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Protection of Human Rights under the European Convention on Human Rights and the Court of Justice of the European Union: The Case of Croatia**

ABSTRACT: This study examines the role of the European Union (EU) and the Council of Europe in safeguarding fundamental rights. It examines the relationship between the two European courts, the differences in the protections afforded by the EU Charter of Fundamental Rights compared with the European Convention on Human Rights, and the impact of both frameworks on human rights in Croatia. The study aims to demonstrate that the EU's multi-layered human rights protection system has positively affected rights protection in member states and prompted essential changes in case law and the daily lives of individuals whose rights are frequently violated.

KEYWORDS: fundamental rights, European Union, Council of Europe, European Convention on Human Rights, European Court on Human Rights, constitutional traditions of the member states.

1. Introduction

The European system of human rights is the most developed regional system. It was created in response to mass human suffering and human rights violations during the Second World War. At the beginning of the current discussion, it is necessary to clarify the role of the European Union (EU), the Council of Europe, and two European courts − the Court of Justice of the EU (hereinafter, CJEU) and the European Court of Human Rights (hereinafter, ECtHR) − and the relationship between the EU and the European Convention on Human Rights (hereinafter, ECHR). This study examines the contributions of the EU and the Council of Europe in safeguarding fundamental rights, the interplay between the two European

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courts, and the varying levels of protection provided by the EU Charter and the ECHR, highlighting their impact on human rights protection in Croatia.

The ECHR was signed in Rome on 4 November 1950. It was created as a result of aspirations to establish a common system of values at the European level as a basis for future European unity. It took over principles from the United Nations (UN) Universal Declaration of Human Rights and elaborated them in detail.

The first chapter of this paper focuses on how the system of fundamental rights protection has been developing in the EU over the years since the establishment of the European Steel and Coal Community. The second chapter covers the protection of fundamental rights and the role of the ECHR in the legal order of the EU. The third chapter presents a discussion on the interplay between the CJEU and the ECtHR in fundamental rights protection. The fourth chapter focuses on the role of ECHR in the legal order of European states: the case of Croatia. The focus of the last chapter is on the historical development of human rights in Croatia, the national implementation of the ECHR, how human rights protection obligations deriving from the ECHR are reflected in the national constitution, and analysis of Croatian landmark cases before the ECtHR.

This study demonstrates that the EU's multi-layered human rights protection system has positively impacted human rights protection in member states, initiating essential changes in case law and the daily lives of individuals whose rights are frequently violated.

2. Establishment of the EU and the First Case Law in Fundamental Rights Protection

Fundamental rights in the EU are embodied in the Treaty on the Functioning of the EU (hereinafter, TFEU), which promotes three levels of human rights protection in the EU: the constitutional traditions of the member states, the ECHR, and the Charter of Fundamental Rights of the EU (hereinafter, the Charter). The European Economic Community, which was established in 1957, dealt exclusively with economic interests and the creation of a common market. Human rights were not the primary focus of political and legal interest; thus, the provisions of the Treaty on the European Economic Community did not include protection of human rights. At the end of the last century, human rights and the rule of law became a key element of a single European legal order (Article 2 of the Treaty on EU):

> The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including and the rights of members of minorities. These values are common to member states in a society where pluralism, non-discrimination, tolerance, justice, solidarity and equality of women and men prevail.

The architecture of fundamental rights in the EU has developed impressively since the creation of the European Community, which was initially conceived as a European organisation dealing exclusively with economic cooperation; the protection of fundamental rights was guaranteed at the level of the Council of Europe, whose members at that time were all member states of the EU (today, they are all member states of the EU). For this reason, the first founding treaties did not contain provisions for the protection of fundamental rights. The protection of fundamental rights in the EU came to life through the practice of the CJEU. There is a complex system of fundamental rights protection in today's Union. Fundamental rights are protected by domestic constitutions and other national regulations; international treaties (the most important of which is the ECHR); the Charter; and norms of primary and secondary EU law, that is, general principles and other norms of international law apart from the ECHR, such as the UN Convention on the Rights of the Child and the like.

Although not formal sources of EU law, national constitutions, the ECHR, and international norms influence its interpretation, particularly in shaping general legal principles. The CJEU, once focused mainly on the internal market, now plays a significant role in protecting fundamental rights within the scope of EU law. This development, however, remains constrained by the EU's limited competences. The Court's engagement with fundamental rights evolved through a dialogue with national constitutional courts, prompting their incorporation as general principles within the EU legal order.[1] Thus, in the first phase of development, in the *Stauder*[2] case, the CJEU, for the first time, broadly interpreted its powers and jurisdiction and took the position that fundamental rights form part of the general principles of EU law that guarantee legal protection. By delivering such an opinion in the *Stauder* case, the CJEU opposed the questioning of the

[1] Vasiljević and Vinković, 2019.
[2] C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, 12 November 1969.

principle of supremacy by the German Constitutional Court. In 1970, in the *Internationale Handelsgesellschaft*[3] case, the CJEU explained the connection between general principles and national fundamental rights. In *Internationale Handelsgesellschaft*, the CJEU held that the validity of EU law must be assessed solely against fundamental rights at the EU level, not national constitutional standards. The Court upheld the contested regulation, finding it did not disproportionately infringe on the rights to entrepreneurship and property. However, the German Federal Constitutional Court disagreed, asserting in *Solange I* that German constitutional rights take precedence until the EU provides an adequate catalogue of fundamental rights. This decision limited the direct effect of EU law and initiated a constitutional dialogue that later encouraged the CJEU to enhance fundamental rights protection within the EU legal framework.[4]

In explaining the verdict, the Federal Constitutional Court removed the supremacy of European law as a general principle and limited the direct effect of European law to those provisions that do not encroach on the fundamental postulates of German constitutional doctrine. The Federal Constitutional Court concluded that the EU still does not have a codified catalogue of fundamental rights, and as long as (*Solange doctrine*) that is the case, Union law cannot take precedence over the German Constitution. The position of the Federal Constitutional Court that fundamental human rights are not sufficiently well protected in the legal system of the Union, and that national legal systems, specifically German, protect fundamental rights better, marked the beginning of its dialogue with the CJEU. Such a decision of the Federal Constitutional Court inspired the CJEU to become even more actively involved in the development of the protection of fundamental rights at the European level, which has meanwhile reached the high standards of protection guaranteed by national constitutions.

In the second phase, the CJEU found inspiration for the further development of fundamental rights in the ECHR. Thus, the ECHR was indirectly included in the legal system of the EU, although it has not become a source of law in the EU. This might happen when the EU becomes a party to the ECHR. In the *Nold* case,[5] the CJEU, attempting to mitigate the

[3] C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970.
[4] 2 BvL 52/71, *Solange I*. (BverfGE), 29 May 1974.
[5] C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft*, 11 January 1977.

negative consequences of the initial conflict with the German Federal Constitutional Court, explained that the fundamental rights in the EU legal order come from two sources, namely, the constitutional traditions common to the member states and the international treaties for the protection of human rights, which the member states are signatories to or participated in the drafting of.

As we can see, the CJEU has built the doctrine of fundamental rights in a series of cases, but from a pragmatic perspective, without defining the entire policy of protection of fundamental human rights. Those decisions of the CJEU enabled the German Federal Constitutional Court to change, in the case known as *Solange 2*,[6] its long-standing position and conclude that the protection of fundamental rights in the EU has meanwhile reached the standards guaranteed by the German Constitution and that *as long as* this is the case, the Federal Constitutional Court will no longer control the application of secondary Union law in Germany. Despite such a decision, the Federal Constitutional Court takes the position that it reserves the right to monitor the quality of the protection of fundamental rights if it falls below a satisfactory level. The quality of protection monitored by the CJEU is the so-called general level of protection of fundamental rights by the Union. Although it is possible that the protection is less in an individual case, if it is generally guaranteed, the national court will not react. In light of such developments, the following can be concluded: As long as the EU, especially the jurisprudence of the CJEU, generally ensures effective protection of fundamental rights from the sovereign powers of the Union, protection that can be considered materially similar to the protection of fundamental rights unconditionally prescribed by the German Basic Law and to the extent that the essential content of fundamental rights is generally protected, the Federal Constitutional Court will no longer use its jurisdiction to decide on the applicability of secondary Union law that is cited as the legal basis for acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany; further, it will not conduct judicial supervision of such regulations according to the standards of protection of fundamental rights contained in the German Basic Law.

Although the CJEU, as evidenced by the *Solange saga*, has embarked on the construction and effective protection of fundamental rights, the previous judicial practice also had episodes in which the Court, in controversial situations, avoided assessing compliance with fundamental

[6] 2 BvR 197/83, *Solange II*. (BverfGE), 22 October 1986.

rights. Thus, in the third phase of the development of fundamental rights, in the *Grogan* case,[7] the CJEU showed caution in extending the justification to fundamental rights and avoided solving a legal issue that could lead to the non-application of the norms of the Irish constitution that regulate the prohibition of medical termination of pregnancy.

The last stage in the development of the protection of fundamental rights in the EU is represented by the adoption and entry into force of the EU Charter. Today, fundamental rights at the EU level are protected by the Charter, but the general principles developed by the CJEU in its early practice are still important. The fundamental rights of the EU are binding today on the institutions of the EU, but also on the member states when they implement EU law. In addition, the CJEU recognised some fundamental rights as having a horizontal effect, in which case they directly bind individuals.[8] The fact that fundamental rights bind member states is important in the context of this chapter because all national justifications for limitations of market freedoms must be in accordance with the EU Charter. The Charter represents the first written catalogue of fundamental rights in the EU and has been legally binding since the entry into force of the TFEU. According to Article 6 of the TEU, the Charter is an integral part of it and has the same legal force as the primary law of the EU. Fundamental rights in the EU, as they are guaranteed by the Charter today, bind the European legislator, thus limiting it − and that is their primary role. For this reason, the CJEU interprets EU law in accordance with the Charter[9] and controls the legal validity of European law in relation to the Charter, including secondary EU law adopted for the purpose of harmonisation in the internal market.[10]

With the accession of the EU to the ECHR, as provided for in Article 6 of the TEU, the obligation of the EU and its institutions to respect fundamental rights will be legally strengthened even more, not only by the obligation to comply with the Charter, but also with the ECHR, which

[7] Lawson, 1994.
[8] Prechal, 2020.
[9] C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014.
[10] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 08 April 2014.

means that the ECHR will be able to supervise institutions.[11] After the entry into force of the TFEU, the EU initiated negotiations with the Council of Europe on the Draft Accession Agreement, and in July 2013, the European Commission asked the CJEU to issue a decision on the compatibility of that Accession Agreement with the Founding Treaties. Moreover, the draft Protocol on the Accession of the EU to the ECHR provided for the possibility of the EU acceding to the ECHR.[12] Nevertheless, on 18 December 2014, the CJEU issued negative Opinion 2/13 on the Agreement on the Accession of the EU to the Convention.[13] The CJEU took the position that the Agreement can affect the special features and autonomy of Union law because it does not ensure compatibility between Article 53 of the ECHR and Article 53 of the Charter, does not prevent the danger of affecting the principle of mutual trust between member states in Union law, and does not foresee any relationship between the mechanism established by Protocol No. 16 and the previous procedure provided for in Article 267 of the TFEU. Furthermore, the CJEU considers that the Agreement can affect Article 344 of the TFEU because it does not exclude the possibility of disputes between member states or between member states and the Union, regarding the application of the ECHR in the area of application of Union law, brought before the ECtHR; then, it does not foresee the ways of functioning of the mechanism of the opponent of the request and the procedure of prior involvement of the Court, which enables the preservation of the special features of the Union and the rights of the Union, and it does not respect the special features of the law of the Union in relation to the judicial supervision of acts, actions, and omissions of the Union in the field of common foreign and security policy, because judicial supervision entrusts certain of these acts, actions, or omissions exclusively to a body that is external to the Union. After such a decision of the Court, the EU and

[11] There are two main reasons for the inability of the EU to accede to the ECHR. Until the adoption of the Treaty of Lisbon, the EU did not have the power to accede to the ECHR as it did not have a legal personality. On the side of the Council of Europe, the main objection related to Article 59 of the ECHR stipulates that the Convention is open for signature by members of the Council of Europe, and according to the Statute of the Council of Europe, its members can only be states. With the entry into force of the 14th Protocol, the ECHR was amended, specifically Article 59, in which a new paragraph 2 is inserted: the European Union can accede to this Convention.

[12] Draft Protocol on the Accession of the European Union to the European Convention on the Protection of Human Rights.

[13] Case Opinion *2/13, Opinion pursuant to Article 218(11) TFEU*, 18 December 2014.

the Council of Europe again started negotiations in 2019, which are still in progress.

The main role in this change is played by the CJEU, which strengthened its jurisdiction over human rights by deriving it from the "common constitutional traditions of the member states" and international treaties to which the member states are parties − for example, the ECHR to which Croatia is a party since 1997. Some human rights have been established as general principles of European law − for example, the right to property, freedom of association, freedom of religion, or the principle of equality, which had particular importance in the law of the former European Community. Since the 1980s, the European Commission has also developed a human rights policy in its relations with third countries, which is also reflected in the so-called criteria from Copenhagen (1993), which set the standards that countries must meet before joining the Union, and based on which the possibility of expanding the EU to countries of Southeast Europe was opened.[14]

3. Protection of Fundamental Rights and the Role of the European Convention in the Legal Order of the EU

The Council of Europe is the oldest European organisation based in Strasbourg, founded on 5 May 1949 in London. It includes 46 member states − all European states except Belarus and the Russian Federation, which was excluded from the Council of Europe on 16 March 2022, due to aggression against Ukraine. The main goal of the Council of Europe is to strengthen cooperation and unity on the European continent and promote human rights and fundamental freedoms, as well as democracy and the rule of law. In addition to these three key pillars that represent the fundamental values of the organisation, the Council of Europe deals with several specific social matters such as social exclusion; racial, national, and other forms of intolerance; human trafficking; violence against women; children's rights; bioethics; terrorism; protection of cultural and natural heritage; and other contemporary challenges of European societies.

Currently, the Council of Europe is particularly engaged in the fight against all forms of intolerance and discrimination under the motto "living together in Europe of the 21st century", paying special attention to the protection of human rights of sensitive social groups such as Roma,

[14] Grabbe, 2002.

refugees, migrants, and LGBT persons. By developing the neighbourhood policy, the Council of Europe seeks to strengthen political engagement and the promotion of European values and standards beyond the borders of the European continent, especially in the context of the so-called Arab Spring.

The Council of Europe is unique in its activity in setting standards and monitoring and cooperating with member states regarding their application. Until now, the CoE has adopted more than 200 legal instruments (conventions and protocols) from various fields, but the ECHR is the greatest achievement. The ECHR establishes a list of rights and freedoms that member states must guarantee to everyone. The ECHR system of protection is based on the principle of subsidiarity, which means that the party states have primary responsibility for the protection of human rights and the prevention and correction of possible violations. The ECtHR is the supervisory body of the ECHR that determines whether, according to individual complaints, the state has violated some of the rights guaranteed by the ECHR, and it has been operating as a permanent body since 1998. The third pillar of the ECHR is the Committee of Ministers, which as a collective political body, supervises the execution of judgments. In the Strasbourg human rights protection system, the ECHR is complemented by the European Social Charter and the Framework Convention for the Protection of National Minorities, which are also characterised by a strong monitoring mechanism. The new so-called third generation of CoE legal instruments include the Convention on the Suppression of Trafficking in Human Beings, the Convention on the Protection of Children from Sexual Violence, and the Convention on Preventing and Combating Violence against Women and Domestic Violence.[15]

Why is the ECHR such an important tool in the protection of human rights in the legal order of the Union? In the legal order of the Community, the ECHR became applicable after two stages: the reception of the content of the ECHR based on the national provisions of constitutional law and the direct applicability of the ECHR itself and the incorporation of the rules of the Convention and the Protocol into European law based on the decisions of the CJEU.[16] Initially, the legal status of the ECHR in the EC legal system was unclear, but the CJEU began to apply its legal rules. In the CJEU[17] case,

[15] de Búrca, 2011.
[16] C*ase of O'sullivan Mccarthy Mussel Development Ltd v. Ireland*, App. No. 44460/16, 08 October 2018.
[17] C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 13 December 1979.

the court applied the legal analysis that is common before the ECtHR, and although the EU (or EC) is not a member of the Convention, it began to apply its legal rules. Moreover, in the CJEU case, the CJEU explicitly refers to the ECHR, more precisely to Protocol 1 on the protection of property rights.

In that case, the CJEU applied the ECHR for the first time, but in the context of economic freedoms and the common market (not in the context of human rights protection). The dispute was related to Community Regulation, which imposed a temporary ban on the planting of grapevines. The CJEU accepted the right to property as a fundamental right that protects but can be limited: if the ban is in line with objectives of general interest (e.g. the temporary reduction of surplus vines), the restriction is justified. Therefore, no violation of property rights has occurred. Furthermore, the CJEU discussed the right to effective legal protection in the context of equality between men and women and concluded that this right represents

> a general principle of law common to the constitutional traditions of the Member States. This principle is contained in Art. 6 and 13 of the ECHR. As recognized by the European Parliament, the Council and the Commission in the Declaration of 1977, and the CJEU in its decisions, the principles on which this ECHR is based must be considered in Community law.[18]

In the framework of the protection of fundamental human rights, today, the EU has significantly evolved concerning the organisation established by the Founding Treaties. In the Community's legal and political agenda, the protection of human rights has a central place, although, at the very beginning of the Community's creation,[19] a special system for the protection of fundamental human rights was not immediately built, due to greater concentration on the construction of the "common market". For years, the EU lacked a unique catalogue of human rights protection, except for a few provisions of the founding treaties that refer to the principle of

[18] C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 15 May 1986.

[19] Pernice, 2008. He argues that 'taken seriously, all three pillars: the Charter as a binding instrument, the accession to the European Convention of Human Rights and the reference to the general principles of law as established by the CJEU, together will change the face of the Union fundamentally'.

equal pay for equal work, the general prohibition of discrimination, and the ban on discrimination based on citizenship. The protection of human rights remained primarily the task of the national courts of the member states and the ECHR, as all member states of the Community were also members of the Council of Europe and parties to the ECHR. The CJEU gradually built a human rights protection system through its judicial activism.

4. Interplay between the CJEU and the European Court on Human Rights in Fundamental Rights Protection

All EU member states (27), in addition to being members of the Council of Europe, are under the jurisdiction of the CJEU in Luxembourg and the ECtHR in Strasbourg. The CJEU is competent to interpret European law for its uniform application in all member states. The ECtHR is responsible for the protection of fundamental rights in all member states of the Council of Europe that have ratified the ECHR. Requests for the interpretation of national law in light of European law are submitted to the CJEU by the national courts of the member states, already at the level of the first instance court, while requests to the ECtHR are submitted by individuals or their authorised representatives only after all domestic legal remedies have been exhausted, including the decision of the Constitutional Court in countries that have constitutional courts. Neither are appellate courts.

The role of both courts is extremely important in the protection of fundamental rights of individuals on the European territory. However, the path of legal protection that an individual must go through in the case of these two courts is different. Although the citizens of any EU member state enjoy dual protection offered by two different legal systems, most of them rely on the protection offered by the ECtHR when their fundamental rights are violated. However, the legal procedure before the ECtHR is much longer because the individual must exhaust all national remedies before sending the application to the ECtHR; meanwhile, if the case goes to the CJEU through a preliminary ruling procedure, it will take significantly less time. However, the preliminary ruling procedure may be initiated by the national lower courts, whereas the higher courts must start the preliminary ruling procedure if there is no legal remedy against their judgment. This could also prolong the legal procedure, but the crucial element of the preliminary ruling procedure to be started relates to whether the situation is within the scope of the EU law; otherwise, the CJEU does not have competence in the field of

the alleged violation of fundamental rights. Despite the different procedures of the judicial protection of fundamental rights, individuals enjoy this dual protection of fundamental rights by European courts. The human rights protection system in the EU is built from several different legal sources. One of the more significant sources constitutes the legal norms of international law, which are an integral part of European law.

In the case of the CJEU, if a national court refers to a preliminary question regarding the interpretation of European law, it must stop the proceedings and wait for the interpretation of the CJEU. On average, this wait lasts 15.7 months.[20] If the interpretation of the CJEU is different from what is required by the norm of national law, the national judge must exempt the norm of national law from application and directly apply the norm of European law.[21] In case of the application before the ECtHR, it is necessary to first exhaust all domestic legal remedies, unless the person submitting the request to the ECtHR proves that it would also be ineffective. In an appeal submitted to the highest court (including constitutional courts where they exist) of the state against which the person wants to appeal, it is necessary to present at least the same complaints that will be presented later in the application to the ECtHR. As such, what is the relationship between the two European courts? In the *Bosphorus* case, the ECtHR expressed the opinion that there is a (rebuttable) presumption that fundamental human rights are protected by Community law in a way that is equivalent to the protection provided by the ECHR.[22]

In addition, in the *Steck* case,[23] which dealt with gender discrimination in legal social security systems, the ECtHR referred to the "great persuasive value" of the CJEU judgment in the same case.[24] At this point, it is important to clarify the difference between these two courts. Both courts are international institutions that operate within the framework of two different

[20] Court of Justice of the European Union, 2019.
[21] C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA - Simmenthal II*, 09 March 1978.
[22] In other words, the ECtHR established the concept of "equivalent protection" in the *Bosphorus* case, stating that 'it is not against the EC to join international organizations and assume other obligations, if these organizations offer human rights protection equal to that guaranteed by the EC'. *Case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005.
[23] *Case of STEC and Others v. the United Kingdom,* App. Nos. 65731/01 and 65900/01, 06 July 2005.
[24] Potočnjak and Grgić, 2010.

legal orders: the EU and the Council of Europe.[25] The Council of Europe, as an international organisation, has a formally narrower scope of activity than the EU, which represents a *sui generis* legal order, as it addresses all political, social, and economic problems of Europe, except for defence. Nevertheless, while the Council of Europe more or less remains within the limited sphere of its Statute (democracy, human rights, rule of law, cultural values), the EU has expanded its activities and encompassed new areas, such as foreign and security policy. Meanwhile, the Council of Europe expanded its membership after 1989 further and faster than the EU. Ratification of the ECHR and membership in the Council of Europe are unwritten prerequisites for EU accession. The EU and the Council of Europe have some common and some opposing views. The Council of Europe is an international, intergovernmental organisation, while the EU is a supranational body.

As can be concluded from the above analysis, there is a problem with the different identities of the CJEU and the ECtHR. As far as the protection of fundamental rights is concerned, the ECtHR has a somewhat simpler job as it has a catalogue or "list" of fundamental rights contained in the ECHR, but it also has different powers and organisational structures than the CJEU. The ECHR was created to protect human rights; thus, we can see diversity in the goals of the two courts − that is, a functional distinction, as the CJEU is more oriented towards protection in economic matters and in the area of the four market freedoms (freedom of movement of workers, goods, services, and capital), as its primary goal. There is no mandatory cooperation between the two courts.

Unfortunately, the mechanisms of sanctioning member states for non-compliance with the decisions of both courts are still quite weak. For

[25] The Council of Europe is an organisation founded in 1949 to protect human rights and establish the democratisation process. In the first chapter of the Statute, it is emphasised that 'the goal of the Council of Europe is to achieve greater unity between its members to preserve and promote the ideals and principles that are their common heritage and to encourage their economic and social progress' and that 'this goal will be pursued through the organs of the Council, discussing issues of common interest, concluding agreements and adopting joint actions in the economic, social, cultural, scientific, legal and administrative fields, as well as preserving and developing human rights and fundamental freedoms'. Article 3 of the Statute states that 'each member of the Council of Europe recognizes the principle of the rule of law and the principle according to which every person under its jurisdiction must enjoy human rights and fundamental freedoms and undertakes to sincerely and effectively cooperate in achieving the goal specified in Chapter I'.

example, the existing situation in the internal legislation of the member states greatly influences how often a member state will decide to implement the decisions of the European courts. The existence of both courts in the European legal framework and interaction in deciding on fundamental rights can strengthen the status of human rights if they cooperate and decide under the general principles found in the constitutional traditions of the member states. However, it can also be a double-edged sword if a conflict of jurisdiction would lead to different interpretations and thus legal uncertainty. However, the most powerful weapon in the protection of human rights is the dialogue between European courts, including national courts. If we define the relationship between two European courts according to the principle of equivalent protection, we can somehow call it indirect supervision.

The conditions for the application of this presumption are: (1) that the member state had a strict obligation to fulfil its obligation under European law; thus, there is no margin of discretion in judgment; and (2) whether the Union's supervisory mechanisms were applied, that is, whether the national courts asked a preliminary question to the CJEU. This presumption can be rebutted in situations where there are obvious deficiencies in the protection of human rights; hence, in this case, the ECtHR could intervene. Thus, for example, in the case *Dhabi v. Italy*,[26] the ECtHR established the existence of a violation of Article 6 (1) of the ECHR in situations where the courts of last instance (against whose decisions there is no longer the possibility of investing a legal remedy) do not send a preliminary ruling to the CJEU and do not justify such a decision.[27] Nevertheless, the ECtHR must act in such a way as not to encroach on the principle of autonomy and supremacy of European law. It would be easiest to escape such a judgment by establishing that the member state had a strict obligation to implement European law, so there was no margin of discretion, as it was established in the case *O'Sullivan McCarty Mussel v. Ireland*.[28] However, it is important that member states − when they have a wide margin of appreciation − be careful not to violate convention law. This is why it is important that national courts

[26] *Case of Dhabi v. Italy*, App. No.17120/09, 08 July 2014.
[27] C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 06 October 1982.
[28] *Case of O'Sullivan McCarthy Mussel Development Ltd v. Ireland,* App. No. 44460/16, 08 October 2018.

carefully implement the proportionality test in the narrower sense, which they rarely do otherwise.

EU membership and the influence of European laws play a key role in transforming national, social, and legal norms; the issue of abortion in Ireland provides the best example of this fact. When Ireland introduced its abortion ban, European law seemed silent on the matter. Nevertheless, in the early 1990s, rulings by the CJEU in *Grogan*[29] and the ECtHR in *Open Doors Counselling*[30] began to edge the Irish abortion ban – allowing women in Ireland to travel overseas to seek abortion, as an EU service, and entitling them to receive information about a service lawfully provided out of state. This led to a first round of legal reforms in Ireland, with the approval of the 13th and 14th amendments to the Irish Constitution in 1992 recognising a right to interstate travel and a right to access information about abortion.

One of the more significant cases is the aforementioned *Grogan* case, which was conducted before the CJEU, and the *Open Door* case of the ECtHR, both of which concern Ireland. The *Open Door* case arose a little earlier and refers to two non-profit organisations, Open Door Counseling and the Dublin Well Woman Centre, which provided diverse marriage and family counselling services, including information on termination of pregnancy and abortion clinics. In Great Britain, the Dublin Well Woman Center also organised trips to terminate pregnancies, given that Irish legislation was very restrictive at the time. The Society for the Protection of the Unborn Child (SPUC) filed a lawsuit against them, considering that they violated the constitution; ultimately, the Supreme Court issued a verdict confirming the violation, considering that it is illegal to help pregnant women have an abortion abroad and to provide them with information about clinics that do so. In *Open Door* case, ECtHR found Ireland's injunction against these organisations providing information on abortion services abroad violated the right of freedom of expression (Article 10 ECHR). A little later, the SPUC also filed a lawsuit against three student associations that advertised institutions in Great Britain that perform abortions through publications, considering the publications illegal; this case reached the EU Court through a previous question referred by the High Court.

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[29] C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, 04 October 1991.

[30] *Case of Open Door and Dublin Well Woman v. Ireland*, App. No. 14235/88 and 14234/88, 07 March 1991.

Both courts avoided considering the legal regulation of termination of pregnancy, with the addition that before the CJEU, termination of pregnancy carried out in accordance with national law was interpreted as a medical service covered by the principle of freedom to provide services guaranteed by the founding treaties, which *de facto* confirmed abortion as a medical service within the scope of EU law. In the end, the ECtHR ruled that there had been a violation of the right to freedom of expression guaranteed by Article 10 of the Convention, noting that states enjoy a wide margin of judgment in matters of morality and that Irish law does not prohibit pregnant women from traveling abroad to have an abortion and therefore this does not constitute a criminal offense; the ECtHR did not consider whether the Convention guarantees the right to abortion or whether the right to life covers the foetus, while the CJEU ruled that the link between student associations and clinics in Britain is too weak to be considered a violation of the freedom of movement of services. However, the CJEU left open the question of what would have happened if that link had been stronger, that is, if the clinic had advertised directly.

Moreover, while the Irish abortion ban ultimately withstood scrutiny for compliance with the ECHR, in the landmark 2010 ruling in *A., B.&C. v. Ireland*,[31] the ECtHR held that Ireland had breached its positive obligation under the ECHR for failing to institute an effective process whereby a patient could obtain an abortion in the limited cases when it entitled to it under the X doctrine. This forced Ireland back again to the drawing board, and in 2013, the state adopted its first abortion law – the Protection of Life During Pregnancy Act – eventually regulating termination of pregnancy in a few cases in the state.[32]

EU law, especially the CJEU rulings, still shapes ECtHR jurisprudence. Additionally, the ECtHR has formulated an advanced doctrine concerning the accountability of EU member states for human rights breaches originating from EU law. Overall, the two European Courts have established a cooperative relationship. This relationship is not confined to an institutional framework; instead, it is informal and based on a twofold approach that includes an ambiguous presumption of equivalent protection of human rights, as well as a general legal commitment from the CJEU to adhere to the jurisprudence of the ECtHR. However, the supplementary competencies of both European Courts are insufficient to ensure robust

[31] *Case of A, B and C v. Ireland*, App. No. 25579/05, 16 December 2010.
[32] Fabbrini, 2023.

protection of fundamental rights. Consequently, a comprehensive redesign and restructuring of the current architecture is necessary.

5. Role of the ECHR in the Legal Order of European States: The Case of Croatia

As can be seen from the analysis of abortion cases concerning Ireland, the ECHR had and still has an extremely large influence on the legal systems of the members of the Council of Europe; this is because its purpose, as stated, is not primarily the protection of the individual rights of the applicant requirements that the ECtHR expressly stated in the case *Varnava and others v. Turkey*.[33]

> 156. ... The court serves the species beyond individual interests in creating and applying the minimum human rights standards in the legal space of the contracting states. Individual the interest is subordinated to that, which shows the competence of the Court to continue the examination of requests where respect for human rights requires it, even if the applicant requests, he no longer wants to conduct the proceedings (...)

Furthermore, the Convention's strong impact on the legal systems of European countries was particularly evident in the emergence of two simultaneous and interdependent processes in European public law. One refers to the constitutionalisation of the Convention's law, and the other to the Europeanisation of national constitutional rights.

In the case *Kjeldsen, Busk Madsen, and Pedersen v. Denmark,* the ECtHR already emphasised that the ECHR was 'designed to maintain and promote the ideals and values of a democratic society'.[34]

The bearers of these processes are the ECtHR and the national constitutional courts of the contracting states. Today, the ECHR is viewed

[33] *Case of Varnava and Others v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009.
[34] *Case of Kjeldsen, Busk Madsen and Pedersen v. Denmark,* App. No. 5095/71, 5920/72, 5926/72, 7 December 1976.

as a 'constitutional instrument of European public order',[35] a position expressed by the ECtHR in the case *Loizidou v. Turkey*.[36]

Therefore, it can be stated that although the ECHR is one of the most important documents for the protection of human rights in Europe, the meaning of the Convention does not derive from the text itself, but from the practice of the ECtHR. The ECtHR, applying an evolutionary approach, provided the Convention with a leading role in defining modern standards of human rights protection in European countries. As a human rights court, the ECtHR has expanded the scope of Convention rights following current conditions, such that the Convention not only protects against the direct violation of classic civil and political rights but also establishes standards in connection with other violations of rights in the private sphere, determining the contracting states and negative obligations as well as a wide range of positive obligations.

According to the Croatian Constitution (Article 141), international agreements such as the ECHR are directly applicable.[37]

However, in several laws, the legislator has incorporated the norms from the ECHR into national laws. The desire to bring the norms of the domestic legal order textually closer to the letter of the ECHR has created certain difficulties in interpreting the Convention's standards. If the Croatian constitution proclaims the principle of direct effect of international legal norms, the repetition of the same norms is redundant and inappropriate.[38] However, the same reproduction of the ECHR norms can bring a certain added value only in the case of the Constitution, because the thus transferred norms of the Convention are lifted from the supralegal status to the constitutional level:

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[35] Repetto, 2013.

[36] *Case of Loizidou v. Turkey*, App. No. 15318/89, 18 December 1996.

[37] 'International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law'. Croatian Constitution, *Official Gazette*, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 76/10, 85/10, 04/14.

[38] Omejec, 2014.

> A similar argument does not apply to repetitions at the level of law, to which, in the best case, a didactic value can be attributed. On the other hand, it is evident that in the reproduction of the text of the Convention, there are certain deviations, sometimes with unclear motivation. Thus, for example, despite the otherwise far-reaching following of the text of Art. 6 Convention from the general definition of the right to a fair trial, both in the Constitution and in the Law on Courts, the right to a public trial has been excluded.[39]

Furthermore, several key judgments of the ECtHR that influenced the legal order of the Republic of Croatia and its adaptation to European values need to be highlighted. After one request from 1998, further (allowed) requests against the Republic of Croatia were submitted in 1999, on which the Court rendered judgments in 2001, and related requests are based on Article 6 of the Convention and the right to a fair trial − the right for which the largest number of verdicts have been passed to date.[40] The initial ruling in 2002 was highly significant and marked the moment when Croatia's legal system and the general public became more acquainted with the workings of the ECtHR. Namely, in the case *Mikulić v. Croatia*,[41] the Court found a violation of the rights of the applicant's private life due to the inefficiency of domestic courts in the proceedings to establish paternity. According to the opinion of the Court, the ineffectiveness and long duration of the procedure (over four years for the paternity determination procedure) were caused by the applicant's prolonged uncertainty regarding her origins. Consequently, the Court did not find only a violation of her right to private and family life (Article 8) but also a violation of the right to a trial within a reasonable time (Article 6). This case holds importance due to Croatia's positive obligation to ensure an effective legal framework. Such a framework must allow a child to establish his father's identity in a paternity dispute within a reasonable timeframe, thereby applying the principle of efficiency while demanding effective safeguarding of Convention rights. Moreover, after the case, a new Family Law was enacted in 2003, which specified a three-month deadline for presenting evidence in the paternity determination process, starting from the delivery date of the decision to the parties

[39] Uzelac, 2010.
[40] Marochini Zrinski, 2018.
[41] *Case of Mikulić v. Croatia,* App. No. 53176/99, 07 February 2002.

involved. Should the defendant fail to respond within this timeframe, the Court is empowered to issue a judgment without requiring non-enforcement expertise. The judgments that followed (from 2003) again referred to the violation of rights to a fair trial and a trial within a reasonable time and the right to access the court, as well as Article 13, referring to the right to an effective legal remedy. However, a judgment was already passed in 2004, which established a violation of the right to respect for the home, in *Cvijetić v. Croatia*,[42] and the problem highlighted in the judgment extends to the present day.

According to recent surveys of public opinion, Croatia ranks first in the EU in terms of the number of judges and at the very bottom in terms of the perception of the independence of the judiciary.[43] The reasons for the negative perception of the judiciary in the public are, to a large extent, found in long trials, some of which last for decades; individual decisions of some judges who deviate significantly from well-established judicial practice; the way of selecting individual judges; and a large number of cases of violation of the right to a fair trial. Such a method of selecting judges casts doubt on their independence, which falls within the scope of the violation of the right to a fair trial from Article 6 of the ECHR.[44] The negative perception of the judiciary is also augmented by uneven judicial practice in similar court cases, which calls into question legal certainty, which, among others, also represents a guarantee of the right to a fair trial.[45] Despite the elaborate legal regulations for sanctioning discrimination and hate speech, there is a lack of final judgments.[46] In addition, the current scarce practice in cases of hate speech is uneven despite the recent rulings of the Constitutional Court of the

[42] *Case of Cvijetić v. Croatia,* App. No. 71549/01, 26 May 2004.
[43] European Commission, 2019.
[44] In the case of *Parlov-Tkalčić v. Croatia*, App. No. 24810/06, the ECtHR examined the so-called internal impartiality, that is, pressures that call into question the bias of the court or the judge, which come from the court itself, and pointed out the following:
'The Court reiterates that, according to its constant judicial practice, the existence of impartiality in the sense of Article 6 paragraph 1 must be determined by applying a subjective test, whereby the personal conviction and behavior of the specific judge must be taken into account, that is, whether the judge had some personal prejudice or bias in that case; and also by applying an objective test, that is, in a way to determine whether the court itself, taking into account, among other aspects, its composition, offered sufficient guarantees to exclude any justified doubt regarding its impartiality'.
[45] *Case of Glavak v. Croatia*, App. No. 73692/12, 5 October 2017.
[46] Vasiljević, 2019.

Republic of Croatia.[47] One of the rare final convictions of misdemeanour courts for hate speech was the subject of consideration by the ECtHR. The judgment in the case *Šimunić v. Croatia*,[48] in which the ECtHR decided on inadmissibility, found that the phrase "For home ready" does not enjoy protection within the framework of the right to freedom of expression.[49]

In addition, citizens largely express dissatisfaction due to delays in the resolution of criminal charges, almost to the point of the statute of limitations for initiating criminal proceedings, and due to non-prosecution of criminal charges. The effectiveness of criminal proceedings (Article 2 of the ECtHR) should be according to the standards from a series of ECtHR judgments passed against the Republic of Croatia, from 2005 until today.[50] These standards include conducting an effective investigation while ensuring a legal remedy against procrastination and other irregularities in the work of state attorneys and investigative judges, and the court's obligation to conduct the proceedings within a reasonable time. The processing of war crimes is stagnant.

At this point, it is interesting to analyse two controversial decisions of the Grand Chamber: *Blečić*[51] *and Oršuš*.[52] In the case *Blečić v. Croatia*, the applicant's claim was related to a violation respecting the right to property due to the loss of the specially protected tenancy right to the peaceful

[47] Constitutional Court decision no. U-III-1296/2016; Constitutional Court decision no. U-III-2588/2016.

[48] *Case of Šimunić v. Croatia*, App. No. 20373/17, 22 January 2019.

[49] The High Misdemeanour Court confirmed the first-instance conviction and increased the fine from HRK 5,000 to HRK 25,000. The Constitutional Court of the Republic of Croatia rejected the applicant's constitutional complaint against the aforementioned verdict (Decision of the Constitutional Court No. U-III-2588/2016). Šimunić submitted a request to the ECtHR claiming that the following rights from the European Convention were violated by the decisions of domestic courts: the right to a fair trial from Article 6 of the Convention, nullum crimen nulla poena sine lege from Article 7 of the European Convention because the incriminated expression is not prohibited by any domestic law or regulation, the right to freedom of expression from Article 10 of the Convention, the right to an effective legal remedy from Article 13 of the Convention, prohibition of discrimination from Article 14, and the prohibition of systematic discrimination from Article 1 of Protocol No. 12.

[50] Case of *Camassso v. Croatia,* App. No. 15733/02, 13 April 2005; *Case of Jeans v. Croatia,* App. No. 45190/07, 13 January 2011; *Case of Starčević v. Croatia,* App. No. 80909/12, 13 February 2015; *Case of Bilbija & Blažević v. Croatia,* App. no. 62870/13, 06 June 2016.

[51] *Case of Blečić v. Croatia,* App. No. 59532/00, 08 March 2006.

[52] *Case of Oršuš and Others v. Croatia*, App. No. 15766/03, 16 March 2010.

enjoyment of her possession. A first section of the Court Chamber found that there was no violation of the applicant's rights, considering that the decision of the national authorities was made with respect to the principles of proportionality. However, the case was referred to the Grand Chamber, which in its decision declared lack of jurisdiction *ratione temporis*, considering that the domestic judgment became *res judicata* on 15 February 1996, when the Supreme Court, by its verdict, changed the judgment of the County Court, despite the subsequent decision of the Constitutional Court (from November 1999) on the inadmissibility of the lawsuit. Consequently, the Court considers that the interference in question falls outside of the temporal jurisdiction of the Court, considering that in the Republic of Croatia, the Convention entered into force in November 1997.

This decision was met with numerous criticisms, both from domestic and foreign lawyers and the judges themselves who were part of the Grand Chamber, not only from the ratione temporis perspective but from the potential discrimination on ethnic grounds because during the war in Croatia, a huge number of Serbs refugees left their homes, went abroad and lost their tenancy rights, including Ms. Blečić. To this day, the ratio of the Court in this matter remains unclear, given that it is one of the conditions of admissibility for submitting a request to the ECtHR to exhaust domestic legal remedies, which also includes the filing of a constitutional lawsuit, which, if "skipped", represents an obstacle to submitting a request to the ECtHR. The majority of the Court found that MS Blečić's tenancy right had been terminated in February 1996 when the Supreme Court of the Republic of Croatia issued a decision terminating the tenancy right. As that date preceded, by more than a year, the date on which the claims from Croatia came within the jurisdiction of the ECtHR, the majority considered that her application was inadmissible. The majority further explained that termination of the tenancy rights was an "act with immediate effect" which had occurred at the time of the Supreme Court's decision. The majority considered that, for the purposes of the Convention, the subsequent 1999 decision by the Constitutional Court upholding the 1996 Supreme Court's judgment did not constitute a continuing violation. Instead, it merely upheld the Supreme Court's 1996 intervention. In contrast, six dissenting judges considered that Croatia's accession to the tenancy law was only completed in 1999 when the Constitutional Court issued its decision, arguing that this date should be used as the basis for determining jurisdiction. In this way, the requirement of the ECtHR's temporal jurisdiction would be satisfied.

The next controversial decision was in *Oršuš and others against Croatia*, where the Grand Chamber narrowed the field of free assessment of Croatia in the area of education of Roma children and found a violation of the applicant's right to education (Article 1, paragraph 2) together with the prohibition of indirect discrimination (Article 14). The complainants were 15 Croatian nationals of Roma descent, who had at times attended separate classes, comprising only Roma pupils, in their respective primary schools. The complainants had brought an action in the municipal and constitutional courts of Croatia, complaining that the situation constituted racial discrimination in violation of their rights to education and freedom from inhuman and degrading treatment and had caused them emotional and psychological harm. Both the municipal and constitutional courts rejected the claims, favouring the argument that segregation was a lawful measure to deal with Roma children's inadequate command of the Croatian language. The complainants then lodged the case with the ECtHR, alleging that they had been denied the right to education and had been discriminated against because of their race and origin, and that the length of the proceedings before the Croatian authorities had been excessive.

It should be noted here that the opinion of the minority of eight judges from the composition of the Grand Chamber who considered it to be the majority assessed this subject as a means for further development of the concept of indirectness of discrimination in the practice of the ECtHR. As a result of such an approach, this judgment became one about the situation of Roma in general, and not a judgment based on facts. They also emphasised that in a situation where the ECtHR changed the well-reasoned judgment of the Constitutional Court of the Republic of Croatia (U-III-3138/2002 dated 7 February 2007), which was based on Convention principles, as well as the unanimously adopted judgment of the Council of the same Court, a narrow majority needed more persuasiveness to justify the decision and offer practical guidance on how to proceed with developing and applying the concept of indirect discrimination. However, the Court, while recognising the efforts made by the Croatian authorities to ensure that Roma children receive schooling and attention, considered that there were no adequate safeguards in place capable of ensuring proportionality between the means used and the legitimate aim pursued. It followed that the placement of the complainants in Roma-only classes at times during their primary education had no objective and reasonable justification.

Another important case in the sphere of discrimination is a *Sabalić* judgment. In *Sabalić v. Croatia*,[53] the ECtHR ruled that domestic authorities did not adequately fulfil their procedural obligations in the case of a violent attack on the applicant motivated by her sexual orientation; therefore, they violated the procedural aspect of Article 3 of the Convention in conjunction with its Article 14. Namely, the police initiated misdemeanour proceedings against the assailant for disturbing public order and peace, which did not consider the characteristics of a hate crime, and the sentence imposed on the assailant was disproportionate to the severity of the abuse the applicant suffered. Criminal proceedings were not initiated because the state attorney's office considered that owing to the previous conviction of the assailant in a misdemeanour proceeding, criminal prosecution would be contrary to the principle of *ne bis in idem.*

The ECtHR concluded that this response of domestic authorities was not effective and could create the impression of impunity for violent hate crimes. Failure to initiate criminal proceedings due to a potential violation of the *ne bis in idem* principle was not justified. Namely, in accordance with paragraph 2 of Article 4 of Protocol No. 7, in addition to the Convention, the case can be reconsidered if there were “significant violations” in the previous procedure that could affect the resolution of the case. The fact that the motives of hatred in the violent attack were not investigated, as well as the fact that the motives of hatred were not taken into account when determining the punishment, represents a "substantial violation" in the sense of paragraph 2 of Article 4 of Protocol No. 7.

On 21 March 2023, the ECtHR published its judgment in the case *Beus v. Croatia*, in which it found that Mr. Beus's (the applicant) rights to the prohibition of discrimination (Article 14 of the ECHR) were violated in connection with the procedural aspect of the prohibition of torture (Article 3 of the ECHR). The applicant was the victim of verbal attacks and threats because of his sexual orientation, and on one occasion, he was physically attacked by several men. Before the ECtHR, he complained about the lack of an adequate procedural response by domestic authorities to the acts of homophobic violence to which he was exposed. The ECtHR established that after a verbal and physical attack on the applicant in May 2014, the police immediately went to the scene and concluded that the applicant had been exposed to threats and that he had suffered physical injuries as a result of a violent attack by several men who uttered homophobic insults. Therefore,

[53] *Case of Sabalić v. Croatia,* App. No. 50231/13, 14 January 2021.

the Court considered that these initial findings were sufficient as a prima facie indication of violence due to the applicant's sexual orientation. However, although the police filed a criminal complaint with the competent state attorney's office due to the threats, several suspects were never prosecuted. Meanwhile, the Misdemeanour Court found one of the suspects, M.M., guilty of disturbing public order and peace, but the conviction in question did not include the commission of a hate crime. Taking into account all of the above facts, the ECtHR stated that the manner in which the police responded to the numerous reports of the applicant creates the impression of impunity for the acts of harassment and violent hate crime to which the applicant was exposed, instead of representing procedural mechanisms that show that such acts are by no means tolerable. Therefore, it established a violation of the applicant's right to the prohibition of discrimination (Article 14 of the ECHR) in connection with the procedural aspect of the prohibition of torture (Article 3 of the ECHR), and awarded him EUR 10,000.00 in the name of non-material damages and EUR 3,000.00 in the name of compensation and expenses.

However, in the case of *ne bis in idem* principle, the ECtHR went a step further. The practice of the ECtHR in the interpretation of the *ne bis in idem* principle, expressed in the judgment in *Maresti v. Croatia*,[54] stirred up the professional public and resulted in the re-examination of the "criminal" limits of Croatian misdemeanour legislation and the relationship between criminal and misdemeanour proceedings. The principle of *ne bis in idem* was incorporated into the text of the Convention 35 years after its adoption, with the signing of Protocol No. 7. The Protocol itself entered into force in 1988. However, not all countries of the EU have accepted it, and the CJEU, in considering its application in tax cases (more specifically, fines) considers that the EU Charter does not prevent a member state from imposing a tax fine and a criminal penalty sanction, provided that the tax penalty does not have a criminal character.[55]

After years of inconsistent practice, the Grand Chamber of the ECtHR in the *Zolotukhin v. Russia*[56] case established the criterion of identity of material facts, i.e. identical or substantially the same facts, as the criterion for assessing the identity of acts (*idem*), also referring to the case law of the

[54] *Case of Maraseti v. Croatia*, App. No. 55759/07, 25 June 2009.
[55] C-617/10, *Åklagaren v Hans Åkerberg Fransson, 07 May 2013.*
[56] *Case of Sergey Zolotukhin v. Russia*, App. No. 14939/03, 10 February 2009.

CJEU.[57] According to this criterion, the principle of *ne bis in idem* applies when the elements of a misdemeanour and a criminal offence, or two criminal offences, completely or "substantially" overlap. Therefore, the judgment of the Grand Chamber of the ECtHR in the case *A. and B. v. Norway* went a step further in the interpretation of that principle and, without changing the already existing findings from the *Zolotukhin* judgment, additionally clarified what double trial or punishment means in the case of conducting parallel proceedings (*bis*).[58] This criterion was applied by the ECtHR in judgments against the Republic of Croatia, *Maresti, Tomasović*[59], and *Marguš*[60], which found that the applicant had undoubtedly been tried twice for the same criminal offences.

In the *Statileo v. Croatia* judgment, the ECtHR sitting in a panel of seven judges, on 10 July 2014, ruled that the applicant's property rights guaranteed by Article 1 of Protocol No. 1 of the ECHR were violated.[61] The applicant was the owner of the apartment that was allocated for use in 1955 to a third person with the establishment of the right of occupancy, with the entry into force of the Law on Renting Apartments in 1996. In 2008, the institute of tenancy rights was abolished, and the holders of that right to apartments in private ownership was granted the status of "protected tenants". They enjoyed several safeguards, such as the obligation of the owner of the apartment to enter into a rental agreement with them for an indefinite period; payments protected rent, the amount of which was significantly lower than the market price; and protection in case of lease cancellation. The domestic courts found the tenant in the applicant's apartment to be a protected tenant, as a member of the family household of the former holder of the right of occupancy, who had passed away in the meantime. The applicant − the owner of the apartment − refused to enter into a lease agreement with the protected tenant. The Municipal Court in Split ordered the applicant to enter into a contract apartment rental agreement with a protected tenant with an agreed monthly protected rent in the amount of HRK 102.14 because otherwise, the judgment would replace such a contract. The applicant's appeal and the constitutional complaint were rejected. The applicant complained before the ECtHR of the violation of

[57] C-436/04, *Leopold Henri Van Esbroeck, 09 March 2006.*
[58] Ivičević Karas, 2014.
[59] *Case of Tomasović v. Croatia,* App. No. 53785/09, 18 October 2011.
[60] Case of Marguš *v. Croatia,* App. No. 4455/10, 27 May 2014.
[61] *Case of Statileo v. Croatia,* App. No. 12027/13, 10 July 2014.

Article 1 of Protocol No. 1 to the Convention because he could not regain possession of his apartment or collect market rent for his rent. The ECtHR found that in this case, there was an interference with the property rights of the applicant − the owner of the apartment − because as a lessor, he had several restrictions in the implementation of the right to use their property. Such interference was legal because it had a legal basis in the Law on Renting Apartments and the Decree on Conditions and Criteria for Determining Protected Rent. The interference was in accordance with the general interest of protecting the rights of others, that is, rights-protected tenants. However, the intervention was not proportional.

In *F.O. v. Croatia*,[62] the ECtHR found a violation of the right to respect for private life guaranteed by Article 8 of the ECHR, because the applicant was subjected to verbal abuse by a mathematics teacher. Specifically, in a Croatian high school in 2011, a math teacher berated a group of high school seniors for being late to math class. He shouted at one of the pupils who was late, calling him a moron, an idiot, a fool, a hillbilly, and a stupid cop. After the pupil reported the event that day to the head teacher, in class the following day, the teacher said to the pupil '... when you say to a fool that he is a fool, that should not be an insult for him…You don't know what the insults are, but you will see what the insults are' (paragraph 7). In the third and final incident, eight days later, the teacher asked the pupil to turn to a page in his textbook. After the pupil had turned to the wrong page, the teacher said '[y]ou, fool, not that page. I didn't mean to insult you, because I know you will call your dad' (paragraph 8).[63] In this case, the ECtHR concluded that although the Croatian legislation provides for a mechanism for the supervision of the educational process, which includes measures of inspection supervision and measures of professional-pedagogical supervision, the competent authorities did not take appropriate measures to respond to the applicant's allegations of harassment at school.

Finally, it is important to stress that implementation of the ECHR in the national legal order includes the execution of a judgment of the ECtHR. Therefore, the Croatian Constitutional Court decision[64] by which it adopted the constitutional complaint of the applicant Zdravko Vanjko, due to the failure of domestic courts to 'enforce the final and binding judgment of the

[62] *Case of F.O. v. Croatia,* App. No. 29555/13, 22 April 2021.
[63] Leisure, 2023.
[64] Decision and Ruling of the Constitutional Court of the Republic of Croatia no. U-III/3304/2011, 23 January 2013, *Official Gazette* 13/2013.

ECHR in the *Vanjak v. Croatia* case' is extremely significant.[65] Failure to execute the ECtHR verdict was considered a violation of Article 46, paragraph 1 of the ECHR and Articles 115, paragraph 3 and 134 of the Constitution. This case shows that national courts are expected to enforce international human rights judgments**,** particularly those from the ECHR. The ECtHR holds domestic courts accountable for neglecting binding international obligations. It sets an important precedent in Croatian constitutional law by reaffirming that ECHR rulings must be implemented at the national level.

6. Conclusion

Although the Constitution of the Republic of Croatia mandates the direct application of the ECHR, it is most often implemented in national law through legislation, and the courts refer to it sporadically with the lack of a teleological interpretation of convention law. The long duration of court proceedings fuels a growing trend of mistrust in the judiciary, which causes national courts to lose their identity as protectors of human rights. Hence, individuals in such circumstances place their trust in the ECtHR, believing that they will find justice before this court. Although the Constitutional Court has largely harmonised its practice with the ECtHR, some still do not perceive it as a fundamental protector of human rights, partly because of how constitutional judges are selected and partly because it has issued controversial judgments that have shaken citizens' trust in some situations. With the ongoing election of new constitutional judges and judicial activism, the Constitutional Court would restore citizens' confidence in this key institution for protecting fundamental rights.

This study demonstrates that the EU's multi-layered human rights protection system has positively impacted human rights protection in Croatia, initiating essential changes in case law and the daily lives of individuals whose rights are frequently violated. However, there are some obstacles in implementing judgments of the ECtHR. The human rights protection system faces several challenges, with more complex cases coming to the Court and governments finding it increasingly difficult to respond quickly to judgments. I believe that the Strasbourg Court lacks its enforcement powers. A possible strategy could be taking complementary

[65] *Case of Vanjak v. Croatia*, App. No. 29889/04, 14 January 2010.

actions within the EU legal system, such as the infringement procedure[65] before the CJEU. Strategic litigation and political action are and will remain essential.

[65] In support of its action, the Commission alleges infringement of Directive 2000/43/EC on account of systematic and persistent improper administrative practice, on the part of the authorities of the Slovak Republic concerning indirect discrimination in respect of the Roma community in the field of education. C-799/23, *European Commission v Slovak Republic,* 01 August 2025.

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