2017

Frisk and Jensen v Denmark (App. No.19657/12), judgment of 5 December 2017

MGN Limited v United Kingdom (2011) 53 E.H.R.R. 5

Mertinas and Mertinienė v Lithuania (App. No.43759/09), judgment of 8 November 2016

Petrie v Italy (App. No.25322/12), judgment of 18 May 2017

Pfeifer v Austria (2007) 48 E.H.R.R. 175

Sanchez Cardenas v Norway (2007) 49 E.H.R.R. 147

Commentary

This judgment represents a second application made by this applicant, stemming from responses to his interview in a magazine on social media, and his pursuit of defamation claims against those responding. In the facts of *Egill Einarsson v Iceland (No.1)*, the Icelandic Supreme Court had held that the comment: ‘Fuck you rapist bastard’ was a value judgment and therefore could not be considered defamatory. This was held to be a violation of the applicant’s art.8 right to privacy. According to the Court, the context in which the comment was made at a time when the applicant was facing accusations of rape was particularly relevant. The statement that the applicant was a ‘rapist’ was in this case an imputation of objective and factual nature, and therefore defamatory as the accusations had not been proven. This case showed a shift in the Court’s jurisprudence in the balancing of the rights to privacy and the right to freedom of expression on social media platforms.

In this case, we see what could perhaps be considered a mitigation of the decision in *No.1*, reinforcing that while these findings of defamation in online forums may still stand, the effective protection of the right to reputation under art.8 does not require states to impose compensation where the context does not render this appropriate. However, this mitigating effect should not be overstated. Although this decision does show a greater margin of appreciation offered to states in the protection of the right to reputation than was found in the judgment of *No.1*, the effect on balancing of rights from *No.1* does still stand and the right was still notionally protected in this case.

While largely uncontroversial, the case is a helpful guide for those who widely express their views on social media as well as for those who use these platforms to launch attacks and insulting comments seeking to hide behind anonymity of how the rights to privacy and freedom of expression are protected. In an era that the use of online platforms has become part of our everyday life and its regulation remains rather challenging, the Court reiterated that while the rights to privacy and freedom of expression will be protected under the Convention, the states will enjoy a margin of appreciation to effectively balance these rights.

Christopher Gray

Freedom of expression and online blogs

Internet forum—blogs—users' comments—elections—police officers—insulting language—hate speech—criminal sanctions—freedom of expression—art.10

☞ Blogs; Elections; Freedom of expression; Hate speech; Police; Russia; Social media

Savva Terentyev v Russia (Application No.10692/09)

European Court of Human Rights (Third Section): Judgment of 28 August 2018

Facts

The present case concerns an allegation made by Mr Savva Sergeyevich Terentyev (the applicant), against the government of the Russian Federation (the Government) owing to the perceived infringement of his right to freedom of expression in respect of a comment which was made by the applicant on an internet blog. The comment was about a police raid in the offices of a newspaper which had been openly supportive of the opposition candidate in the 2007 regional elections. In raiding the office, the police declared that the software on the office computers were counterfeit and subsequently seized the hard disks. That same day Mr I.S, who was also the President of a regional non-governmental organisation, published an online blog under which a comment was left by Mr T which described the “police” as the regime’s “faithful dogs”. On the same date Mr B.S, an acquaintance of the applicant, also published a blog in which he included a hyperlink to Mr I.S’s blog. The applicant followed this hyperlink and read the comment left by Mr T. Afterwards, the applicant returned to Mr I.S’s blog and left a comment wherein he disagreed with Mr T and drew a distinction between the “police” and, as he described them, the “cops”. The latter, in his view, were “lowbrows and hoodlums” and he speculated about the desirability of having a large oven in the centre of every Russian city where “cops” could be burnt like in Auschwitz.

These comments led to criminal proceedings which began on 14 March 2007. In preparation for the preliminary hearing, a report was published on 30 April 2007 which stated that the applicant had expressed a “distinctly negative opinion of “all police officers”. At the beginning of his trial, the applicant pleaded not guilty contending that he had drawn a distinction between a police officer and cop and argued that, although he was the author of the comment, it reflected his emotional and spontaneous reaction to the situation of the day and had subsequently been removed from the blog. The court called for a socio-humanities forensic report which could examine the impact of the impugned statement. The report concluded that the applicant had targeted all police officers as a “social group” and had aimed at “inciting hatred and enmity” towards them whilst also calling for their physical extermination. On 7 July 2008, the applicant was found guilty under art.282 (1) of the Russian Criminal Code for “having publicly committed actions aimed at inciting hatred and enmity and humiliating the dignity of a group of persons on the grounds of their membership of a social group”. The court of first instance gave particular weight to the fact that the applicant had negatively influenced public opinion with the aim of inciting social hatred. The applicant appealed his conviction to the Supreme Court of the Komi Republic asserting that the term “social group” had been deliberately extended to encompass police officers and that his prosecution under this provision were brought arbitrarily, given that many well-known figures had made similar statements yet not faced prosecution. The Supreme Court rejected the applicant’s appeal.

The applicant lodged a complaint with the European Court of Human Rights (the Court) complaining that the criminal sanctions against him violated his right to freedom of expression under art.10.

Held

- (1) There had been a violation of art.10 (unanimous).
The Court first dealt with the applicant’s assertion that the interference, which the parties agreed had occurred, was not prescribed by law. The Court reiterated that it has consistently recognised that domestic law must be of general application so as to allow it to adapt to changing social circumstances. In line with this view, the Court opined that in any system of law, regardless of how clearly drafted a provision may be, there will also be a need for interpretation by the domestic courts. Importantly, the Court noted that the way in which the term “social group” was interpreted by the domestic courts did not conflict with the natural meaning of those words. The Court therefore concluded that the interference with the right to freedom of expression was prescribed by law. The Court also very quickly

asserted that the requirement of a legitimate aim was met given that the prosecution in question was aimed at protecting the reputation and rights of the Russian police. In deciding whether the infringement was necessary in a democratic society, the Court held that the term “necessary” implies that there must be a pressing social need and that although member states enjoy a certain margin of appreciation in assessing the necessity of an infringement, it is the Court which has the final say. The Court held that in exercising this “final say” it was required to have regard to the situation as a whole and that it must determine whether the actions taken by the national authorities were proportionate and whether their reasons for doing so were relevant and sufficient. Crucially, the Court stated that, in situations where speech is being used to spread or incite violence, the state, as the guarantor of public order, is entitled to resort to criminal sanctions and that in the case of inciting or spreading of violence against public officials the margin of appreciation is even wider. In applying these principles to the present case, the Court reasoned the applicant’s speech did incite hatred and violence and was not “merely insulting”. Further, the Court found that whilst the use of vulgar and insulting language is not in itself sufficient to cause that language to fall outside the protection of art.10, if that language amounts to wanton denigration it may fall outside the protecting scope of art.10. In addition, the Court considered and expressed severe disapproval at the references to Auschwitz and the Holocaust, but it did not find them sufficient on their own to justify interference with art.10. The main justification for the Court’s approach was the time the comments were expressed just before the elections when all the views should be circulated freely. The Court also found that the domestic courts did not appear to have examined the comments in their whole context but rather had limited their examination to the form and tenor of the speech. Due to this failing, the Court found that the reasons for interference could not be viewed as relevant and sufficient. Finally, the Court found that the suspended sentence that was given to the applicant was of the most severe form which could be given and that this was excessive due to the finding that the impugned statements were not sufficient to warrant such an interference.

- (2) The finding of a violation of art.10 constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.
- (3) The respondent state was ordered to pay EUR 5,000 in respect of costs and expenses (unanimous).
- (4) The remainder of the applicant’s claim for just satisfaction was dismissed (unanimous).

Cases Considered

Christian Democratic People’s Party v Moldova (No. 2), (App. No.25196/04) judgment of 2 February 2010

Dlugolecki v Poland (App. No.23806/03), judgment of 24 February 2009

Dmitriyevskiy v Russia (App. No.42168/06), judgment of 29 May 2012

Feldek v Slovakia (App. No. 29032/95), judgment of 12 July 2001

Gorzelik and Others v Poland (2007) 44 E.H.R.R 47

Gül and Others v Turkey (2011) 52 E.H.R.R. 38,

Janowski v Poland (App. No.25716/94), judgment of 21 January 1999

Karataş v Turkey (App. No. 23168/94), judgment of 16 January 2018

Lindon, Otchakovsky-Laurens and July v France (App. No.21279/02), judgment of 22 October 2007

Magyar Helsinki Bizottság v Hungary (App. No. 18030/11), judgment of 8 November 2016

Morice v France (2016) 62 E.H.R.R. 1

Otegi Mondragon v Spain (2015) 60 E.H.R.R. 7

Öztürk v Turkey (App. No. 22479/93), judgment of 9 June 2009

Pentikäinen v Finland (2017) 65 E.H.R.R. 21

Vejdeleland and Others v Sweden (2014) 58 E.H.R.R. 15

Commentary

The present case is interesting due to how far the applicant was allowed to go in terms of hateful speech yet still find protection within art.10. The Court's finding that, despite being seen as offensive, insulting and virulent, the applicant's comments should still receive protection, signals a clear endorsement of the right to freedom of expression and the ability to speak one's mind. However, it is worth flagging up at least three criteria that the Court considered to reach this conclusion. The first had to do with the time the comments were expressed. The Court has reaffirmed on a number of occasions that political speech is one of the highest forms of the freedom of expression. The fact therefore that the comments were expressed before the local elections played a defining role in the conclusion of the Court. The other criterion carefully considered by the Court was that the comments were made against the police as a public institution and did not target a minority or specific individuals, although there were references to Auschwitz, and as a result this could not incite hate or violence against specific people. Finally, the Court did not approve of the criminal sanctions imposed on the applicant which considered the most serious interference with the right to freedom of expression.

The case comes as part of a series of cases decided by the Court on the right of freedom of expression on online platforms and hate speech (see also *Egill Einarsson v Iceland* (No.2) (Application No. 31221/15) and *Ibragim Ibragimov and Others v Russia* (Application Nos 1413/08 and 28621/11) in the same issue) which shows the difficulties in balancing the freedom of expression on social media and online platforms with the protection of the rights of others and the margin of appreciation states enjoy in these cases.

Jordan Owen

Parenting testing and contact rights

Biological father—legal father—parenting testing—contact rights—child's best interest—right to receive information—right to family life—art.8

☞ Best interests; Children's welfare; Contact; Germany; Paternity; Right to respect for private and family life

Fröhlich v Germany (Application No.16112/15)

European Court of Human Rights (Fifth Section): Judgment of 26 July 2018

Facts

In 2004, the applicant began a relationship with X, a married woman who continued to live with her husband, with whom she had six children. Two years later, X told the applicant that she was pregnant and in October 2006, she gave birth to a girl. Shortly after, the relationship with the applicant ended. X and her husband, the girl's legal father, refused the applicant's subsequent initiatives to have contact with the child and did not consent to paternity testing. The applicant brought a complaint before the Family Court

arguing that he is the child's father and gave the court a sworn declaration that he had sexual intercourse with the mother at the time of conception. The applicant appealed the decision to the Court of Appeal. The court orally heard evidence by the applicant, the child's legal father and the mother. The father argued that he was aware of his wife's relationship, but she had told him that this relationship ended in 2005. Both parents confirmed that all the children except the youngest one knew about the dispute with the applicant and argued that it was not in the child's best interests to find out about the situation. In 2012, the court appointed a legal guardian to the child who also confirmed that contact with the applicant would be detrimental for the child. Despite the guardian's objection, the child appeared before the court and confirmed that although she did not know the reasons her parents had a dispute with the applicant, she did not want to establish a contact with him. The Court of Appeal decided to reject the appeal. In its judgment, the court placed emphasis on the child's best interests and explained that the child was well-integrated in a family where she felt happy and secure. She was emotionally attached to her mother's husband who was the only father she knew. Establishing therefore contact rights with the applicant would break up the family as a unit and have detrimental effects for the child. In 2014, the Federal Constitutional Court rejected the applicant's complaint as he had not provided any new reasons other than the ones already submitted and examined by the Court of Appeal.

The applicant complained before the European Court of Human Rights (the Court) that the failure of the domestic courts to establish contact with his daughter violated his right to private and family life under art.8. He also claimed that the failure of the domestic authorities to investigate his allegations about paternity violated his art.8 right in conjunction with art.6.

Held

- (1) The complaint about the refusal of contact rights in conjunction with art.6 was manifestly ill-founded and inadmissible (unanimous).
With reference to the applicant's complaint that the domestic courts' decision to refuse him contact with the child violated his rights under arts 8 and 6, the Court stated that this falls within the scope of art.8 alone. The Court considered that the Court of Appeal's refusal to grant the applicant contact rights amounted to an interference at least with the applicant's right to private life. The Court, however, found that the interference had a legal basis—the child's best interests; that the competent authorities had a wide margin of appreciation in deciding a child's best interests; and that in this case the Court of Appeal had provided detailed reasons for why they believed that it was not in the child's best interests to not allow contact rights. The Court also noted that the applicant was given numerous opportunities to be orally heard by the domestic courts, to submit his own evidence and participate in all the proceedings. As a result, the Court did not agree with the applicant that the Court found against him because they based their findings on standardised arguments in favour of social families.
- (2) There had been no violation of art.8 (unanimous).
The Court repeated the same principles regarding the applicant's complaint concerning the refusal to provide information about the child. It was noted that all parties accepted that the impugned decision interfered with the applicant's right to family life. The Court also took note of the importance a paternity test would have both for the applicant and the future of the child. This was particularly significant considering the legal father's child doubt about him being the biological father. However, the Court could not object to the domestic court's decision that at least for the time being a paternity test or contact rights would not be in the child's best interests. The subsidiary role of the Court in these cases was also mentioned and it was concluded that the domestic courts had adduced sufficient reasons for their decision

to refuse the applicant information rights and provided the applicant with the requisite protection of his interests.

Cases considered

Ahrens v Germany (App. No.45071/09), judgment of 22 March 2012

Anayo v Germany (2012) 55 E.H.R.R. 5

I.S. v Germany (App. No.31021/08), judgment of 5 June 2014

Kautzor v Germany (App. No.23338/09), judgment of 22 March 2012

Schneider v Germany (2012) 54 E.H.R.R. 12

Commentary

Despite the unfortunate set of circumstances of the case and the inability of the applicant to find out whether he was the biological father, and if so to establish contact rights with the child, the case is a strong reminder that the right to family life of a parent is always balanced against a child's best interests. The Court reiterated that the assessment of what is best for the child is to be conducted by the national competent authorities and the Court only has a subsidiary role in reviewing the effectiveness of the assessment. Even in this case that the domestic legislation could not enable a possible biological father to establish contact rights, because the legislation gives these rights only to biological fathers and persons who have assumed responsibility for a child, the Court noted that the domestic courts took significant steps to decide what was best for the child by holding oral hearings, collecting expert reports, appointing a legal guardian and giving the opportunity to the child to decide whether she wanted contact rights with the applicant. One key decisive criterion that emerges from the merits of the case regarding the protection of the right to family life of a parent is that the domestic courts noted that not offering to the applicant contact rights was in the best interests of the child *for the time being*. This means that the applicant was not barred from establishing contact rights later on.

Sofia Galani

Independent investigations

Use of force—police—death—ill-treatment—effective and independent investigation—art.2—art.3

☞ Duty to undertake effective investigation; Impartiality; Inhuman or degrading treatment or punishment; Police detention; Right to life; Russia

Khodyukevich v Russia (Application No.74282/11)

European Court of Human Rights (Third Section): Judgment of 28 August 2018

Facts

In September 2008, the applicant's son, Mr Alchine, was arrested and taken to the police station after an altercation with his wife. On the same day, a few hours after being released, he was found unconscious in the street. He was taken to the hospital and died eleven days later. The applicant alleged that her son had passed out after being hit on the head by the police officers during an altercation and they dragged

his body in the street a few meters away from the police station. The police officers said that Mr Alchine was drunk when he arrived at the police station, but no injury was visible on his body. A criminal investigation was opened by an investigator from the same police station for voluntary violence resulting in severe health damage. On the same day, Mr Alchine's wife went to the police station where she confessed having caused physical harm to her husband. She then withdrew her statement. After Mr Alchine's death, the Instruction Committee opened an investigation for voluntary violence causing unintentional death. An autopsy revealed that the death resulted from complications due to a head injury which had been caused by a hard object. The investigator suspended the investigation on the ground that the duty for the investigation had expired and that no witness had been identified. The applicant's complaint against the decision was dismissed.

In March 2014, Mrs Alchine (the wife) went to the Instruction Committee and confessed to have hit her husband. The investigation revealed that Mr and Mrs Alchine had a fight, during which Mrs Alchine had struck her husband on the head with a rolling pin. The investigator found that Mrs Alchine had exceeded the bounds of self-defence and ended the criminal proceedings. On the same day, the investigator dismissed the proceedings against the police officers and concluded that the offence had been committed by Mrs Alchine. He rejected the applicant's claim that her son had been killed by the police officers due to the fact that this claim solely relied on the applicant's suspicion and the lack of evidence. The regional court rejected the applicant's appeal against the investigator's decision to terminate the criminal proceedings against Mrs Alchine in a final judgment. The applicant was awarded damages as a compensation for the excessive length of the investigation. She did not contest this decision.

The applicant brought a claim before the European Court of Human Rights (the Court) alleging that the police officers had ill-treated her son while he was in the police station, which had resulted in his death and a violation of arts 2 and 3.

Held

- (1) The Court declared the complaint admissible (unanimous).
- (2) There had been no violation of the substantive limb of arts 2 and 3 (unanimous).
The circumstances of the case did not allow the judges to establish that Mr Alchine was beaten by the police officers. According to witnesses, the applicant's son was able to speak and communicate with others when he left the police station and did not show any physical injury. Moreover, the Court noted that it was the first time that the applicant raised the argument that the police officers left her son dying in front of the police station. Thus, the national authorities had not been able to check the accuracy of this allegation and the Court did not have enough evidence to establish that the police officers inflicted ill-treatment on the applicant's son. It considered that the national authorities did not fail their substantive obligation to protect Mr Alchine's life.
- (3) There had been a violation of the procedural limb of arts 2 and 3 (unanimous).
The judges reiterated that the right to life under art.2 in combination with art.1 required an effective investigation into the use of force by state agents, especially in cases where this force resulted in someone's death. This obligation also applies to art.3 and in cases in which an individual alleges to have been the victim of ill-treatment in the hands of the police or other state agents. The applicant was notably suspicious regarding the independence of the first investigator who was from the same police station as the police officers suspected of ill-treatment. The Court found that the investigation should have been entrusted to an officer who would not work in the same unit in order to preserve the litigants' trust in the transparency of the investigations and to exclude any suspicion of lack of independence.
- (4) There was no need to consider art.13 separately (unanimous).

- (5) The applicant's complaint that her son's detention was incompatible with art.5 was dismissed as ill-founded (unanimous).
- (6) The applicant's claims for EUR 100,000 in damages was found excessive, but she was awarded EUR 10,000 for the distress, frustration and feeling of injustice she had experienced.

Cases considered

Al-Skeini and others v the United Kingdom (2011) 53 E.H.R.R. 18
Armani Da Silva v the United Kingdom [GC] (2016) 63 E.H.R.R. 12
Assenov and others v Bulgaria (1998) 28 E.H.R.R. 652
Brecknell v The United Kingdom (2008) 46 E.H.R.R. 42
Enoukidze and Guirgvliani v Georgia (App. No.25091/07), judgment of 26 April 2011
Gambulatova v Russia (App. No.11237/10), judgment of 26 March 2015
Giuliani and Gaggio v Italy [GC] (2012) 54 E.H.R.R. 10
Ireziyev v Russia (App. No.21135/09), judgment of 2 April 2015
Kaya v Turkey (1998) 28 E.H.R.R. 1
Lykova v Russia (App. No.68736/11), judgment of 22 December 2015
McCann and others v The United-Kingdom (1995) 21 E.H.R.R. 97
McKerr v The United Kingdom (2002) 34 E.H.R.R. 20
Mustafa Tunç and Fecire Tunç v Turkey (App. No.24014/05), judgment of 25 June 2013
Ramsahai and others v The Netherlands [GC] (2008) 46 E.H.R.R. 43

Commentary

The unanimous conclusion of the judges in this case leaves no doubt as to the importance the Court attaches to the independence of an investigation into the ill-treatment and death of an individual. The Court reiterated the well-established principles regarding the procedural duties arising from arts 2 and 3, particularly in cases in which the allegations are against the use of force employed by state agents. They also reinforced their position that in spite of any investigative difficulties, such as lack of evidence, states remain under a duty to conduct an effective and independent investigation even if there is no conclusive outcome on the cause of death. Although this case does not add much to the principles of the Court regarding the procedural obligations of states under arts 2 and 3, it does show that even in cases where the applicants have no evidence or witnesses to support their allegations or another person takes responsibility for the death of another individual, national authorities are not absolved from their duty to investigate the use of force by the police.

Lucie Laffont

Contact rights during divorce proceedings

Contact rights—visiting rights—divorce—interim injunctions—lengthy proceedings—parents and child relationship—right to family life—art.8

Divorce; Family proceedings; Length of proceedings; Parental contact; Right to respect for private and family life; Romania

Cristian Cătălin Ungureanu v Romania (Application No. 6221/14)

European Court of Human Rights (Fourth Section): Judgment of 4 September 2018

Facts

The applicant in this case, Cristian Cătălin Ungureanu, was born in 1972, lives in Ploiești and was at the relevant time married to I.M.U., with whom he had a son born in 2006. Following disputes between the parents concerning their son's education, I.M.U. filed for divorce and custody of the child on 13 September 2012. On 19 October 2012, she and the child left the family home and moved in with her parents.

The applicant lodged an application for sole custody, shared custody or visiting rights (according to a specific schedule) during the divorce proceedings with the Ploiești District Court on 2 November 2012. On 8 January 2013, the District Court ruled that it would not be in the child's best interest to change residence and that the applicant had not been prevented from visiting the child, noting that the law did not provide for establishing visiting rights during divorce proceedings. The applicant appealed to the Prahova County Court, which on 27 May 2013 upheld the previous ruling. After the ruling of the County Court, the applicant claims I.M.U. and her family denied him any contact with the child.

The Ploiești District Court gave its judgment on the divorce proceedings on 22 January 2014 following several postponements mostly due to the parties' submission of additional evidence. The Court ruled that the child's sole residence would be with his mother and that the applicant would have the child stay at his home every other weekend and for two weeks during the summer. The applicant requested the Court expedite the drafting of the judgment as he had been unable to see his child for ten months.

The judgment was served to the applicant on 4 March 2014, who subsequently lodged an appeal on 28 March 2014. I.M.U. also lodged an appeal in 2 April 2014. Due to administrative problems within the District Court, the file would not be sent to the County Court before 7 May 2014, despite requests by the applicant to expedite the proceedings in order to re-establish contact with his son. The County Court delivered its ruling on 22 October 2015, upholding the previous decision. At the request of the applicant, the file was sent to the Bucharest Court of Appeal, which delivered a decision on 2 November 2016, upholding the ruling with some changes to the visiting schedule. On 19 February 2017, the child moved in with the applicant in accordance to the child's express request and in accordance with a notarised agreement between the parents.

The applicant complained before the European Court of Human Rights (the Court) that the inability to secure visiting rights during the divorce proceedings and the unreasonable length of those proceedings had resulted in a violation of art.8 and his right to family life causing psychological harm to the child and damage to their relationship.

Held

- (1) The Court declared the application admissible (unanimous).
- (2) There had been a violation of art.8 (unanimous).

Noting that the domestic courts had stated that domestic law did not provide for the visiting rights during divorce proceedings, the Court acknowledges that following the decision of 8 January 2013, it became increasingly difficult for the applicant to maintain a relationship with the child. The applicant's complaint, therefore, relates to the effects of the law on the relationship with his son.

While domestic courts do not always reject requests for visiting rights, the applicant could not have benefited from favourable case-law as it is not regarded as a primary source of law. The Court found the Government's claim that applicant was not prevented from seeing his child to be a mere observation of circumstances and not an effective examination of the

child's best interests, leaving the exercise of a crucial right at the discretion of I.M.U., with whom the applicant was in conflict.

Since the proceedings lasted over four years, and the relationship of the applicant and his child affected for approximately three years and five months, the Court considers the lengthiness of the proceedings to show that the respondent state had failed to discharge its positive obligations under art.8 of the Convention, owing to insufficient quality of domestic law.

- (3) The Court held that there is no need to examine separately whether there had been a violation of art.8 with respect to length of divorce proceedings (unanimous).
- (4) The respondent State was ordered to pay EUR 8,000 in respect of non-pecuniary damage and EUR 2,380 in respect of costs and expenses (unanimous).
- (5) The Court dismissed the remainder of the applicant's claim for just satisfaction (unanimous).

Cases Considered

Cristescu v Romania (App. No. 13589/07), judgment of 10 January 2012

Eberhard and M v Slovenia (App. Nos 8673/05 and 9733/05), judgment of 1 December 2009

Jovanovic v Sweden (App. No. 10592/12), judgment of 22 October 2015

M and M v Croatia (2017) 65 E.H.R.R. 9

Mitrova and Savik v Former Yugoslav Republic of Macedonia (App. No. 42534/09), judgment of 11 February 2016

Radomilja v Croatia [GC] (App. Nos 37685/10 and 22768/12), judgment of 20 March 2018

Commentary

In *Cristian Cătălin Ungureanu v Romania*, the main question was whether the domestic legislation had an adverse impact on the relationship between the applicant and his son. The Court had no difficulty in accepting that the relationship between a parent and their child falls within the protection of art.8. It therefore focused its analysis on whether the respondent state took the right steps to discharge its positive obligations under art.8. The weaknesses of the domestic legislation, the lengthiness and uncertain results of the interim injunctions led the Court to conclude that the long time the applicant spent away from his son in spite of his efforts to swiftly change the circumstances severely affected the relationship with this son. The Court's ruling serves to prompt legislative changes for the purpose of ensuring that family life is not unnecessarily harmed in divorce proceedings, thus ensuring they are carried out thoughtfully, with respect for the circumstances at hand and with due urgency.

Anthony Morelli

Conditions of detention in correctional facilities

Conditions of detention—correctional facilities—inmates—Malta—degrading and inhuman treatment—art.3

✉ Inhuman or degrading treatment or punishment; Malta; Prison conditions; Right to effective remedy

Abdilla v Malta (Application No.36199/15)

European Court of Human Rights (Fourth Section): Judgment of 17 July 2018

Facts

The applicant Mr Jean Pierre Abdilla, who is a Maltese national born in 1975, was sentenced to 16 years imprisonment on 3 December 2009 for drug-related offences. During his imprisonment at the Corradino Correctional Facility in Paola, Malta, the applicant was detained mostly in Division 2 of the facility, where he stayed in various cells, but he also spent two short periods in high security unit Division 6. After his second stint in Division 6, he was placed back in Division 2 in cell no.45 for 3 years and later in cell no.72. The applicant claimed the 200-year-old facility needs maintenance, lacks light and air, is squalid and has a bad smell. Windows in the prison have two iron grids and a third layer of iron bars (triple-barred) and although Division 2 has three skylights, they are kept closed even during summer causing very hot conditions. While the applicant was placed in cell no.42 he suffered fumes and excessive heat pouring into his inadequately ventilated cell from the bakery nearby. Mr Abdilla also described the cell as nearly underground and the triple-barred windows barely allowed him to see outside. He claimed that during winter the cell was cold and humid. When he was moved to cell no.70 in December 2014, the applicant felt claustrophobic due to its small size and low ventilation, also claiming he had occasional access to running water. The meals at the facility were small portions of poor quality, non-nutritious food prepared in an unhygienic kitchen. Mr Abdilla also alleges that dead mice were found in the kitchen and two prisoners were taken to hospital due to food poisoning in September 2015. Inmates were forced to flush toilets using a bucket of water as there were no flushing systems installed in the prison. Furthermore, access to running water was scarce in the facility with no in-cell access to water at times; inmates could purchase bottled water but were forced to reduce drinking water whenever they were low on cash. In terms of showering, hot water was dirty and scarcely available with one cracked shower tray which could lead to potential injury. For all Division 2 inmates Mr Abdilla alleged there was only one shower available most of the time with two showers available only over the summertime. The applicant also complained that telephone costs were too high and the prison allowance given to detainees was very little especially considering the tuck shop was unreasonably expensive. When Mr Abdilla suffered health issues and was confined to his bed, the emergency buzzer in his cell did not work and so it took 30 minutes for staff to arrive and assist him.

The applicant complained before the European Court of Human Rights (the Court) that the conditions of detention violated his right to be free from inhuman and degrading treatment.

Held

- (1) The applicant's complaint under art.3 was declared admissible (unanimous). The complaint under art.13 taken in conjunction with art.3 was also declared admissible (unanimous).
- (2) There had been no violation of art. 3 (six votes to one). Following an overall assessment of the detailed account of the applicant of his conditions of detention, the Court found that the he was not subjected to distress or hardship which exceeds expected levels of suffering inherent in the state of imprisonment. The judgment heavily relied on previous cases concerning the same prison where the Court found the Maltese Government had committed no violation of art.3.
- (3) There had been a violation of art.13 taken in conjunction with art.3 (unanimous).
- (4) The State is required to pay the applicant EUR 5,000. Although no violation of art.3 had been found, Mr Abdilla's right to art.13 was not upheld as the applicant did not have access to effective domestic remedies regarding his conditions of detention (unanimous).

Cases considered

- Ananyev and Others v Russia* (2012) 55 E.H.R.R. 18
Ćonka v. Belgium (2002) 34 E.H.R.R. 54
Danilczuk v Cyprus (App. No.21318/12), judgment of 3 April 2018
Eskerkhanov v Russia (App. No.18496/16), judgment of 25 July 2017
Klass v Germany (1978) 2 E.H.R.R. 214
Kudla v Poland (2000) 35 E.H.R.R. 198
M.S.S. v Belgium and Greece (2011) 53 E.H.R.R. 2
Muršić v Croatia (2017) 65 E.H.R.R. 165
Neshkov and Others v Bulgaria (App. No.36925/10), judgment of 27 January 2015
Peñaranda Soto v Malta (App. No.16680/14), judgment of 19 December 2017
Story and Others v Malta (App. No.56854/13), judgment of 29 October 2015
Torreggiani and Others v Italy (App. No.43517/09), judgment of 8 January 2013
Visloguzov v Ukraine (App. No.32362/02), judgment of 20 May 2010
Yanez Pinon and Others v Malta (App. No.71645/13), judgment of 19 December 2017

Commentary

The case provides an eloquent summary of the Court's principles on the matter as well as of its earlier case-law on Maltese detention facilities. Given that Malta had not been found in breach of art.3 in earlier cases with similar facts and cases regarding the conditions of detention in the same facility, the Court felt that it was not necessary to depart from its approach in this case. Judges Motoc and Bošnjak in their joint concurring opinion argued that it is paramount to the Court's integrity that the present case is dealt with in the same manner as earlier cases. However, Judge Pinto de Albuquerque's dissenting opinion is interesting to the case as it highlights that although the previous cases relate to a different division within Corradino Correctional Facility than the division discussed in the present case, and considering the similarity of complaints across the board as well as the report prepared by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's (CPT) report, the prison as a whole obviously forces inmates to live in inhuman and degrading conditions.

Despite the unfortunate outcome for the inmates, who keep challenging the conditions of detention at the same facility, the case offers legal certainty and predictability as unless the conditions worsen, the Court does not seem willing to find Malta in breach of art.3.

Kaj Hadad

Book Reviews

La Charte des droits fondamentaux saisie par les juges en Europe—The Charter of Fundamental Rights as Apprehended by Judges in Europe, by Laurence Burgorgue-Larsen (ed.), (Pedone, 2017), 716 pages, paperback, ISBN: 978-2-23-300824-4.

The book under review sets itself the ambitious task of surveying the use of the EU Charter of Fundamental Rights (the Charter) by national courts and other stakeholders in 22 EU Member States. The merits of empirical research with such a broad geographical scope can hardly be overstated. By yielding fresh comparative insights, this approach can significantly feed into the ongoing discussion of the Charter's legal effects in the context of multi-level protection of fundamental rights in Europe. However, such a collective effort is fraught with potential pitfalls stemming from the divergences between Member States' legal systems and judicial practices, not to mention the practical difficulties of coordinating the work of scholars from multiple Member States. Overall, while some of these obstacles have perhaps proved to be insurmountable, the team of contributors under the direction of Laurence Burgorgue-Larsen provides a comprehensive account of the domestic reception of the Charter in the Member States covered.

By way of introduction, the first chapter by François-Xavier Millet discusses the Charter's scope of application as interpreted by the Court of Justice of the EU (CJEU), with a focus on the notion of "implementation of Union law" by Member States set forth in art.51 of the Charter. When it comes to determining the level of protection under art.53 of the Charter, Millet fleshes out the CJEU's approach by surveying different possible scenarios depending on the degree of harmonisation of secondary law applicable to the case at hand. He argues that the Charter has not radically transformed the EU's fundamental rights protection system, nor has it been invoked by the CJEU as an autonomous basis for enhancing the standard of protection. Rather, the Charter has provided the Court with added legitimacy to pursue the constitutionalisation of the Union's legal order and to reinforce the Court's autonomy, thereby transforming the Court itself (p.31). This line of argument finds interesting echoes throughout the collection.

The core of the book consists of 22 national reports written in French or English, predominantly by academics but also other legal professionals. The chapters follow an identical pattern based on a questionnaire addressed to individual contributors. The first section of each chapter covers the Charter's formal status as defined by national constitutional law and the mentions of the Charter in democratic deliberations and legislative texts. The second section is designed to provide a thorough assessment of the Charter's role in national judicial proceedings. To begin with, it inquires into how national judges interpret the Charter's scope of application defined in its art.51 and if they allow the Charter to be invoked in horizontal situations. It then examines the references to the Charter in decisions of constitutional and ordinary courts and the approaches of these courts to issues surrounding the Charter's art.53. Finally, it turns to the role of the Charter in references for a preliminary ruling and the invocation *ex officio* of the Charter by national courts. Emphasis is rightly placed on the interactions between the Charter, national constitutions and the European Convention on Human Rights (ECHR) in national case law.

The collection concludes with a synthesis report by Laurence Burgorgue-Larsen titled "Irreducible diversity". In an effort to pick up the central threads running through the 22 national analyses, Burgorgue-Larsen constructs two different mosaics, one constitutional and the other judicial. The former is assembled by reviewing the differences in the Charter's place in the hierarchy of norms and its role in constitutional review, illustrating the varying degrees to which national constitutions have been Europeanised or internationalised. The latter is constructed by bringing together the remaining themes identified in the questionnaire to paint a picture of the diversity in the Charter's treatment by national

courts. Given the difficulties of synthesising 22 Member State reports in the space of 20 pages, this final chapter is more of a commentary than a fully fledged comparative analysis, but insightful nonetheless.

Before acknowledging the book's contribution to existing scholarship, several remarks are due on its weaker points. As described above, the national reports strictly follow the same format, to the extent that each questionnaire item is reproduced verbatim as a section heading. While this editorial decision added cohesion to the collection, it remained an obstacle to developing a coherent narrative and contextualising the empirical findings. It also led to frequent repetitions of identical points within individual national reports due to significant overlaps between some sections of the questionnaire. Considering this, it is all the more problematic that the book lacks a methodology section that would justify the chosen approach and the structure of the questionnaire. Finally, one can only regret that the panoramic view of the Charter's presence on the national level is incomplete as six Member States are not covered,¹ a decision explained by the difficulty to find available researchers (p.6).

Yet these observations in no way detract from the book's principal strength, which lies in amassing an impressive number of detailed and targeted empirical studies on the Charter's place in adjudication by Member State courts. Similar attempts had been made before but not with quite as much focus and editorial direction.² Most of the contributions offer a very nuanced discussion with ample reference to national doctrine—the chapters on Germany, Belgium or Italy are cases in point. Notwithstanding the diversity of judicial approaches to the Charter, the collection reveals striking similarities among Member States in the way the Charter is invoked in judicial proceedings. Most notably, apart from several cases in which the Charter was applied in an autonomous manner and sometimes even led to a higher standard of protection, the Charter is typically cited alongside national constitutional provisions or the ECHR, and a reference to it rarely has any evident influence on the decision reached. What is particularly striking is the widespread lack of judicial rigour on the part of national judges, who tend to “throw the Charter into the mix” by a mere reference to its provisions without further discussion and often without justifying its applicability. The collection thus succeeds in exposing some of the current limits of EU fundamental rights adjudication in Member State courts.

In keeping with its design and purpose, the reviewed book does not fully explore the implications of the presented empirical findings, nor does it propose any solutions to the evident deficiencies in the Charter's application by national judges. It nevertheless deserves attention for its rich comparative material, which will no doubt inform any subsequent critical discussions on the Charter's role in fundamental rights protection.

Petr Mádr

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¹ Croatia, Estonia, Latvia, Lithuania, the Netherlands and Slovakia.

² See, e.g. Société de législation comparée, “Mise en œuvre de la Charte des droits fondamentaux de l'Union européenne” (2012), www.legiscompare.fr/web/Mise-en-oeuvre-de-la-Charte-des?lang=fr [Accessed 21 May 2018].

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