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* * * * *

UNIVERSITY OF MISKOLC, FACULTY OF LAW
3515 MISKOLC-EGYETEMVÁROS, HUNGARY
Tel.: +(36) (46) 565-111/13-53
E-mail: editor.eis@uni-miskolc.hu

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EVIS ALIMEHMETI*

Human Rights in Albania: Protection under the European Convention on Human Rights,****

ABSTRACT: The paper sheds light on some of the current challenges of human rights protection in Albania, through a historical overview of the constitutional framework of such protection, the place of international law in the national system, in particular the European Convention on Human Rights and the findings of the European Court of Human Rights. It shows that, whereas the constitutional and legal framework aligns with the standards of protection of human rights enshrined in the Convention, the findings of the Court in the last two decades indicate continuous challenges yet to be addressed in relation to several rights and freedoms, especially those concerning the guarantees related to fair trial, lengthy court proceedings, property rights, and effective remedies.

KEYWORDS: human rights, international law, constitutional court, European Convention on Human Rights, European Court of Human Rights.

1. Introduction

Albania has transitioned from a totalitarian regime to a democratic one, founded on the principles of the rule of law and protection of human rights and freedoms. Human rights form one of the fundamental pillars of the Albanian Constitution, supported also by important commitments at the international level, through adherence to human rights treaties. However, the journey of transitioning to international standards of human rights protection is a complex one, conditioned by specific historical, political, social, and legal processes. This paper aims to shed light on some of the current challenges of human rights protection in Albania, through a

* Professor, Faculty of Law, University of Tirana, Albania. Evis.Alimehmeti@fdut.edu.al.

** The paper has been conceptualized to serve as part of the reading materials for the “Human Rights and Rule of Law” LL.M. program at the Central European Academy. Hence, it has an informative character.

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historical overview of the constitutional framework of such protection, the place of international law in the national system, in particular the European Convention on Human Rights (ECHR) and the findings of the European Court of Human Rights (ECtHR). It shows that, whereas the legal framework generally aligns with the international standards, in particular those related to the ECHR, the findings of the ECtHR in the last two decades indicate continuous challenges yet to be addressed in relation to several rights and freedoms included in the ECHR, and the need for additional implementation mechanisms.

To this end, the first section of the paper provides a short overview of the place of human rights during the communist regime, the repressive ideology of the regime, and its consequences for human rights, as well as a description of the new framework following the change of the regime, up to the current constitutional provisions in force. The subsequent section focuses on the status of international law in the internal legal system, based on a normative and case law overview, identifying advantages of the new constitutional provisions, but also challenges, regarding the place of the ECHR and EU law compared to domestic law. The last section delves into judgments of the ECtHR *versus* Albania in the last two decades, providing insights into *some* of the court's main findings on the standards of human rights protection in Albania, including those related to the recent constitutional justice reform. As it is difficult to cover the case law of the ECtHR in relation to all complaints submitted to the court against Albania, this last part focuses on cases indicating a pattern of violation, leading also to *pilot* and *quasi pilot* judgements.

2. Brief historical background

Albania endured a harsh communist dictatorship and remained isolated for almost 5 decades. In 1946, following general elections, the legislative assembly in Albania adopted the Statute of the People's Republic of Albania, where the power came "from the people" and belonged "to the people."¹ However, according to the historian Hoxha, the 1946 constitutional framework, followed by amendments in 1950, described the establishment of a democratic government based on free elections and

¹ Hoxha, 2021. The text of the Statute of People's Republic of Albania, [Online]. Available at: <https://www.crteeducazione.org/wp-content/uploads/2025/02/STATUTI-I-ASAMBLESE-KUSHTETONJE%C2%A6eSE-1946.pdf> (Accessed: 09 October 2025).

recognised the freedoms of conscience and belief, expression, and organisation, including the establishment of different political parties and other freedoms.² The constitutional provisions of 1950 established “the state of workers and peasant workers.”³ They also guaranteed the right to private property and private initiatives in the economy.⁴ Interestingly, the word “socialist” was used only twice in the entire text of the Constitution, namely, in article 11, related to agriculture and in article 12, to state a working principle.⁵ However, in practice, such guarantees were short-lived.⁶ A new Constitution, adopted in 1976, proclaimed Albania as a People’s Socialist Republic, a state of the “dictatorship of the proletariat,” which enshrined and protected the interests of all employees.⁷ It proclaimed the governance of the country through “its own forces” and the development of external relations based on the “principles of Marxism-Leninism and proletarian internationalisation.”⁸ At the political level, the entire system operated on the principle of centralised power.⁹ The foreign policy was characterised by a total isolation from the rest of the world as a “potential danger” to the country’s independence.¹⁰

The word “freedom” was not used anywhere in the entire text of the Constitution of 1976. There were a few provisions proclaiming individual rights, but they were not respected in practice. According to article 39 of the Constitution of 1976, the rights were inseparable from the fulfilment of duties, and could not be exercised contrary to the socialist order; the exercise of the rights and duties of individuals was to be based on the harmony between the interests of the individual and those of the socialist

² Ibid.

³ Albanian Constitution 1950, Art. 2., [Online]. Available at: <https://shtetiweb.org/2013/10/08/kushtetuta-e-republikes-popullore-te-shqiperise-1950/> (Accessed: 09 October 2025).

⁴ Ibid. Arts. 11., 14-22.

⁵ Art. 12: The state supports the socialist development of agriculture by organizing state agricultural enterprises, machine and tractor stations, and by assisting agricultural cooperatives and other forms of association of working peasants established on a voluntary basis. Art. 13: In the People’s Republic of Albania, the socialist principle applies: “From each according to his ability, to each according to his work.”

⁶ Hoxha, 2021; Zickel and Iwaskiw, 1994, pp. 171-172.

⁷ Albanian Constitution 1976, Arts. 2-3.

⁸ Ibid. Arts. 14-15.

⁹ Ibid. Art. 11.

¹⁰ Zickel and Iwaskiw, 1994. For more, in general, see the chapter on human rights during communism in Alimehmeti, 2002.

society, giving, however, priority to the latter.¹¹ In other words, observance and development of the rights of individuals followed and served the strengthening of the socialist regime. The free legal profession and the Ministry of Justice were abrogated as “unnecessary,” based on the argument that the court and the prosecution office served as guarantors of the rights of the accused in the legal process.¹² The freedoms of conscience and expression of religion were banned.¹³ Individuals accused of committing the crime of “agitation and propaganda” were often denied the right to due process and, in some cases, executed without a court order.¹⁴

According to the Constitution of 1976, the judicial system consisted of the People’s Courts as the bodies that carry out the administration of justice. The High Court directed the activity of the lower courts, guided however by the ideology of the regime.¹⁵ According to article 78, the Presidium of the People’s Assembly controlled the implementation of laws and decisions of the People’s Assembly as well as the High Court, the Prosecutor General, and other state bodies, a clear example of the centralisation and unification of the three powers. Additionally, the Presidium of the People’s Assembly was vested with the power to interpret the laws and present them for approval to the Assembly.¹⁶ Judges of the People’s courts were elected by the people and the such courts had the duty “to protect the socialist legal order,” and “educate the working masses in the spirit of respecting and implementing socialist legality, relying on their active participation.”¹⁷

Towards the end of 1980s, following the wave of democratic changes in the regimes of the countries of Eastern Europe, the government led by the successor of the dictator Hoxha, made efforts to adapt to such changes and ease their impact inside the country. It applied to join the Conference on Security and Cooperation in Europe and introduced a few measures aimed at the acknowledgement of the rights and freedoms of individuals.¹⁸ Following massive protests calling for the establishment of a democratic regime,

¹¹ Albanian Constitution 1976, Art. 39.

¹² Human Rights Watch, 1996, p. 11. Tartale and Tartale, 2011, p. 42.

¹³ Albanian Constitution 1976, Art. 37.

¹⁴ Qendra Shqiptare për Mbrojtjen e të Drejtave të Njeriut, 1997; 1996. Federal Research Division of the Library of Congress, 1992.

¹⁵ Gjykata e Lartë - “Historiku”, [Online]. Available at: <https://gjykataelarte.gov.al/en/gjykata/historiku> (Accessed: 10 October 2025).

¹⁶ Albanian Constitution 1976, Art. 78.

¹⁷ Ibid, Art. 101.

¹⁸ News from Helsinki Watch, 1991; Human Rights Watch, 1992.

general elections were held in February 1991, leading to the formalisation of a multiparty regime. Soon, the Assembly adopted Law No. 7491, dated 29.04.1991, "For the Main Constitutional Provisions," abrogating the Constitution of 1976 and sanctioning the system of parliamentary democracy.¹⁹ The new constitutional framework recognised human rights as one of the fundamental principles of the new democratic system. Article 4 of the Law regulated the state's responsibility to guarantee the fundamental rights and freedoms of people and national minorities. Apart from these general stipulations, the Law did not include provisions on human rights and freedoms. The gap was addressed two years later with another Constitutional Law, providing a detailed catalogue of human rights.²⁰ A third Constitutional Law, adopted in 1992, established the Constitutional Court with the exclusive jurisdiction to review the constitutionality of legal norms and make the final interpretation of constitutional provisions.²¹ Additionally, several important laws paved the way for the transition to the free market economy and private ownership, such as the Law on Commercial Companies in 1992, the Law on Foreign Investments in 1992, the Civil Code in 1994 and the Civil Procedure Code in 1996, the Criminal Code and the Criminal Procedure Code in 1995, as well as other laws related to the mechanisms for restitution of properties to former owners.

In 1995, Albania was accepted as a full member of the Council of Europe. In 1996, Albania ratified the European Convention for the Protection of Fundamental Human Rights and Freedoms and some of its Protocols (ECHR). The ratification of the human rights instruments in the framework of the Council of Europe and the United Nations paved the way to the adoption of a new Constitution in 1998, through a nationwide referendum. The catalogue of human rights included in the Constitution of 1998 is modelled upon the text of the ECHR. However, it also includes additional rights and freedoms, categorised into "Personal rights and freedoms," "Political rights and freedoms," and "Economic, social and cultural rights and freedoms."²² Between 1998 and 2015, the Constitution of

¹⁹ Law no. 7491, dated 29.04.1991, "For the Main Constitutional Provisions," Arts. 1-3.

²⁰ Law no.7692, dated 31.3.1993, "For an addition in the Law no.7491, dated 29.4.1991, 'For the main constitutional provisions.'"

²¹ Law 7561 dated 29.04.1992, "On some amendments and additions in the Law no. 7491, dated 29.04.1991, 'For the main constitutional provisions.'"

²² Constitution of the Republic of Albania, 1998. A consolidated version of the Constitution can be online available at:

1998 was amended 4 times, namely in 2007 (a change in the composition of local elected bodies); 2008 (electoral system changed from a majoritarian to a proportional formula, introduction of a mechanism of confidence voting strengthening the position of the Prime Minister, and new rules on the voting of the Head of State); 2012 (new rules of immunity for members of parliament and judges), and 2015 (mandatory assets and other integrity related declarations for elected officials).²³ The amendments of 2015 also included limitations on the rights to vote and to be elected for those sentenced to imprisonment for a crime. Such changes provided the basis for the adoption of a law restricting the right to vote of those convicted for a series of serious offences. The restrictions also apply to those already serving a sentence before the entry into force of the law.²⁴ The attempt by the Albanian Helsinki Committee to have the restrictions declared unconstitutional was unsuccessful. The ECtHR reviewed the restrictions in *Mysliha and others v. Albania* and concluded that the restrictions were within the margin of appreciation of Albania, and therefore found no violation of article 3 of Protocol 1 of the ECHR.²⁵

A major constitutional reform took place in 2016, foreseeing a new architecture of the judiciary. The main objectives of the reform included the strengthening of the judiciary's independence from the other two branches of power and the restoration of public confidence in the administration of justice. The reform established new bodies overseeing the career of judges and prosecutors, namely the High Judicial Council and High Prosecution Council.²⁶ Their new composition does not include members from the other two branches of power, foreseeing the membership of judges, prosecutors,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)064-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)064-e) (Accessed: 11 October 2025).

²³ Law no. 9675, dated 13.1.2007, "On some amendments to Law No. 8417, dated 21.10.1998, 'Constitution of the Republic of Albania.'" Law no 9904, dated 21.4.2008, "On some amendments to Law No. 8417, dated 21.10.1998, 'Constitution of the Republic of Albania'", as amended. Law no. 88/2012, dated 18.09.2012, "On some amendments to Law No. 8417, dated 21.10.1998, 'Constitution of the Republic of Albania'", as amended. Law no.137/2015, dated 17.12.2015, "On some amendments and additions to Law No. 8417, dated 21.10.1998. 'Constitution of the Republic of Albania'", as amended.

²⁴ Law no. 138/2015 "On guaranteeing the integrity of persons who are elected, appointed or exercise public functions." Decision of the Constitutional Court no. 43, dated 05.06.2017.

²⁵ Decision of the Constitutional Court no. 43, dated 05.06.2017. *Mysliha and others v. Albania*, App. Nos. 68958/17 and 5 others, 24 October 2023.

²⁶ Arts. 147, 149 of the Constitution, 1998, as amended.

academics, advocates, and civil society representatives instead. The reform introduced new rules concerning the election of judges of the Constitutional Court and the High Court, including the organisation of a new inspectorate for judges and prosecutors.²⁷ Most importantly, the new constitutional amendments foresee the assessment of judges, prosecutors and other legal officers of all instances, through the extraordinary constitutional mechanism of Transitional Qualification Assessment, shortly referred to as the ‘vetting’ procedure. Two ad hoc bodies, namely, the Evaluation Commission and the Appeal Chamber, perform an evaluation of judges, prosecutors, and related legal officers based on their assets, professional abilities and background (professional ethics). The procedure also includes the establishment of an International Monitoring Operation (IMO), led by the European Commission, to support the re-evaluation process by monitoring and overseeing the entire process of the re-evaluation.²⁸ According to the new constitutional provisions, the IMO observers are entitled to file findings and opinions with the Commission and the Appeal Chamber and contribute to the background assessment. In those findings, the International Observers may request that the Commission or the Appeal Chamber take evidence or may present evidence obtained from state bodies, foreign entities, or private persons, in accordance with the law.²⁹ The process has produced important results, with almost half of the number of judges, prosecutors and other related legal officers being removed from their positions.³⁰ A package of new laws was adopted, based on the new constitutional framework, including amendments to the Law on the Organisation and Functioning of the Constitutional Court. According to the amended article 71/c of the Law, proceedings before the Constitutional Court may be reopened if an international court with binding jurisdiction over the Republic of Albania finds that an individual’s fundamental rights or freedoms have been violated “owing to a [prior] decision of the Constitutional Court.”³¹

The following section focuses on the place of international law in the internal legal system and the force of norms issued by international

²⁷ Ibid. Art. 147/d.

²⁸ Ibid, Art. 179/b.

²⁹ Constitution 1998, *as amended*, Annex for the Transitional Qualification Assessment, Art. B.

³⁰ Šemic, 2022.

³¹ Law no. 8577, dated 10.2.2000, “On the Organization and Functioning of the Constitutional Court,” *as amended*.

organisations, based on the constitutional provisions in force. Understanding such a relationship is important to reflect on the effectiveness of human rights protection, especially the commitments under the ECHR and related challenges.

3. The place of international agreements in the constitutional framework in force

The Constitution of 1998 set the foundations of a unified system of national and international law, particularly in the area of human rights. The international norms are directly applicable and are superior to the domestic ones, including the Constitution in one specific case. According to article 116 of the Constitution, ratified international agreements form part of the internal legal system and are directly implemented (except when implementation requires specific regulation).³² Furthermore, article 17 of the Constitution limits the application of restrictions to the rights and freedoms foreseen in the Constitution to those provided in the European Convention on Human Rights.³³ As widely accepted in scholarship, the specific reference of the Constitution to the ECHR places the latter in the rank of the Constitution, an interpretation supported also by the Constitutional Court.³⁴ According to the court, “The legislator cannot impose limitations that exceed those provided for by the ECHR, but it is not prevented from expanding the scope of rights and freedoms through legislation and giving a greater dimension to the realisation of the protection of the individuals.”³⁵

According to article 122 of the Constitution, a ratified international agreement takes precedence over the *laws of the country* that conflict with it, whereas the norms issued by an international organisation have

³² Ibid. Art. 122.

³³ Art. 17 of the Constitution provides the following:

1. The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it. 2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

³⁴ Omari and Anastasi, 2010, p. 59; Berberi, 2014, p. 41; Ministry of Justice and Euralius, 2021.

³⁵ Decision of the Constitutional Court no. 9, dated 23.03.2010. Decision of the Constitutional Court no. 24, dated 13.06.2007.

precedence over the *country's law*, when the agreement ratified by the Republic of Albania for participation in that organisation expressly provides for the direct application of the norms issued by it. In the Albanian version, the two expressions do not have the same meaning. According to the scholar Anastasi, the difference between *laws* (“ligje” in Albanian) and the *country's law* (“e drejta”) concerns the understanding of the latter to include all legal provisions in force in a country, i.e. also the Constitution.³⁶ The difference in the wording clearly serves the objective of removing any barriers for the EU accession; upon acceptance of Albania, the EU legislation would supersede conflicting domestic norms, including the Constitution, and no additional constitutional adjustments are needed.

At the same time, article 5 of the Constitution foresees the binding force of international law over Albania. The provision triggered a debate, initially among scholars, as to its relationship with articles 116 and 122 of the Constitution, which make reference only to ratified international agreements.³⁷ Eventually, a case concerning the application of the provisions of an agreement not ratified by Albania involved both the High Court and the Constitutional Court in the determination of the relationship between the articles. Both courts supported the reading of article 5 of the Constitution independently from the other articles, maintaining the position that Albania is bound not only by the provisions of ratified instruments, but also by general principles of international law, such as *jus cogens* and other fundamental norms.³⁸

Generally, in its case law, the Constitutional Court has supported the supremacy of the norms of international law over domestic rules. The court considers the hierarchy of the normative sources included in article 116 of the Constitution to have established the supremacy of international treaties over domestic laws. In the court's words:

The Constitution has chosen the monistic concept in the relationship between national and international law. In other words, the constitutional provisions have defined a hierarchy of

³⁶ Anastasi, 2007.

³⁷ The Constitutional Court had previously supported the reading of article 5 together with articles 116 and 122 of the Constitution. For more on the cases and the approaches in scholarship and courts, see Alimehmeti and Caka, 2015.

³⁸ Unifying Decision of the High Court of Albania, no.1, dated 30.1.2003. Decision of the Constitutional Court of Albania, no. 13, dated 12.7.2004.

legal norms, mandatory for implementation by courts and other bodies, according to which international agreements ratified by law become part of the domestic legal order and have precedence over ordinary laws.³⁹

However, the support of such a national identity applies almost exclusively to the ECHR, in the cases of human rights complaints, where the Constitutional Court (and the High Court) distinctively makes use of the case law of the ECtHR. In 2006, Albania signed the Stabilisation and Association Agreement (SAA) with the European Community; it received the candidate status in 2014, followed by the opening of negotiations and review of the *acquis* chapters. The position of the Constitutional Court on the status of the SAA, compared to other treaties and domestic laws, is rather blurry and recently openly inconsistent. In a few cases, initially, the Constitutional Court interpreted the SAA as imposing specific legal obligations, whereas recently it has taken a new position referring to it as a framework instrument with no legal obligations.

The first clear position of the Constitutional Court on the status of the SAA dates back to 2009. In reviewing a Decision of the Council of Ministers, challenged in court for restricting the economic freedoms, the Constitutional Court considered whether the restriction of the economic freedoms was also in accordance with the SAA. It maintained, *inter alia*, that article 33 of the SAA prevented the imposition of new quantitative restrictions on imports or exports from its date of entry into force, concluding that the Decision violated the principles enshrined in articles 11 and 118 of the Constitution and article 33 of the SAA.⁴⁰ Thus, the Constitutional Court read the SAA as comprising legal obligations and superseding the force of domestic laws. In the following years, the court considered the binding force not only of the SAA but also of the case law of the CJEU. Thus, in its decision no. 14 of 2014, related to competition rules, the Constitutional Court considered, “as in previous judgments,” useful to refer to the SAA and the case law of the European Court of Justice, regarding the application of the competition rules.⁴¹ Moreover, in a few other cases, the Constitutional Court has considered Directives of the EU as having binding force over the domestic legislation. In a case in 2010, the

³⁹ Decision of the Constitutional Court no. 36, dated 16.06.2023, para. 30.

⁴⁰ Decision of the Constitutional Court no. 24, dated 24.07.2009.

⁴¹ Decision of the Constitutional Court no. 14, dated 21.03.2014, para. 31.

court reviewed the compatibility of the provisions of a domestic law with the requirements of Directive 2006/43/EC, concluding on the compatibility of the law with the Directive.⁴²

However, recently, in a much-debated decision, adopted in 2022, the Constitutional Court moved away from such views. The court defined the SAA as a “framework agreement,” serving only to guide the processes of the approximation of the legislation:

[...] The Court notes that the SAA is a framework agreement for relations between the Republic of Albania, on the one hand, and the EU and its Member States, on the other. This agreement was ratified by Law No. 9590, dated 27.07.2006 and entered into force on 1 April 2009, after its ratification by all EU Member States. It aims to support Albania in strengthening democracy and the rule of law, to contribute to political, economic and social stability in Albania and in the region, to approximate Albanian legislation to Community law and to support Albania in completing the transition towards a functioning market economy. In this way, the SAA is an agreement, which has created a process of association of the parties in function of the stabilisation and preparation of the Republic of Albania for eventual membership in the EU.⁴³

In the court’s view, one of the measures adopted in the framework of the SAA was the approximation with the EU law of the respective national piece of legislation, whose constitutionality had not been challenged in the court.⁴⁴ The court rejected the claim of violation of the hierarchy of norms, included in articles 116 and 122 of the Constitution, ‘as long as the cause of its violation is presented as non-compliance with the obligations of the MSA.’⁴⁵

The new reasoning of the court poses several questions as to the nature of the responsibilities of the parties under a “framework agreement,” the difference with other international treaties and the openly avoided question of consistency of the positions of the court. The definition of the

⁴² Decision of the Constitutional Court no. 3, dated 05.02.2010.

⁴³ Decision of the Constitutional Court no.30, dated 02.11.2022, para. 71.

⁴⁴ Ibid, para. 76. See also Decision of the Constitutional Court no. 48, dated 15.11.2013.

⁴⁵ Ibid, para. 78.

SAA as a framework agreement is novel to the case law of the court, deserving clear arguments, at least to the understanding of the legal obligations that derive from such an instrument and its standing in the hierarchy of domestic legal norms. The terminology contributes to a perception that the SAA contains no legal obligations, at least not until Albania becomes a full member of the EU. This is especially important considering that consumer rights, invoked in the case, form part of the EU primary legislation, included in the constitutional norms of the Union. Additionally, the court missed the opportunity to evaluate the application of article 5 of the Constitution in the case, in view of its previous precedents recognising the interest of article 5 with principles of international law. In fact, the case signalled another departure from the previous positions of the Constitutional Court as the court read article 5 in conjunction with articles 116 and 122 of the Constitution, reducing its scope of application to the ratified agreements only. The following excerpt from the text of paragraph 73 of the case illustrates it:

The Constitution, in its articles 5, 116 and 122, provides that the Republic of Albania applies the international law binding on it, by listing ratified international agreements, which are part of the internal legal system, in the hierarchy of normative acts that have force before laws..." (italics added).⁴⁶

It remains to be seen whether the Constitutional Court will revert to its previous views regarding the role and place of the SAA and EU law in the domestic normative system, especially considering Albania's candidate country status, and the strong will on both sides to accelerate the process of full accession.⁴⁷ In fact, several articles of the SAA, such as articles 70, 71 and 126, contain specific obligations to be observed in the areas of competition and state aid, but also requirements concerning implementation and enforcement of existing and future legislation harmonised with the EU acquis. Such responsibilities rest with all court instances. In practice, except for the Constitutional Court and occasionally the High Court, judges of the other courts rarely make use of the EU acquis or international law in general. There is a stronger attention to the ECtHR case law, especially in the findings against Albania, but generally, the preparation remains limited

⁴⁶ Ibid, para 73.

⁴⁷ Delegation of the European Union to Albania, 2025.

for various reasons. These could include the insufficient focus of legal curricula and professional trainings, a lack of interest in developing expertise in international legal issues, but also the limited sources of information in Albanian on the jurisprudence of international bodies of human rights.⁴⁸

4. ECtHR's judgements versus Albania

Complaints concerning the right to a fair trial, property rights and lack of effective remedies represent the largest number of applications submitted to the ECtHR against Albania.⁴⁹ The first judgment of the ECtHR delivered against Albania is *Qufaj Co. v. Albania*, decided in 2004.⁵⁰ The applicant (a company) complained against the negligence of state authorities to execute a court decision invalidating the guarantees for a fair trial. Additionally, the applicant claimed a violation of article 13 of the ECHR in relation to the refusal of the Constitutional Court to consider the non-execution of the court decision as part of its reviewing jurisdiction. The ECtHR supported the claims of the applicant, maintaining that “the execution of a judgment given by a court must be considered as an integral part of ‘due process’ within the meaning of Article 6” and “state authorities cannot cite a lack of funds as a justification for not honouring a financial obligation arising from a judgment judicial.”⁵¹ Furthermore, the ECtHR considered the Constitutional Court competent to examine the request of the company regarding the non-execution of a final decision, as part of the requirements of a due legal process, concluding that there had been a violation of article 6 of the ECHR for the non-execution of final court decisions. Subsequently, the Constitutional Court reviewed its approach regarding complaints against the non-execution of final court decisions.

Complaints regarding the recognition of property rights of former owners, deprived of their properties during the communist era, increased significantly during the past two decades. Such complaints include also the

⁴⁸ Caka and Merkuri, 2021, p. 26. For more on the place and status of the international agreements in the internal legal order, see Alimehmeti and Caka, 2015.

⁴⁹ European Court of Human Rights. Violations by article and by States, [Online]. Available at: www.echr.coe.int/documents/d/echr/Stats_violation_1959_2022_ENG (Accessed: 13 October 2025).

⁵⁰ *Qufaj Co. Sh.p.k. v. Albania*, App. No. 54268/00, 18 November 2004.

⁵¹ *Ibid*, para 38.

non-execution of final court decisions recognising property rights. Thus, the lack of effective restitution mechanisms, manifested especially in relation to non-execution of final judicial or administrative final decisions led to numerous judgments of the ECtHR against Albania, finding violations of articles 6, 13 and article 1/prot.1, such as in *Caush Driza, Rramadhi, Driza, Vrioni, Gjyli, Gjonbocari* and more.⁵² The property-related cases indicated a widespread problem affecting a large group of individuals. The repetitive findings of the ECtHR and the non implementation of its continuous judgements of property rights violations paved the way to a *pilot judgement* in 2012 in the case of *Manushaqe Puto*.⁵³ In this case, 20 applicants complained that despite their inherited title to plots of land having been recognised by the authorities, final administrative decisions awarding them compensation in lieu of restitution had never been enforced, and there were no effective remedies to address the non-enforcement. Noting that the complaints reflected a widespread problem in Albania affecting a large number of people, the ECtHR decided to apply the pilot-judgment procedure. It supported the claims of applicants regarding the violation of article 6/ 1, article 1 of Protocol No. 1 and article 13 of the ECHR for the lack of an effective domestic remedy to redress the prolonged non-enforcement of the decisions awarding them compensation *in lieu*. Additionally, it held that Albania had to take general measures in order to effectively secure the right to compensation within 18 months.⁵⁴ The case triggered the adoption of a new law on the treatment of the property and the transformation of the Property Restitution Agency.

At the same time, in addition to property rights, an increasingly high number of complaints submitted to the ECtHR concerns the lack of effective remedies for unreasonable delays within judicial proceedings.⁵⁵ The

⁵² *Driza v. Albania*, App. No. 33771/02, 13 November 2007; *Caush Driza v. Albania*, App. No. 10810/05, 15 March 2011; *Ramadhi and others v. Albania*, App. No. 38222/02, 13 November 2007; *Vrioni and others v. Albania*, App. No. 2141/03, 24 March 2009; *Gyli v. Albania*, App. No. 32907/07, 29 September 2009; *Gjonbocari v. Albania*, App. No. 10508/02, 23 October 2007.

⁵³ *Manushaqe Puto and others v. Albania*, App. Nos. 604/07, 34770/09, 43628/07 et al., 31 July 2012.

⁵⁴ *Ibid*, paras. 110-121.

⁵⁵ *Ramadhi and others v. Albania*, see note 52, *Gyli v. Albania*, see note 52, *Gjonbocari v. Albania*, see note 52; *Marini v. Albania*, App. No. 3738/02, 18 December 2007; *Beshiri and Others v. Albania*, App. No. 7352/03, 22 August 2006; *Mishgjoni v. Albania*, App. No. 18381/05, 07 December 2010.

situation deteriorated further in the case of *Luli and others*, where the ECtHR issued a *quasi-pilot* decision regarding the lack of effective remedies in Albania for unreasonable lengths of judicial processes. The court urged Albania to introduce a domestic remedy to address the length of proceedings, indicating potential models to follow.⁵⁶ In response to the findings of the ECtHR, an acceleratory and compensatory remedy was introduced in the Albanian Civil Procedure Code.⁵⁷ A new Chapter X, on mechanisms to address the duration of judicial processes in the first and second court instances, was added in the Code. According to its provisions, parties can request a determination of violations of the requirement of “reasonable time” and ask for expedited proceedings. If a violation is found, the court is authorised to mandate procedural measures within a specified time frame, and this decision is final.⁵⁸ In *Bara and Kola v. Albania*, the ECtHR provides an evaluation of the overall effectiveness of this newly introduced remedy.

However, the problem with the effectiveness of remedies concerning court proceedings persisted, leading to further judgments against Albania. In *Sharxhi and others v. Albania*, the applicants, owners of flats in a demolished residential and commercial property, complained about the seizure, expropriation and the subsequent demolition of their properties within a period of one month in 2013.⁵⁹ This occurred despite a court order suspending all actions on the property. The ECtHR found again a violation of article 13 of the ECHR regarding the lack of effective remedies concerning the non-observance of the interim measure, in addition to the violation of the right to a fair trial, the right to private and family life and property rights under article 1 of Protocol no. 1.

⁵⁶ *Luli and others v. Albania*, App. Nos. 64480/09 64482/09 12874/10, 01 April 2014.

⁵⁷ Civil Procedure Code, 1995, as amended, Chapter X. Articles 399/1 of the Chapter provides the following:

1. In the competence of courts, according to the instances of adjudication specified in this Chapter, shall be included the adjudication of requests for due compensation to the person, who has suffered a pecuniary or non-pecuniary damage due to the unreasonable length of a case, as per the definition of Article 6/1 of the European Convention “On Protection of Human Rights and Fundamental Freedoms”.

2. Provisions of this chapter define the evaluation of reasonable duration of a process, as well as the due compensation, when unreasonable delays have been determined in investigation procedures, trial of cases, as well as in the procedures of execution of decisions.

⁵⁸ *Ibid*, Art. 399/8§1.

⁵⁹ *Sharxhi and others v. Albania*, App. No. 10613/16, 11 January 2018.

Lack of effective remedies was part of the findings of the ECtHR in *Marini v. Albania* too, but here the court dealt with a specific and complex issue related to the powers of the Constitutional Court in Albania, namely its voting rules and reasoning of the decisions.⁶⁰ In this case, the applicant claimed a violation of article 6 of the ECHR concerning the rejection of his appeal by the Constitutional Court due to the lack of majority votes, in accordance with article 133/ 2 of the Constitution (the Constitutional Court includes 9 judges). Furthermore, according to article 74 of the Law on the Functioning and Organisation of the Constitutional Court (CCOA), in the case of a tied vote, the appeal is rejected without prejudice. Three judges of the Constitutional Court supported the applicant's claims, criticising the lower courts for violating the applicant's right to a fair trial. In contrast, the majority of the Constitutional Court did not present reasons for overturning the case or the details of how the remaining four judges voted. The ECtHR found a violation of the applicant's right of access to the court, arguing that the Constitutional Court's failure to reach a majority left the applicant without a final decision on his case and had accordingly restricted the essence of his right of access to a court. In an *obiter dictum*, the ECtHR observed the following concerning the particular regulation in Albania concerning the voting rules:

In contrast to other legal systems, which either preclude a tied vote or provide different alternatives to enable a final decision to be reached in the event of such a vote, in the Albanian legal system a tied vote in the Constitutional Court results in a decision which does not formally determine the issue under appeal. Moreover, no reasons are given for dismissing the appeal in such an eventuality other than that the vote was tied. Having regard to its above considerations, the Court can only conclude that the tied vote arrangements foreseen in section 74 of the CCOA [the Constitutional Court Organisation Act] do not serve the interests of legal certainty and are capable of depriving an applicant of an effective right to have his constitutional appeal finally determined.⁶¹

⁶⁰ *Marini v. Albania*, see note 55.

⁶¹ *Ibid*, para 123.

The court concluded with the finding of a violation of the right to access to court, due to the Constitutional Court's failure to take a decision on his constitutional complaint, and other rights under article 6, as well as the lack of an effective remedy for the length of the proceedings. Recently, the ECtHR considered the same issue of the failure of the Constitutional Court to take a decision in *Meli and Swinkels Family Brewers v. Albania*.⁶² This time, the ECtHR did not consider the failure to form a majority as a violation of the right of access to the courts. The ECtHR examined the requirement of the CCOA for a majority of five judges, in order for applications not to be dismissed with the effect of *res judicata*. According to the ECtHR, this provision could complicate access to justice, particularly in the Albanian legal system, where a quorum of six judges and the five votes required to find a constitutional violation could lead to the dismissal of applications even if the majority favours the applicant. In the court's view, "this issue could become more acute in circumstances where the Constitutional Court might operate for extended periods of time without a full bench, as was previously the case in Albania following the 2016 reforms of the justice system and the delays in filling vacancies on its bench. In such scenarios, individuals seeking redress for alleged violations of their constitutional rights might face particularly difficult odds in reaching the required five-judge majority in their favour and reversing the presumption of constitutionality; for example, a five-out-of-six majority would be needed to prevail in a formation with the minimum quorum of six judges."⁶³

Surprisingly, the ECtHR did not delve further into the issue of whether the failure to reach a majority left the applicant without a final decision on his case, attributing the responsibility for exposing the shortcomings of the rule of the majority to the applicants; according to the court, they did not put forward any explicit arguments along these lines.⁶⁴ The ECtHR was satisfied that article 74 of the CCOA was repealed and that there is now clarity on the outcome of appeals that do not reach a majority of five votes, namely, such appeals are deemed to be definitively rejected. In the applicants' case, a majority of the Constitutional Court voted in favour of dismissing their complaints, while one complaint resulted in a tied vote.

⁶² *Meli and Swinkels Family Brewers N.V. v. Albania*, App. Nos. 41373/21 and 48801/21, 16 July 2024.

⁶³ *Ibid*, para. 65.

⁶⁴ *Ibid*, para. 66.

Thus, the ECtHR concluded that the legal framework in the country was sufficiently clear on the outcome of such appeals, and therefore, the applicants had not been deprived of the right of access to a court. At the same time, the ECtHR focused on the reasons provided by the “effective majority (that is, the judges who voted to dismiss the complaints)” and the “effective minority (the judges who voted in favour of upholding the complaints).”⁶⁵ It maintained that the respective decisions were limited to the results of the voting and did not include the reasons as to the merits of the case.

Thus, differently from the approach in *Marini*, where the lack of reasoning of the judgment was considered under the right of access to court’s claim, the ECtHR considered the lack of substantive reasons as affecting the legal certainty, violating the right to a reasoned judgment. It concluded that the applicants had not been provided with the relevant legal grounds for the dismissal of their claims in violation of article 6/1 of the ECHR.⁶⁶ The non-addressing of the issue is somewhat disappointing, considering the frequency of the failure of the Constitutional Court to reach a majority and the consequences of the judicial reform, including the slow process of appointing new judges and the prolonged judicial processes.⁶⁷

The lack of effective remedies in relation to articles 6 and 8 of the ECHR has also been claimed by judges and prosecutors, removed from their positions as a result of the vetting process described above. The first complaint on the vetting procedure examined by the ECtHR involved the dismissal of *Xhoxhaj*, a judge of the Constitutional Court, removed from office at the end of the vetting procedure.⁶⁸ The appellate instance for the vetting procedure reviewed her complaint and upheld the decision of dismissal from office. It also maintained that a public hearing for her appeal was not necessary. She complained to the ECtHR that her rights to a fair trial, private life and effective remedies had been violated. The ECtHR did not find any violations. According to the court, the vetting bodies had been independent and impartial, the procedures had been regular, the examination of the appeal in a public hearing had not been necessary, and the principle of

⁶⁵ Ibid, para. 71.

⁶⁶ Ibid, para. 76.

⁶⁷ See the Constitutional Court’s decision no. 25, dated 10.05.2021, decision no. 12, dated 09.03.2021, decision no. 39, dated 15.12.2022, decision no. 67, dated 03.10.2024, decision no. 1, dated 07.01.2025. See also European Commission (2024) Rule of Law Report, p. 9.

⁶⁸ *Xhoxhaj v. Albania*, App. No. 15227/19, 09 February 2021.

legal certainty had not been violated. Moreover, the court found that there had been no violation of Article 8, as the dismissal from office had been proportionate, and the permanent legal ban on re-entering the justice system serves to guarantee the integrity of the magistrate's office and public trust in the justice system.

In contrast, the case of *Besnik Cani v. Albania* highlighted a different aspect of the vetting process.⁶⁹ In the case, a former prosecutor, dismissed in 2020, raised concerns about the appointment of one of the judges to the Special Appeal Chamber in violation of the eligibility rules. The ECtHR supported his arguments, maintaining that the authorities should have ensured that all judges appointed to the SAC complied with the appointment rules for their position. The domestic institutions had not examined the claims presented by the applicants concerning the ineligibility of the member appointed to the SA. Consequently, the ECtHR concluded that there had been a violation of the applicant's right to "a tribunal established by law". Given that finding, the Court also considered article 46 of the ECHR related to the implementation of the ECtHR's decision, maintaining that the most appropriate redress for the violation of the applicant's rights would be to reopen the proceedings, should the applicant request the reopening and re-examine the case in a manner that complies with the requirements of Article 6/1 of the Convention. Subsequently, in the case of *Sevdari v. Albania*, related to another prosecutor removed based on the vetting procedure, the ECtHR found a violation of Article 8 with regard to her dismissal.⁷⁰ The ECtHR considered the removal disproportional to the vetting bodies' findings, primarily related to the inability to prove that her husband had paid tax on his income earned abroad. According to the ECtHR, the amounts on which tax had not been shown to have been paid was relatively small and there was no indication of bad faith in her declarations during the vetting process. A less severe form of sanction could have been applied. The ECtHR invoked again article 46 of the ECHR, recommending that the proceedings for the applicant be reopened as an appropriate form of redress.⁷¹ The applicant was successful in reopening the proceedings before the appellate instance of the vetting process, which reinstated her in the previous position as prosecutor, becoming the first and only case of reinstatement in the previous position, as a result of an

⁶⁹ *Besnik Cani v. Albania*, App. No.37474/20, 04 October 2022.

⁷⁰ *Sevdari v. Albania*, App. No. 40662/19, 13 December 2022.

⁷¹ *Ibid*, paras 142-145.

ECtHR's judgement. The lack of effective remedies in relation to claims presented under article 8 of the ECHR was invoked by the applicants in *Xhoxhaj v. Albania* and *Nikehasani v. Albania*, too, but their complaints were dismissed as unsubstantiated.⁷²

Overall, while the vetting process has served as an extraordinary mechanism to reform and increase the integrity of the judiciary, the reviewed cases illustrate the remaining challenges and the importance of fair trial rights and judicial procedures for the subjects of the process. Moreover, the vetting process has significantly impacted the length of judicial proceedings. Unreasonable delays of the judicial processes in Albania are alarmingly increasing, with the average length of a process amounting to a decade.⁷³ Recently, in *Bara and Kola v. Albania*, the ECtHR evaluated the effectiveness of post-reform mechanisms introduced to expedite the judicial processes. The ECtHR was satisfied that the criteria for evaluating the 'reasonable time' align with its established case law, including such factors as the complexity of the case, the conduct of the parties, and what is at stake for the claimant.⁷⁴ The ECtHR advised the domestic courts to assess the entire duration of the proceedings, not just the point when a request is made, and to set reasonable deadlines for these procedural measures to ensure the remedy is effective.⁷⁵ As concerns the length of the proceedings, the ECtHR did not support the government's arguments attributing the delays to the justice reform and the vetting process. The ECtHR noted that the High Court had already accumulated a backlog of 16,777 cases before the start of the vetting process. As noted by the ECtHR, delays in the processes before the High Court had been identified in several decisions of the Constitutional Court.⁷⁶ In principle, the ECtHR supported the new post-reform 'acceleration' procedures, considering them "likely to be effective in addressing delays in proceedings." However, in the circumstances of the case (related to the first applicant), the ECtHR maintained that "the acceleratory remedy did not serve the purpose of speeding up the

⁷² *Xhoxhaj v. Albania*, see note 68; *Meli and Swinkels Family Brewers N.V. v. Albania*, see note 62, paras. 145-147; *Nikehasani v. Albania*, 58997/18, 13 December 2022, paras. 131-136.

⁷³ European Network of National Human Rights Institutions, 2023, p. 24. *Iliria S.R.L.v. Albania*, App. No. 1011/09, 05 March 2024, a case involving international arbitration, the ECtHR did not justify the duration of 17 years and nine months of the legal proceedings.

⁷⁴ *Bara v. Albania*, App. No. 43391/18 17766/19, 12 October 2021, para. 106.

⁷⁵ *Ibid*, para. 108.

⁷⁶ *Ibid*, paras. 69, 95.

proceedings before the High Court or preventing them from becoming unreasonably long.”⁷⁷ It concluded that there had been a violation of article 6 of the ECHR concerning the length of the process and article 13 concerning the lack of remedies to address the unreasonable length.

On the other hand, property restitution-related complaints continue to represent a large part of the complaints submitted to the ECtHR against Albania. Recently, the Court issued two judgments highlighting the continuous challenges yet to be addressed concerning the recognition of property rights restitution mechanisms in Albania.⁷⁸ On a final note, the low number of fully executed judgments of the ECtHR in the cases against Albania further indicates the pressing need for effective policies and instruments to address the identified deficiencies.⁷⁹

5. Conclusions

While the constitutional and legal framework aligns with the standards of protection of human rights enshrined in the ECHR, there remain significant challenges concerning their enjoyment in practice. International law has a privileged status in the internal legal system, but in practice the reliance and preparation of courts to apply it remain limited. Judgments of the ECtHR identify remaining challenges in the Albanian human rights legal framework, especially concerning the enjoyment of the guarantees related to fair trial, effective remedies in relation to lengthy proceedings and property rights. In particular, the length of court proceedings has become an acute systemic deficiency, affecting not only the parties to a case but also the judiciary and society, with the far-reaching consequence of undermining public confidence in the judiciary. It remains to be seen whether – or when – the new mechanisms introduced by the justice reform will ultimately address such challenges.

⁷⁷ Ibid.

⁷⁸ *Rama v. Albania*, App. No. 17758/06, 12 December 2024; *Gabaj v. Albania*, App. No. 33369/17, 17 December 2024.

⁷⁹ Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, [Online]. Available at: <https://www.coe.int/sq/web/execution/closed-cases> (Accessed: 19 October 2025).

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OLGA DORUL*

The Protection of Human Rights under the ECHR in Central and Eastern Europe: The Case of the Republic of Moldova**

ABSTRACT: The present study is dedicated to evaluating the participation of the Republic of Moldova in the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. This convention established the most effective regional mechanism for the protection of human rights. The state granted its citizens the possibility of exercising the right to individual application before the European Court of Human Rights by ratifying the European Convention on Human Rights in July 1997. Since then, more than 17,000 applications have been submitted to the ECHR alleging that the Moldovan authorities have failed to comply with the provisions of the European Convention on Human Rights. In over 600 cases, the European Court of Human Rights has found violations of the obligations assumed by the Republic of Moldova upon ratifying the European Convention on Human Rights.

In this article, we aim to address the Republic of Moldova's participation in the European Convention on Human Rights in an evolutive manner. Thus, after establishing the historical context in which this regional treaty was ratified, we will describe the actions of the Council of Europe in the Republic of Moldova, identify the most important human rights treaties developed under the auspices of the Council of Europe that have been ratified by the Republic of Moldova, and strive to provide a comprehensive overview of the implementation of the European Convention on Human Rights within the national legal order. Finally, this study explores several landmark cases in which the European Court of Human Rights has established general principles. These cases have led to substantive changes in the legal system of the Republic of Moldova. They illustrate how the

* PhD in Law, Associate professor at the International and European Law Department, Law Faculty, Moldova State University, Associate professor at the Cross-Border Faculty, "Dunarea de Jos" University of Galati, Romania. <https://orcid.org/0000-0001-8613-4066>, dorulolga@yahoo.com.

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Court's jurisprudence has influenced national law-making and institutional reform, contributing to the consolidation of the rule of law and the alignment of domestic norms with European human rights standards.

KEYWORDS: case-law, European Convention on Human Rights, European Court of Human Rights, implementation, Republic of Moldova.

1. Introduction

The collapse of the USSR, whose seeds of emergence are attributed to the rise of new reformist leaders in the Central Committee of the Communist Party of the Soviet Union after 1985, generated the possibility of involving the people of Republic of Moldova in the struggle for the national movement. Although this momentum faced a series of political attacks and attempts to undermine the situation in the state from both internal and external pro-imperial forces, the colossal effort of pro-democratic and national political forces resulted in the adoption of the Declaration of Independence by the Parliament on August 27, 1991, a moment appreciated by the newspaper "Moldova Suverană" as the "high point of Moldova's history".

The text of the Declaration of Independence of the Republic of Moldova, adopted on August 27, 1991, expressly contains provisions guaranteeing the exercise of social, economic, and cultural rights, and political freedoms for all the citizens of the Republic of Moldova, including those belonging to national, ethnic, linguistic, and religious groups, in accordance with the provisions of the Helsinki Final Act and subsequent documents, such as the Charter of Paris for a New Europe.

The dissolution of the USSR triggered the emergence of secessionist movements with aggressive messages and actions in several former socialist republics, leading to armed conflicts. One of these was the armed conflict of a non-international character, which later became internationalised in 1992 in the Republic of Moldova (the Transnistrian conflict). Consequently, the central authorities are unable to exercise effective control over the left bank of the Dniester River.

In these circumstances, in 1993, the OSCE established a Special Mission in the territory of the Republic of Moldova with the objective of facilitating the achievement of a lasting comprehensive political settlement based on CSCE principles and commitments, of the conflict in the Left-

Bank Dniester areas of the Republic of Moldova in all its aspects. To achieve this objective, the Mission, inter alia, provides advice and expertise, as well as a framework for other contributions, on such parts of a political settlement as the effective observance of international obligations and commitments regarding human and minority rights, democratic transformation, repatriation of refugees, definition of a special status of the Trans-Dniester region etc.

On February 8, 1995, the Parliament approved the Concept of the foreign policy of the Republic of Moldova,¹ which established that the main direction of foreign policy would be for the Republic of Moldova to make efforts to join the Council of Europe as soon as possible and to accede to the most important international conventions developed under the auspices of this highly authoritative institution. This would constitute an important moment in the achievement of European standards in the field of establishing the rule of law in the Republic of Moldova.

The Republic of Moldova became a member of the Council of Europe on July 13, 1995. The Parliament of the Republic of Moldova ratified the European Convention on Human Rights on July 24, 1997.

Since its accession to the Council of Europe, the organisation has supported the reforms launched in the Republic of Moldova, guided by the principles of democracy, human rights, and the rule of law. In this context, it is worth mentioning the Joint Programs of the Council of Europe and the European Union aimed at promoting and ensuring respect for fundamental human rights and freedoms: CoE and EU Joint Program “Partnership for Good Governance,” Phase I (2015-2018), Phase II (2019-2021); CoE Action Plan for Supporting Democratic Reforms in the Republic of Moldova (2013-2016); Program for Supporting Democracy in the Republic of Moldova (2010-2012); Program on Combating Ill-Treatment and Impunity in the South Caucasus, Moldova, and Ukraine (2009-2011); Peer-to-Peer II Program – Promoting National Non-Judicial Mechanisms for the Protection of Human Rights, especially the Prevention of Torture (2010-2012); Moldova-JU Program – Strengthening the Independence, Transparency, and Efficiency of the Judicial System in the Republic of Moldova (2006-2010); Program for Strengthening National Capacities for Reviewing, Implementing, Monitoring, and Promoting National Policies on Roma, as well as Combating Negative Stereotypes against Roma – EIDHR (2008-

¹ Hotărârea Parlamentului Nr. 368 din 08-02-1995 pentru aprobarea Concepției politicii externe a Republicii Moldova. In: Monitorul Oficial Nr. 20 art. 187 din 06-04-1995.

2009); Peer Project – Establishing and Activating a Network of Independent Human Rights Structures in CoE Member States That Are Not EU Members (2008-2009)

The Council of Europe Action Plan for the Republic of Moldova (2021-2024) is the third Council of Europe Action Plan for the country. The previous ones covered the periods 2013-2016 and 2017-2020. The current Action Plan² in the chapter on Human Rights provides for technical co-operation aiming to achieve the effective and timely execution of European Court of Human Rights (ECtHR) judgments, creation of a mechanism to monitor the implementation of Ombudsperson institution recommendations in the field of protection of persons deprived of their liberty from torture and ill-treatment, enhancing the effectiveness of the ECHR system at the national level, promoting human rights and dignity, anti-discrimination, hate speech and hate crime, children's rights, ensuring social rights etc.

Distinct areas of cooperation between the Republic of Moldova and the Council of Europe in the field of human rights protection include: Prevention of Torture (the visits of the European Committee for the Prevention of Torture to places of detention in order to assess how persons deprived of their liberty are treated); Fight against Racism (monitoring by the European Commission against Racism and Intolerance (ECRI)); Protection of Social Rights (the work of the European Committee of Social Rights based on the European Social Charter); Protection of Minorities (under the Framework Convention for the Protection of National Minorities, which provides for a monitoring system to evaluate how the treaty is implemented); Fight against Trafficking in Human Beings (the work of the Group of Experts on Action against Trafficking in Human Beings (GRETA) in monitoring the implementation of the Convention on Action against Trafficking in Human Beings), etc.

Since 2004, the Republic of Moldova has developed and implemented four National Human Rights Action Plans aimed at achieving national policy goals in the field of human rights, including the implementation of recommendations from international, regional, and national human rights mechanisms. The objective is to enhance the level of respect and enjoyment of each individual's rights and to effectively minimise the risks of human rights violations in the Republic of Moldova. In the latest National Program

² Action Plan for the Republic of Moldova 2021-2024. Council of Europe. CM(2020)161. 19 November 2020.

for Ensuring Human Rights Respect for the years 2024-2027,³ it is noted that:

From 1997 to 2023, the European Court of Human Rights (hereinafter “ECtHR”) found at least one violation in 516 (86%) of the 599 judgments in Moldovan cases, resulting in a total of 786 violations of human rights. In this regard, the Republic of Moldova surpasses countries like the United Kingdom, Germany, Portugal, Spain, and the Netherlands, which joined the European Convention on Human Rights (hereinafter “ECHR”) long before the Republic of Moldova has, as well as having populations significantly larger than Moldova’s. In 2023, the Republic of Moldova ranked 5th out of the 46 member countries of the Council of Europe in terms of the number of applications submitted per capita. Moldovan citizens turned to the ECtHR 6.5 times more frequently than the European average. Among the most frequent types of violations in Moldovan cases are: non-execution of national court judgments, inadequate investigation of ill-treatment and deaths, poor detention conditions, unlawful detention, irregular quashing of final judgments, and ill-treatment/excessive use of force by state agents.

Based on the aforementioned arguments, the National Program for 2024-2027 is centred on two priorities: general and specific objectives aimed at realizing human rights, prioritised through a consensus among public authorities, civil society, and national human rights protection institutions.

Every year, the National Human Rights Institution of the Republic of Moldova—the Ombudsman’s Office—publishes a report on the respect of human rights and freedoms in the Republic of Moldova. The report also addresses the implementation of the commitments assumed under the European Convention on Human Rights by the authorities. Thus, the 2023⁴

³ Hotărârea Guvernului Republicii Moldova Nr. 164 din 06-03-2024 cu privire la aprobarea Programului național privind asigurarea respectării drepturilor omului pentru anii 2024-2027. In: Monitorul Oficial Nr. 144-147 art. 313 din 11-04-2024.

⁴ Raport anual privind respectarea drepturilor și libertăților omului în Republica Moldova în anul 2023. [Online] Available at: <https://ombudsman.md/post-document/raport-anual->

report highlights deficiencies in the full implementation of the ECHR provisions, particularly in the areas of the right to a fair trial, the right to liberty and security, and others.

The realisation of rights guaranteed by the European Convention on Human Rights, as well as the nature and scope of state obligations under this international treaty, are subjects of ongoing interest within the academic community in the Republic of Moldova. In this context, author collectives, with the support of the Council of Europe, have successfully developed commentaries and thematic indexes on cases versus the Republic of Moldova that have been decided by the ECtHR. Noteworthy among these are the works “The European Convention on Human Rights. Commentary on the Judgments of the European Court of Human Rights versus the Republic of Moldova. Conclusions and Recommendations.”⁵ The content of this work presents each article of the Convention according to a structure comprising generalities, content, and recommendations. The general considerations with which each article begins define its scope of applicability, while the content is determined by the nature of the violations committed by national authorities and found by the Strasbourg Court. The analysis of each article pertains specifically to the judgments of the European Court versus the Republic of Moldova. The analysis reflects how the Court’s general principles were applicable to the particular circumstances of the cases against Moldova.

Another work developed by Moldovan scholars on this subject is “Table Index. Judgments of the European Court of Human Rights versus the Republic of Moldova. December 13, 2001 - December 31, 2018.”⁶ This work provides a synthesis of the ECtHR’s jurisprudence on cases versus the Republic of Moldova from the moment the state acceded to the European Convention on Human Rights until the end of 2018.

2. Human rights treaties concluded under the auspices of the Council of Europe to which the Republic of Moldova is a party

The Republic of Moldova is a party to more than 200 international treaties (including additional instruments) concluded under the auspices of the

privind-respectarea-drepturilor-si-libertatilor-omului-in-republica-moldova-in-anul-2023/
(Accessed: 22 August 2025).

⁵ Poalelungi et al., 2017.

⁶ Poalelungi et al., 2018.

Council of Europe. Among the most important human rights conventions to which the Republic of Moldova is a party, we mention the following:

- Council of Europe Convention against Trafficking in Human Organs adopted on 25/03/2015, entered into force 01/03/2018;
- Council of Europe Convention on preventing and combating violence against women and domestic violence 11/05/2011, 01/08/2014;
- European Convention on the Adoption of Children (Revised) 27/11/2008, 01/09/2011;
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 25/10/2007, 01/07/2010;
- Council of Europe Convention on the avoidance of statelessness in relation to State succession 19/05/2006, 01/05/2009;
- Council of Europe Convention on Action against Trafficking in Human Beings 16/05/2005, 01/02/2008;
- European Convention on Nationality 06/11/1997, 01/03/2000;
- Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 04/04/1997, 01/12/1999;
- European Social Charter (revised) 03/05/1996, 01/07/1999;
- European Agreement relating to persons participating in proceedings of the European Court of Human Rights 05/03/1996, 01/01/1999;
- European Convention on the Exercise of Children's Rights 25/01/1996, 01/07/2000;
- Framework Convention for the Protection of National Minorities 01/02/1995, 01/02/1998;
- European Charter for Regional or Minority Languages 05/11/1992, 01/03/1998;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 26/11/1987, 01/02/1989;
- European Convention on the Compensation of Victims of Violent Crimes 24/11/1983, 01/02/1988;
- European Agreement on Transfer of Responsibility for Refugees 16/10/1980, 01/12/1980;

- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 20/05/1980, 01/09/1983;
- European Convention on the Legal Status of Children born out of Wedlock 15/10/1975, 11/08/1978;
- European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes 25/01/1974, 27/06/2003.
- European Convention on the Repatriation of Minors 28/05/1970, 28/07/2015;
- European Convention on the Adoption of Children 24/04/1967, 26/04/1968.

Among the most recent treaties in the field of human rights protection, we mention the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law concluded on 05/09/2024, and also signed by the Republic of Moldova at that time.

3. Implementation of the European Convention on Human Rights into the legal order of the Republic Moldova

Moldova became a member of the Council of Europe on July 13, 1995. On July 24, 1997, the Parliament of the Republic of Moldova ratified⁷ The Convention for the Protection of Human Rights and Fundamental Freedoms was concluded in Rome on November 4, 1950. The Convention entered into force for the Republic of Moldova on September 12, 1997. To date, the Republic of Moldova has ratified the additional protocols to the Convention, with the exception of Protocol No. 12 and Protocol No. 14bis, which have only been signed.

In this context, it is necessary to point out that at the time of ratification of the ECHR, the Republic of Moldova made several reservations:

The Republic of Moldova declares that it will not be able to ensure compliance with the provisions of the Convention regarding omissions and acts committed by the authorities of the self-proclaimed Transnistrian

⁷ Hotărâre Nr. 1298 din 24-07-1997 privind ratificarea Convenției pentru apărarea drepturilor omului și a libertăților fundamentale, precum și a unor protocoale adiționale la această Publicat : 21-08-1997 în Monitorul Oficial Nr. 54-55 art. 502.

Republic on the territory effectively controlled by them until a definitive resolution of the dispute in that area is achieved.

Under Article 64 of the Convention, the Republic of Moldova formulates a reservation to Article 4, resulting in the possibility of applying penal sanctions in the form of correctional labour without deprivation of liberty, as provided for in Article 27 of the Penal Code, and, respectively, administrative penalties in the form of correctional labour, as provided for in Article 30 of the Code on Administrative Offenses. This reservation will take effect for one year from the date the Convention enters into force for the Republic of Moldova.

Under Article 64 of the Convention, the Republic of Moldova formulates a reservation to Article 5, paragraph 3, resulting in the continued issuance of arrest warrants by prosecutors, as provided for in Article 25 of the Constitution of the Republic of Moldova, Article 78 of the Criminal Procedure Code, and Article 25 of Law No. 902-XII of January 29, 1992, on the Prosecutor's Office. This reservation will take effect for six months from the date the Convention enters into force for the Republic of Moldova.

Under Article 64 of the Convention, the Republic of Moldova formulates a reservation to Article 5, resulting in the possibility of applying disciplinary sanctions against military personnel in the form of arrest by superior commanders, as provided for in Articles 46, 51-55, 57-61, and 63-66 of the Disciplinary Regulation of the Armed Forces, approved by Law No. 776-XIII of March 13, 1996.

The Republic of Moldova interprets the provisions of the second sentence of Article 2 of the first Additional Protocol to the Convention as not imposing additional financial obligations on the state regarding educational institutions with philosophical or religious orientation, other than those provided for by domestic legislation.

It is important to note that in examining the "jurisdiction" of the Republic of Moldova in terms of Article 1 of the ECHR during the admissibility stage of the *case of Ilie Ilașcu and Others vs. Moldova and the Russian Federation*,⁸ The European Court of Human Rights (ECHR) had the opportunity to rule on the effect of the reservation made by the Republic of Moldova, stating that it would not be able to ensure compliance with the provisions of the Convention regarding the omissions and acts committed

⁸ Grand Chamber Decision as to the Admissibility Of Application no. 48787/99 by Ilie Ilașcu and Others against Moldova and the Russian Federation, 4 July 2001. [Online]. Available at: <https://hudoc.echr.coe.int/eng?i=001-5948> (Accessed: 22 August 2025).

by the authorities of the self-proclaimed Transnistrian Republic on the territory effectively controlled by them until a definitive resolution of the conflict in that area. The Court clearly established: "... firstly, Moldova's declaration does not refer to any particular provision of the Convention. [...] Secondly, the Court notes that the declaration does not refer to a specific law in force in Moldova. The words used by the Moldovan Government – "omissions and acts committed ... within the territory actually controlled by such organs, until the conflict in the region is finally definitively resolved" – rather indicate that the declaration in question is of general scope, unlimited as to the provisions of the Convention but limited in space and time, whose effect would be that persons on that "territory" would be wholly deprived of the protection of the Convention for an indefinite period."

In view of the foregoing, the Court considers that the aforementioned declaration cannot be equated with a reservation within the meaning of the Convention, so that it must be deemed invalid. The Court consequently dismisses the Moldovan Government's preliminary objection based on the existence of the declaration.

With reference to the national implementation of the provisions of the European Convention on Human Rights, it is necessary to mention that in 1999, the Constitutional Court had the opportunity to express its general view on the implementation of international human rights treaties ratified within the legal system of the Republic of Moldova,⁹ in the terms of Article 4 of the Constitution of the Republic of Moldova, adopted on July 29, 1994, which provides:

(1) Constitutional provisions on human rights and freedoms shall be interpreted and are enforced in accordance with the Universal Declaration of Human Rights, with the conventions and other treaties to which the Republic of Moldova is a party.

(2) Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations.

⁹ Hotărîrea Curții Constituționale nr.55 din 14.10.1999 privind interpretarea unor prevederi ale art.4 din Constituția Republicii Moldova. In: Monitorul Oficial 118-119/64, 28.10.1999. [Online] Available at: <https://www.constcourt.md/ccdocview.php?tip=hotariri&docid=273&dl=ro> (Accessed: 22 August 2025).

The Constitutional Court of the Republic of Moldova was addressed with the following questions:

What is the meaning of the terms “covenants” and “other treaties”? Which international acts, from a constitutional point of view, fall under the category of covenants and which fall under treaties? What is the distinction between these acts?

Since when is the Republic of Moldova a party to covenants and international treaties: from the date of signing or from the date of ratification?

Which public authority is empowered to determine if a specific law of the Republic of Moldova is not in accordance with the provisions of covenants and international treaties?

Ruling on the aforementioned questions, the Constitutional Court of the Republic of Moldova found the following:

Article 4 of the Constitution guarantees not only the fundamental human rights and freedoms enshrined in the Constitution but also the universally recognised principles and norms of international law.

The term “other treaties to which the Republic of Moldova is a party,” as stated in Article 4 (1) of the Constitution, refers to the international treaties ratified by the Republic of Moldova, including international treaties to which the Republic of Moldova has acceded, which are enforceable for the Republic of Moldova.

The universally recognised principles and norms of international law, the ratified international treaties, and those to which the Republic of Moldova has acceded are an integral part of the legal framework of the Republic of Moldova and become norms of its domestic law.

If there are discrepancies between international covenants and treaties on fundamental human rights and the domestic laws of the Republic of Moldova, according to the provisions of Article 4 (2) of the Constitution, legal authorities are obliged to apply the international regulations.

These reasoning principles also govern the application of the European Convention on Human Rights within the domestic legal order of the Republic of Moldova, as it is an integral part of the legal framework of the Republic of Moldova and constitutes the norms of its domestic law.

On July 9, 2014, the Plenum of the Supreme Court of Justice adopted the Decision on the application of certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the courts. The Decision explicitly states that, in accordance with the

principle of subsidiarity, the primary responsibility for ensuring the respect of the fundamental rights and freedoms provided by the European Convention lies with the State. This principle presumes that, before resorting to the Convention's institutions, any claimant must have brought their complaint to all national institutions that could provide an effective and adequate remedy in the circumstances of the case, as the respondent State "must first be given the opportunity to remedy the situation referred to by its own means and within the framework of the national legal system."

Moreover, this principle not only reflects the existence of redress mechanisms, but also the primary obligation of all the authorities, especially the courts, to prevent violations by directly applying the European Convention in their decisions.

The European Convention and its Additional Protocols constitute international treaties to which the Republic of Moldova is a party. When applying them, the courts must consider the provisions of Article 4 (2) of the Constitution of the Republic of Moldova and the provisions of the Constitutional Court's Decision No. 55 of October 14, 1999, "On the Interpretation of Certain Provisions of Article 4 of the Constitution of the Republic of Moldova," which establishes that the European Convention is an integral part of the national legal system and, therefore, its provisions must be applied directly as any other law of the Republic of Moldova, having priority over other domestic laws that conflict with it.

In this regard, the primary responsibility for applying the provisions of the European Convention rests with the national courts. Thus, when adjudicating cases, the courts must verify whether the law or act that is to be applied and that provides for rights and freedoms proclaimed by the European Convention is compatible with its provisions. In case of incompatibility, the courts shall directly apply the provisions of the European Convention, as noted in the operative part of the judicial decisions issued.

Furthermore, the Decision indicates that the courts must consider that decisions, actions (or inactions) of state authorities, local public administration authorities, persons in positions of responsibility, judges, including criminal investigators and prosecutors, as well as state or municipal officials, must comply not only with the legislation of the Republic of Moldova but also with the universally recognised general principles, norms of international law, and international treaties ratified by

the Republic of Moldova, including the European Convention and its Protocols, as interpreted by the European Court.

When adjudicating cases, the courts must justify, in all instances, based on the established factual circumstances, the necessity of limiting human rights and freedoms. It should be taken into account that the limitation of human rights and freedoms is allowed only when there are sufficient and admissible grounds for such limitation, and when there is a balance between the legitimate interests of the person whose rights or freedoms are limited and the legitimate interests of other persons, the state, or society. The circumstances established by the court, which demonstrate the need to limit the rights and freedoms of the person, must be justified and reflected in the judicial acts.

Additionally, the Decision provides a series of explanations regarding how national courts should understand, in light of the ECHR's case law, the principle of legal certainty, the presumption of innocence, the reasonable time requirement, the burden of proof in establishing the guilt of the accused, and the determination of compensation for moral damage suffered, among others.

4. The impact of the judgments of the European Court of Human Rights (ECtHR) on the legal order of the Republic of Moldova

In 25 years of exercising the individual application by the citizens of the Republic of Moldova to the ECtHR (1997-2022), 568 judgments have been delivered, in which 730 violations of the European Convention on Human Rights (ECHR) by the Republic of Moldova have been found. The most frequently violated rights in the Republic of Moldova are:

- Right to a fair trial (Art. 6 ECHR) - 229 violations (31.4%);
- Prohibition of torture (Art. 3 ECHR) - 171 violations (23.4%);
- Right to liberty and security (Art. 5 ECHR) - 106 violations (14.5%);
- Right to an effective remedy (Art. 13 ECHR) - 65 violations (8.9%);
- Right to respect for private and family life (Art. 8 ECHR) - 43 violations (5.8%);
- Freedom of expression (Art. 10 ECHR) - 21 violations (2.8%).

The most common types of violations are:

- Non-enforcement of court judgments - 81 violations (11.1%);
- Deficient investigation of ill-treatment and deaths - 59 violations (8.1%);

- Annulment of irrevocable court decisions - 56 violations (7.7%);
- Detention in poor conditions - 48 violations (6.6%);
- Ill-treatment - 39 violations (5.4%);
- Unjustified arrest - 30 violations (4.1%);
- Deprivation of liberty contrary to national legislation - 28 violations (3.9%).¹⁰

Under Moldovan law, parties in ordinary court proceedings and ordinary courts of their own motion may raise an exception of unconstitutionality to question the constitutionality of laws and normative acts applicable to that particular case and to seek the staying of those proceedings until the Constitutional Court of Moldova rules on that question of constitutionality. The concept of a complaint filter is based on the idea that violations of human rights resulting from:

- legislation contrary to the Convention standards; both in terms of quality of law and its foreseeability as well as substantive and procedural provisions; or
- lack of adequate protection of human rights provided for by law could have been removed by the CCM if it had the chance to review them and followed the Convention standards. This concept of a complaint filter is substantively different from the proposal of the Ministry of Justice to introduce the “normative framework to create a national mechanism to filter the high amount of applications” addressed to the ECtHR.¹¹

In sum, it should be emphasised that the potential violations of human rights resulting either from “bad law” (legislation non-conforming to the Convention standards) or the lack of adequate and effective protection provided for by law (absence of legislation conforming to the Convention standards) could be dealt with by the CCM in the same way. The exception of unconstitutionality raised by parties to the judicial proceedings or trial courts on their own motion could challenge laws or the established practice of their application in relation to the Convention standards. In this sense, the exception of unconstitutionality raised in the course of judicial proceedings could improve the state of human rights protection without the need to seek

¹⁰ Goinic and Gribincea, 2022.

¹¹ Comparative Report of the Jurisprudence of the Constitutional Court of Moldova and of the European Court of Human Rights, 2017. p. 8 [Online] Available at: https://www.constcourt.md/public/files/file/suport_ue_cc/Com_Rep_ENG.pdf (Accessed: 22 August 2025).

recourse to the international human rights courts.¹²

When the European Court of Human Rights finds a violation, the country in question often has to take compliance measures and amend parts of its legislation. The Court's judgments also lead to frequent evolutions of national tribunals' case-law. For example, there is a single case against the Republic of Moldova stated on the ECtHR page: Case of Metropolitan Church of Bessarabia and others v. Moldova¹³ was established a violation of Article 9 of the ECHR, considering the arbitrary refusal of the Government to register the Metropolitan Church of Bessarabia (the applicant), which was to replace the church of the same name that existed until 1944. The founding act clearly stated that the applicant has no and will have no political aspirations, as it is subordinate to the Romanian Patriarchate. In Moldova, 117 parishes of this church were registered, with approximately one million believers. According to the former law on cults, the applicant had to follow the recognition procedure through a government decision. For eight years, the applicant submitted requests for recognition multiple times, without success. In its final decision, the Supreme Court of Justice argued that the dispute over the recognition of the applicant's cult was an administrative matter to be resolved by the Metropolitan Church of Moldova (a church subordinate to the Russian Patriarchate). After a subsequent request for recognition, the Prime Minister stated that the Metropolitan Church of Bessarabia does not represent a cult but rather a schismatic group within the Metropolitan Church of Moldova, and the recognition of the applicant depended on resolving the internal conflict between the Patriarchates of Bucharest and Moscow. Furthermore, several politicians and institutions expressed negative views regarding the opportunity for the applicant's recognition. Meanwhile, the parishioners and clergy of the Metropolitan Church of Bessarabia (MCB) have been subjected to persecution, including by law enforcement agencies.

The Strasbourg court ruled that, whilst the government had shown some tolerance to the MCB, this could not substitute for full recognition. For example, on several occasions, members of the MCB had been subjected to intimidation. The authorities did not protect MCB members because they had ruled that the MCB's activities were unlawful. In the circumstances, the refusal to recognise the MCB was disproportionate and

¹² *Ibid.* p. 14

¹³ *Case of Metropolitan Church of Bessarabia and others v. Moldova*, App. No. 45701/99, 13 December 2001.

violated the applicants' right to freedom of religion. In July 2002, the Law on Religious Denominations was changed. This allowed the Metropolitan Church of Bessarabia to be legally registered two weeks later. By 2006, the church had registered 86 parishes, 9 monasteries, 2 social missions with 73 sub-divisions, 2 seminaries and a school of ecclesiastical arts. In May 2007 a new Law on Religious Denominations was passed, which included further protections for religious freedom. In October 2007 the government authority responsible for registering religious denominations was dissolved, and full responsibility for the issue was passed to the Ministry of Justice. Further legal reforms to protect religious freedom followed in 2008 and 2009.¹⁴

We consider it appropriate to address in the context of this study other cases in which the ECtHR established the existence of a legal framework that does not meet the requirements of the ECHR provisions.

4.1. Institutional and Legislative Reform in the Republic of Moldova in Response to Inhuman and Degrading Treatment in State Custody

The *Corsacov v. Republic of Moldova* case¹⁵ (2006) was a landmark case in the jurisprudence of the European Court of Human Rights concerning inhuman and degrading treatment inflicted by state authorities. The applicant, a minor at the time of the events, was detained by the police and subjected to severe physical violence, including repeated beatings on the soles of his feet—a practice known as *falaka*. These abuses caused him serious injuries and required an extended period of hospitalisation. The Court qualified the treatment as torture within the meaning of Article 3 of the Convention. Moreover, the authorities failed to conduct a prompt and effective investigation into the complaints submitted, thereby breaching the procedural obligations associated with that article.

In response to this judgment, the Republic of Moldova was required to undertake a series of general reforms aimed at preventing similar future incidents and ensuring that the national system aligns with European standards regarding the protection of individuals in state custody. One of the first measures adopted was the creation of a specialised structure within the

¹⁴ Themes: Freedom of religion and belief Republic of Moldova. Metropolitan Church of Bessarabia v. Republic of Moldova 2001. Protection for religious freedom after church banned from existence. [Online] Available at: <https://www.coe.int/en/web/impact-convention-human-rights/-/protection-for-religious-freedom-after-church-banned-from-existence> (Accessed: 22 August 2025).

¹⁵ *Case of Corsacov v. Republic of Moldova*, App. No. 18944/02, 4 April 2006.

Prosecutor General's Office—an anti-torture unit—responsible exclusively for investigating cases of torture and inhuman treatment. This was followed by the designation of a network of prosecutors with special duties in the field, whose work was supported by methodological guidelines developed with the assistance of the Council of Europe.

On the legislative front, the Moldovan authorities introduced several essential amendments. The Criminal Code was amended in 2018 to toughen the punitive regime for acts of torture, removing the possibility of fines and mandating custodial sentences. The Code of Execution of Sentences was amended in 2012 and later supplemented in 2014 to require a comprehensive and confidential medical examination of persons upon both admission to and release from detention, with detainees also granted the right to be examined by an independent physician at their own request. These amendments were accompanied by a National Action Plan adopted in 2017, aimed at preventing ill-treatment and strengthening institutional capacity to respond effectively to abuse.

Institutional reform continued with the reorganisation of the Ministry of Internal Affairs, the introduction of new internal rules for identifying and reporting abusive practices, and the systematic professional training of operational personnel. Additionally, in 2018, a Professional Intervention Guide was adopted, establishing strict conditions under which force may be used by law enforcement officials, emphasizing the need for proportionality and limiting physical intervention to cases of absolute necessity.

In case of *Cosovan v. Republic of Moldova*¹⁶ the European Court of Human Rights determined that Moldova had violated Article 3 of the European Convention on Human Rights by failing to provide adequate medical treatment to a severely ill detainee, and by maintaining a lack of independence within prison medical services. The Court emphasised that having prison medical units subordinate to the prison administration compromised the patient-doctor relationship—posing serious systemic threats to detainee health care. In response to the Court's finding of systemic failures in the prison healthcare system—including inadequate medical care for seriously ill detainees and a lack of independent medical services—the Moldovan authorities adopted several comprehensive measures.

A key reform was the issuance of Order no. 343 by the Ministry of Justice on 29 December 2022, which restructured medical assistance in

¹⁶ *Ibid.*

prisons. The Order established obligations such as providing nursing services, appropriate nutritional support following medical protocols, and ensuring the confidentiality of medical data through ethical provisions.

Complementing this, the authorities developed an Action Plan (2023) that targeted staffing enhancements by increasing salaries, permitting the filling of vacant medical positions, and setting minimum standards for medical personnel in prisons. The plan also introduced accreditation initiatives for penitentiary hospital units, aligned health policies with national standards, migrated medical record systems to a digital platform, and expanded dental services for inmates.

Moreover, the Committee of Ministers of the Council of Europe, during its December 2024 session, reiterated the urgency of addressing key deficiencies such as the absence of accreditation for prison hospitals and specialist doctor shortages. It demanded clear strategic timelines to resolve these deficits and encouraged consideration of a transfer of medical service oversight from the Ministry of Justice to the Ministry of Health.

4.2. Judicial Reforms in the Republic of Moldova Influenced by ECtHR Jurisprudence on the Protection of Liberty and Security in the Custody of the State

Starting in the mid-2000s, the European Court of Human Rights (ECtHR) delivered a series of judgments against the Republic of Moldova that systematically addressed violations of Article 5 of the European Convention on Human Rights, concerning the right to liberty and security. These decisions progressively recognised flawed judicial practices in the application of coercive measures, gradually leading to significant legislative and institutional reforms.

The *Sarban v. Republic of Moldova* judgment¹⁷ (2005) was one of the first decisions to highlight the lack of genuine and concrete reasoning in pre-trial detention orders. The Court found that national courts had relied on stereotyped formulas in maintaining detention and criticised the failure to assess the specific risks cited by the prosecution. This judgment contributed to raising awareness of the need to revise the Code of Criminal Procedure and to establish clear obligations regarding the justification of custodial measures.

¹⁷ *Case of Sarban v. Republic of Moldova*, App. No. 3456/05, 4 October 2005.

The Musuc group of cases (2008–2010),¹⁸ including Musuc, Efros, Josan, and Gavrilovici, had a significant impact. In these cases, the ECtHR found that prosecutors and courts invoked stereotypical reasons such as the risk of absconding or influencing witnesses, without demonstrating these risks in a concrete manner. These judgments led to adjustments in the training methodology for judges and prosecutors and to the development of internal judicial policies focused on the proportional application of detention. Additionally, one of the legislative consequences was the introduction of the possibility for witnesses to be summoned to court hearings concerning the issue of pre-trial detention, thereby enhancing procedural guarantees and aligning national law more closely with European human rights standards.

Following the judgments delivered in the cases of Șarban, Cebotari, and Mușuc, amendments were initiated to the Criminal Procedure Code of the Republic of Moldova. These reforms aimed to refine the elements of the proportionality test and to eliminate stigmatizing reasoning that relied solely on references to the Criminal Code or assessed the application of preventive measures exclusively through the lens of potential criminal liability.

Colibaba v. Moldova (2007) reiterated the deficiencies in the practice of national courts, particularly the use of pre-trial detention without real and individualised justification. The Court again underscored the State's obligation to apply detention only as a last resort, which led to modest institutional efforts to encourage the use of alternative measures. However, what set this case apart was the troubling conduct of the Prosecutor General, who sent a letter to the applicant's lawyer accusing him of undermining the authority of the state and cooperating with foreign human rights organisations to discredit national institutions. The European Court of Human Rights found that this amounted to intimidation and an attempt to obstruct the applicant's right to individual petition under Article 34 of the Convention. This unprecedented action by a high-ranking state official highlighted not only the systemic misuse of pre-trial detention but also institutional hostility toward international human rights mechanisms and legal representation, revealing deeper structural resistance within the prosecutorial system to European standards of accountability and transparency. In the aftermath of the European Court of Human Rights decision in Colibaba v. Republic of Moldova, significant reforms were

¹⁸ *Case of Mușuc v. Republic of Moldova*, App. No. 42440/06, 6 November 2007.

implemented to strengthen the right of individual petition. The Council of Europe assessed these general measures through an extended monitoring framework and concluded that the Republic of Moldova has made substantial progress in aligning its practices and institutions with the standards of the European Convention.

A pivotal reform came in 2016 with the adoption of the Law on the Prosecutor's Office, which introduced a transparent selection process for the Prosecutor General via a public competition, followed by appointment by the President upon the recommendation of the Superior Prosecutorial Council. Simultaneously, an Ethical Code for Prosecutors was enacted, mandating prosecutors to comply with ECHR jurisprudence and uphold the rights of all parties involved in judicial proceedings.

Furthermore, to prevent abuses during detention, amendments were made in 2012 to the Code of Execution of Sentences. These amendments ensured that detained individuals receive a comprehensive medical examination upon admission as well as upon release. Crucially, detainees were also granted the right to be examined by an independent physician at their own request.

The Buzadji v. Republic of Moldova¹⁹ judgment, delivered by the Grand Chamber of the European Court of Human Rights (ECtHR) in 2016, marked a significant development in the Court's jurisprudence regarding the right to liberty under Article 5 § 3 of the European Convention on Human Rights (ECHR). At the heart of the case was the recurrent and prolonged use of pre-trial detention in Moldova, a practice that had drawn increasing criticism both domestically and internationally.

Tudor Buzadji, the applicant, was a former public official who had been arrested in 2007 on suspicion of committing economic offences during his time in office. While the initial arrest was deemed lawful, the case raised serious concerns about the repeated and seemingly automatic extensions of his pre-trial detention. The Moldovan courts justified these extensions using formulaic reasoning, without sufficient individualisation or critical assessment of Mr. Buzadji's specific situation. In its analysis, the Grand Chamber reiterated that pre-trial detention must be the exception, not the rule, and that once a person has been detained based on reasonable suspicion, any continuation of that detention must be justified by additional, relevant, and sufficient reasons. These may include the risk of absconding,

¹⁹ *Case of Buzadji v. Republic of Moldova*, App. No. 23755/07, 5 July 2016.

interference with the investigation, or the risk of reoffending, but such risks must be substantiated with concrete facts rather than presumed.

A critical failure identified by the Court was the domestic authorities' lack of consideration of alternative measures to detention, such as bail or house arrest. This omission constituted a direct breach of the state's positive obligation to explore less intrusive means of ensuring the proper conduct of criminal proceedings. Most notably, the Grand Chamber strongly criticised the generic and stereotypical reasoning employed by the Moldovan judiciary, emphasizing the need for consistency, clarity, and individual analysis when a person's fundamental right to liberty is at stake. This criticism was crystallised in the Court's own words:

The Court considers that the reasons given by the national courts for the applicant's detention and its extension were abstract and stereotyped. The judges merely cited the grounds for detention without attempting to show how they applied concretely to the specific circumstances of the case. Moreover, the national courts did not act consistently. Thus, those arguments — including the prosecutor's allegations of a risk that the applicant might abscond, influence witnesses, or destroy evidence — were rejected as unfounded and implausible. In other instances, the same arguments were repeated without any apparent change and without offering any explanation for this. The Court considers that, where such an important issue as the right to liberty is at stake, it is the duty of the national authorities to convincingly demonstrate that detention is necessary — something which was omitted in the present case. In light of the above, the Court concludes that there were no relevant and sufficient reasons to order and later prolong the applicant's detention. It follows that there has been a violation of Article 5 § 3 of the Convention.

This case has since become a key reference in ECHR case law concerning arbitrary detention, serving as a precedent in reinforcing the individualised justification requirement for continued deprivation of liberty and underscoring the subsidiarity principle, whereby national courts must diligently protect Convention rights before the ECtHR steps in.

Following the judgment in the Buzadji case, the Moldovan authorities concluded that the Republic of Moldova faces a variety of issues leading to

violations of Article 5 of the Convention. One of these issues is the improper implementation of the existing legislation by national authorities, as in many cases the Court does not find any defect in the national legislation itself — i.e., from the perspective of the quality of the law — but rather notes the failure of prosecutors and national courts to comply with the applicable rules through their proper application. This failure is, for example, due to a lack of diligence, manifested on one hand by the submission of unmotivated and unjustified requests for pre-trial detention, and on the other hand by the issuance of rulings and decisions lacking plausible reasoning to admit such requests. Nevertheless, situations in which the Court finds imperfections in the existing legislation should not be overlooked, especially concerning the absence of effective remedies for violations of Article 5 §§ 1–4 of the Convention. It is imperative that national authorities consider the Court’s jurisprudence in the process of drafting or adjusting legislation. Furthermore, in the absence of specific rules regulating a given situation, courts should apply directly the standards of the European Convention on Human Rights as developed by the Court’s case law, regardless of whether the cases concern the Republic of Moldova or other States Parties to the Convention.²⁰

In conclusion, the cumulative impact of these rulings pushed the Republic of Moldova from isolated, reactive responses toward a more structural approach in addressing pre-trial detention and safeguarding the right to liberty. From targeted legislative amendments to the development of public policies and professional training initiatives, the influence of ECtHR jurisprudence on the Moldovan justice system is both clear and ongoing.

4.3. The Impact of ECtHR Jurisprudence on Strengthening Legal Safeguards and the Oversight of Telephone Interceptions in Moldova

In the case of *Iordachi and Others v. the Republic of Moldova*,²¹ the applicants, members of the non-governmental organisation “Lawyers for Human Rights,” specialised in representing claimants before the Court, argued under Article 8 of the Convention that their right to freedom of

²⁰ Ministerul Justiției al Republicii Moldova. Studiu privind respectarea Articolului 5 din Convenția pentru apărarea drepturilor omului și a libertăților fundamentale de către Republica Moldova. Chișinău: Ministerul Justiției al Republicii Moldova, 2018. [Online] Available at: https://www.justice.gov.md/public/files/agent_guvernamental/A5_MDA.pdf. (Accessed: 22 August 2025).

²¹ *Case of Iordachi and Others v. Moldova*, App. No. 25198/02, 10 February 2009.

correspondence was not respected. They claimed that the national legislation regulating the interception of telephone communications lacked adequate safeguards against potential abuse by national authorities. The applicants did not allege that they had been directly subjected to specific instances of telephone or postal communication interceptions, nor did they initiate national-level proceedings in this regard. Telephone conversations fall within the scope of the notions of “private life” and “correspondence” as defined under Article 8. The mere existence of such legislation poses the risk of being monitored for those subject to it. This risk inevitably impacts the freedom of communication between users of postal and telecommunications services and constitutes “an interference by a public authority” with the applicants’ right to respect for correspondence.

The European Court of Human Rights (ECtHR) found that the Moldovan legislation did not clearly define the scope of offenses justifying interception warrants, as over half of the Criminal Code’s offenses were eligible, leading to overly broad application. The law also lacked clarity on which individuals could be targeted, particularly concerning the vague category of “other persons involved in a criminal offense.”

Furthermore, the legislation failed to set clear time limits on interception measures, allowing authorities to repeatedly obtain warrants after the six-month statutory period. The role of the investigating judge in authorizing interceptions was limited, raising concerns about judicial oversight. Additionally, there were no precise regulations on how intercepted data should be screened, preserved, or destroyed to ensure confidentiality and integrity.

The Parliament was nominally responsible for overseeing secret surveillance, but the law did not specify the procedures or mechanisms for this control, and no evidence that effective parliamentary oversight existed was presented.

Statistics revealed that in 2007, Moldovan courts approved nearly all interception requests, with thousands of warrants issued annually between 2005 and 2007, indicating potential overuse. The Court emphasised that telephone tapping is a serious interference with privacy rights and should only be authorised on the basis of strong and reasonable suspicion of serious criminal activity—a standard not clearly defined in Moldovan law.

Overall, the Court concluded that Moldova’s legal framework did not provide adequate safeguards against abuse of power in phone interceptions, rendering the interference with the applicants’ privacy rights under Article 8

of the European Convention on Human Rights unlawful. Consequently, a violation of Article 8 was found.

This ECtHR judgment served as the basis for amending the legislation of the Republic of Moldova regarding special investigative activities to ensure the protection of the secrecy of correspondence, as stipulated by Article 8 of the ECHR.

4.4. Protection for victims of domestic violence

Having ratified a multitude of international instruments in the area of human rights and fundamental freedoms, the Republic of Moldova has undertaken a series of commitments, among which is the development of a domestic normative framework in line with protected fundamental values. It is worth mentioning that the adoption of national laws inspired from the texts of the international and regional acts does not imply the automatic implementation of the international standards, in particular, in the area of non-discrimination. Quite often, the proper enforcement of the legal provisions is hindered by a series of sometimes concealed barriers, which remain unnoticed by the state authorities. Therefore, Moldova, which displays the traits of a patriarchal society, is knowledgeable about the multiple socio-economic, procedural and cultural barriers.

In recent years, the Republic of Moldova has strengthened its legal and regulatory framework on gender equality, equal treatment of women and men with regard to employment, education, health and other areas. Despite progress with regard to ensuring gender equality, the authorities still have to resolve many issues standing in the way of completely eliminating the differences between men and women and strengthening gender balance.

In this regard, we find it useful to present the case-law of the European Court of Human Rights (ECtHR) in cases against the Republic of Moldova in which the ECtHR had the occasion to rule on matters of violence against women. In all court cases, the Court found non-compliance with the provisions of Article 3 (prohibition of torture) and, selectively, Article 8 (right to respect for private and family life), or Article 14 (prohibition of discrimination) taken together with Article 3.

The first judgment regarding the Republic of Moldova in which the Court examined the issue of domestic violence as a form of discrimination on grounds of gender is in the case of *Eremia v. Moldova*.²² The case concerned an application by the applicants — a mother and her two

²² *Case of Cauza Eremia v. Republicii Moldova*, App. No. 3564/11, 28 august 2013.

daughters — in which they alleged a violation of their rights under the Convention due to the Moldovan authorities failing to undertake the necessary measures to protect them from the violent and abusive behaviour of her husband, that is, the children's father, a police officer. In particular, the applicants complained that the authorities had failed to take appropriate action to prevent domestic violence, safeguard them from its effects, examine their complaints, and sanction the perpetrator. They argued that the violence was gender-based and led to discrimination contrary to Art. 14 of the Convention.

In this particular case, the manner in which the authorities handled the case, in particular their knowledge of the danger of further domestic violence and their failure to apply effective measures against the perpetrator, the Court found that the State had failed to fulfil its positive obligations under Article 3 of the Convention and that there has therefore been a violation of this provision in respect of the first applicant.

Regarding the complaint about the alleged discrimination on grounds of gender, the Court referred to its findings that the first applicant was subjected to violence by her husband several times and that the authorities were aware of this. Additionally, the Court also noted that, having repeatedly been the victim of domestic violence, the first applicant requested an urgent examination of her application for divorce. Nevertheless, the judge apparently refused to consider such application as a matter of urgency and the president of the domestic court has not undertaken any official action with regard to the complaint filed in this regard. Furthermore, the first applicant was summoned to the local police commissariat and was persuaded to withdraw her complaint against the aggressor. Moreover, the complaint submitted by her lawyer regarding this fact was apparently left unanswered. It is also evident that the Department of Social Assistance and Family Protection failed to enforce the protective order on behalf of the applicant until 15 March 2011 and, allegedly, had repeatedly insulted the applicant by suggesting a reconciliation, because, at any rate, "she was neither the first nor the last woman beaten by her husband".²³ Finally, having recognised that he had beaten his wife, the aggressor was, in principle, exempted from any responsibility as a result of the prosecutor's order on the conditional suspension of proceedings.

²³ Aforementioned judgment., par. 87.

In the opinion of the Court, the combination of the above factors clearly shows that the authorities' actions were not a mere omission or delaying of the case regarding violence against the applicant; rather, these led to a repeated show of tolerance for violence and reflected a discriminatory attitude towards the first applicant as a woman.

This case illustrates the difficulties for victims of domestic violence in upholding their rights and obtaining protection and remedies. It includes several elements recurring in cases of domestic violence. For instance, lack of effective protection measures, not charging the perpetrator, dealing with the case as a private matter and discouraging the woman to file a complaint, applying gender stereotypes (this attitude undermines the victim's trust in the justice system and discourages them from upholding their rights).

In the case of *B. v. the Republic of Moldova* the applicant complained that she was subjected to repeated domestic violence by her former husband; however, the State authorities had not undertaken all the required measures to stop and prevent similar situations.

Despite multiple forensic reports confirming physical abuse and several court rulings imposing minor fines on the aggressor, these sanctions proved ineffective. The victim sought the eviction of her abuser from their shared apartment, but after initial favourable decisions, the Supreme Court overturned these rulings, dismissing evidence of systematic violence and prioritizing the husband's property rights over the applicant's safety. Subsequent violent incidents continued, leading to a limited protection order that prohibited contact but did not evict the husband, as the courts found no proven danger to their children and no alternative housing for him. The applicant appealed without success.

The European Court of Human Rights found violations of Articles 3 and 8 of the Convention, emphasizing the State's positive obligations to protect individuals from ill-treatment by private parties. It held that the national authorities' response—characterised by insufficient sanctions, failure to investigate serious allegations fully, and neglecting the impact of the ongoing shared living situation—was inadequate. The victim's ongoing fear and distress due to continuous abuse and forced cohabitation constituted inhuman treatment and interference with her private life. The Court concluded that Moldova failed to balance property rights against the applicant's right to protection and security, violating her Convention rights by not preventing further violence or ensuring her effective protection.

The Court found the practices of discrimination on grounds of gender in the cases of *Mudric versus Moldova*,²⁴ *T.M. and C.M. versus Moldova*.²⁵ Thus, in all the aforementioned cases, the Court found violations of Article 14 of the Convention in conjunction with Articles 3 and 8, on the grounds that the authorities had displayed a discriminatory attitude and failed to apply the national legislation adopted in order to provide protection against domestic violence due to preconceived ideas on the role of women in the family.

Following the adoption of the European Court of Human Rights judgments, a series of reforms were initiated, among which were the adoption and enhancement of the legislative framework on domestic violence, including Law no. 45/2007 on the Prevention and Combating of Domestic Violence. This law was subsequently amended and supplemented to provide stronger support for victims, such as the introduction of provisional protection orders and special measures aimed at safeguarding the physical and psychological integrity of victims.

Additionally, intervention mechanisms within the police and social institutions were strengthened to ensure a prompt and coordinated response to domestic violence cases. Specialised training programs were also established for law enforcement, judicial, and social assistance personnel to enhance their capacity to respond effectively and protect victims.

The monitoring system for domestic violence cases was improved through the creation of inter-institutional coordination structures tasked with overseeing the protection of victims' rights and ensuring the proper implementation of preventive measures.

In 2017, the Republic of Moldova signed the Council of Europe convention on preventing and combating violence against women and domestic violence ("Istanbul Convention"). Subsequently Moldova changed its laws on domestic violence. These changes, which have been in force since 2016, provide better support to victims of domestic violence and tougher sanctions against perpetrators, including criminal penalties for breaching a restraining order. The Moldovan authorities organised training courses for judges, prosecutors, and the police on preventing domestic violence as well as awareness and public information campaigns. Although initial progress has been achieved, systemic issues relating to domestic violence in Moldova have not yet been fully resolved and remain under the

²⁴ *Case of Cauza Mudric v. Republica Moldova*, App. No. 74839/10, 16 October 2013.

²⁵ *Case of Cauza T. M. Şi C.M. v. Republicii Moldova*, App. No. 26608/11, 28 January 2014.

supervision of the Council of Europe's Committee of Ministers. The Moldovan authorities are expected to take further action in due course.²⁶

4.5 The European Court of Human Rights' Reasoning and the Impact of Its Judgment on Moldova's Ethnic Identity Legislation

In the case of *Ciubotaru v. the Republic of Moldova*,²⁷ the applicant argued, inter alia, that there was a violation of his right to respect for private life due to the authorities' refusal to register his ethnicity as declared by him. In the case at hand, the applicant, whose parents were originally from Bălți, Bessarabia, Romania, claimed that at the time of collecting and recording information about his identity, the authorities refused to register his Romanian identity and imposed on him an ethnicity with which he did not identify.

Given that the notion of private life is a broad one, encompassing the physical and psychological integrity of a person, the protection under Article 8 extends to the private sphere of each individual, including the right to establish the details of their identity, such as ethnic identity, which is inherent to a human being.

Considering the highly sensitive nature of the issues raised in the present case, the Court distanced itself from the existing disputes within the Moldovan society regarding the ethnic identity of the main social group and focused primarily on the legislation of the Republic of Moldova and the official position of the respondent Government concerning Romanians and Moldovans.

The Court did not dispute the Government's right to require objective evidence of the claimed ethnicity. In the same context, it may be acceptable for the authorities to reject a request for official registration of belonging to a specific ethnic group when such a request is exclusively subjective and unsubstantiated. In the present case, the applicant apparently faced a legislative provision that made it impossible for him to provide any evidence to support his request. This is evident since the Law on Civil Status Acts, as well as current registration practices of ethnic identity, create insurmountable barriers for all those who wish to register an ethnicity different from that recorded by the Soviet authorities in the case of their parents.

²⁶ *Case of Eremia v. Moldova*, App. No. 3564/11, 28 May 2013.

²⁷ *Case of Ciubotaru v. Moldova*, App. No. 27138/04, 27 April 2010.

According to this article, the applicant could only change his ethnicity if he could prove that at least one of his parents was of Romanian ethnicity and was registered as such. This requirement represented a disproportionate condition in relation to the historical realities of the Republic of Moldova. Additionally, it was noted that Mr. Ciubotaru's claim was based, in principle, on his own subjective perception of his ethnicity. It is evident that he could have provided objective evidence to demonstrate his ties to the Romanian ethnicity, such as language, name, cultural affection, and others. However, no such evidence was required by the legislation in force in the Republic of Moldova.

Given the totality of the circumstances of the case, it cannot be argued that the entire procedure established for the applicant to change the designation of his ethnicity met the positive obligations of the Republic of Moldova to ensure his right to respect for private life. The state's omission actually led to the applicant's inability to have his claim to belong to a distinct ethnic group reviewed based on objective and corroborated evidence brought in support of this claim. Therefore, since the authorities did not comply with the positive obligation to ensure the applicant's right to respect for private life, there was a violation of Article 8 of the Convention.

Subsequently, in 2012 the Moldovan Parliament changed the law. It decided that, when someone reaches sixteen years of age, their ethnicity is registered at their request according to their own wishes. Information on birth certificates and other documents can also be altered at the request of an individual. Mihai's legal proceedings were re-opened, and the Moldovan courts found in his favour. They ordered the authorities to change the ethnicity on his birth certificate to Romanian.²⁸

4.6. The European Court of Human Rights' Ruling and Its Transformative Impact on Moldova's Legal Framework for Religious Freedom

The European Court of Human Rights' judgment in the case of Metropolitan Church of Bessarabia vs. the Republic of Moldova²⁹ was the first case in which the Court rendered a decision against the Republic of Moldova. This judgment marked a defining moment for Moldova's legal system, having a significant impact on the protection of religious freedom and subsequent

²⁸ *Ibid.*

²⁹ *Case of Metropolitan Church of Bessarabia and others v. Moldova*, App. No. 45701/99, 13 December 2001.

legislative reforms. In this case, the Court found that the refusal of Moldovan authorities to officially recognise the Metropolitan Church of Bessarabia, affiliated with the Romanian Patriarchate, violated the rights guaranteed under Article 9 concerning freedom of religion, as well as the right to an effective remedy under Article 13 of the European Convention on Human Rights. This decision compelled the national authorities to register this religious community.

Subsequently, in July 2002, the Metropolitan Church of Bessarabia was officially registered, acquiring legal personality and the capacity to defend its interests before national courts. The ECHR ruling spurred changes to the national legal framework, specifically leading to the revision of the Law on Religious Denominations, which aimed to facilitate the legal recognition of religious communities and align Moldovan legislation with the European standards set forth by the Court's decision. However, the Council of Europe's Committee of Ministers considered these amendments insufficient, urging authorities to clarify recognition procedures and improve judicial protection mechanisms for religious freedom. Several versions of a new law on religious denominations were also proposed and debated.

Beyond these legislative measures, the judgment had a profound effect on Moldova's legal and institutional culture. The ECHR decision was widely disseminated within the judiciary and national institutions, becoming a normative and doctrinal precedent that fostered a more neutral, pluralistic, and respectful approach toward religious diversity.

4.7. Protection of Freedom of Expression

The case of *Guja v. Republic of Moldova*³⁰ represents a landmark for the protection of freedom of expression and the rights of whistleblowers in the Republic of Moldova. The applicant, a journalist and civic activist, was dismissed after making public a critical report against a public official, exposing alleged irregularities in the management of public funds.

The European Court of Human Rights found that the measures taken against the applicant constituted a violation of his right to freedom of expression, guaranteed by Article 10 of the Convention. The judges emphasised the essential role of the media and whistleblowers in exposing corruption and abuses, as fundamental pillars of a democratic society.

³⁰ *Case of Guja v. Republic of Moldova*, App. No. 14277/04, 12 February 2007.

The Court also established that to justify a restriction on freedom of expression, the State must demonstrate that the measures are proportionate, necessary, and do not disproportionately affect the applicant's rights. In this case, the dismissal was deemed excessive and unjustified, having a deterrent effect on other potential whistleblowers.

The Guja judgment prompted a reassessment of national policies and practices regarding whistleblower protection. Subsequently, legislative amendments were promoted to strengthen the legal framework protecting individuals who report wrongdoing, including the adoption of mechanisms against retaliation.

The reforms included clarifying internal procedures for receiving and investigating complaints related to corruption and other misconduct, as well as guaranteeing the anonymity of whistleblowers. Furthermore, the judgment fostered a cultural shift within Moldova's institutional environment, promoting a more open attitude toward transparency and public accountability.

The case of NIT S.R.L.,³¹ examined by the European Court of Human Rights, is among the few in its case law in which the Court ruled in favour of the state, emphasizing that freedom of expression is not absolute and that maintaining balance in the media landscape is a legitimate interest in a democratic society. In the years following 2009, the private television station NIT S.R.L. became one of the most vocal media outlets in the Republic of Moldova, widely seen as sympathetic to the opposition Communist Party. In a politically tense climate, NIT regularly broadcast content critical of the pro-European government, particularly through its news bulletins. This editorial stance drew the attention of the Broadcasting Coordinating Council (CCA) – the national media regulatory authority.

The CCA began sanctioning the station for what it described as a lack of pluralism and objectivity, arguing that NIT violated broadcasting laws by presenting politically biased content. Over time, the penalties became increasingly severe, ultimately culminating in April 2012 with a drastic decision: the revocation of NIT's broadcasting license. The station was taken off the air, and the case was brought before the European Court of Human Rights (ECtHR).

NIT claimed that the actions of the Moldovan authorities were politically motivated, that it was the victim of an abuse of power, and that

³¹ *Case of NIT S.R.L. v. The Republic of Moldova*, App. No. 28470/12, 5 April 2022.

its right to freedom of expression – guaranteed under Article 10 of the European Convention on Human Rights – had been violated. It further argued that the sanctions were arbitrary and that it had been denied a fair process.

However, after ten years of legal proceedings, the Strasbourg Court found no violation of Article 10. The Court was convinced that the decision to restrict the applicant company's freedom of expression was based on relevant and sufficient reasons for the purposes of the "necessity" test under Article 10 § 2 of the Convention. The national authorities had acted within their margin of appreciation, striking a reasonable balance between the need to protect pluralism and the rights of others, on the one hand, and the need to protect the applicant company's right to freedom of expression, on the other. Therefore, the interference was deemed "necessary in a democratic society" within the meaning of Article 10 of the Convention, and no violation of that Article was found in the present case.

Likewise, the Court also found no violation of Article 6 (right to a fair trial) and Article 1 of Protocol No. 1 (protection of property), as claimed by the applicant.

Other cases examined by the European Court of Human Rights that resulted in changes to the national framework addressed: *the right to freedom of peaceful assembly*,³² *protection of private life of a person in a pre-trial detention*³³, *protection of property (equal compensation for the breach of intellectual property rights)*³⁴, *the right to a fair trial (breach of the principles of equality of arms and legal certainty expressed through allowing the state to lodge a lawsuit against the company despite the expiry of the general limitation period)*³⁵, *right to free elections (prohibition of public officials to hold dual citizenship)*³⁶.

With reference to *pilot judgments in cases against the Republic of Moldova*, it is worth mentioning the case of *Olaru and Others v. the*

³² *Case of Christian Democratic Peoples Party v. Moldova*, App. No. 28793/02, 14 February 2009; *Case of Hyde Park and Others v. Moldova*, App. No. 33482/06, 31 March 2009; *Case of Hyde Park and Others v. Moldova*, App. No. 45094/06, 31 March 2009; *Case of Hyde Park and Others v. Moldova*, App. No. 45095/06, 31 March 2009; *Case of Genderdoc-M v. Moldova*, App. No. 9106/06, 12 June 2012.

³³ *Case of Ostrovar v. Moldova*, App. No. 35207/03, 13 September 2005; *Ciorap v. Moldova*, App. No. 12066/02, 19 June 2007.

³⁴ *Case of Balan v. Moldova*, App. No. 19247/03, 28 January 2008.

³⁵ *Case of Dacia S.R.L. v. Moldova*, App. No. 3052/04, 18 March 2008.

³⁶ *Case of Tănase v. Moldova*, App. No. 7/08, 27 April 2010.

Republic of Moldova, where the applicants complained that court decisions awarding them social housing had not been enforced. In this case, the Court identified the existence of a structural problem: Moldovan social housing legislation granted privileges to a very wide category of persons. However, due to a chronic lack of funds available to local governments, final judgments awarding social housing were rarely enforced.

The Court, deciding to adjourn all similar cases, held that, within six months from the date on which the judgment became final, the Moldovan State had to set up an effective domestic remedy for nonenforcement or delayed enforcement of final domestic judgments concerning social housing and, within one year from the date on which the judgment became final, grant redress to all victims of non-enforcement in cases lodged with the Court before the delivery of the present judgment. Following this pilot judgment, the Moldovan Government reformed its legislation by introducing a new domestic remedy in July 2011 against non-enforcement of final domestic judgments and unreasonable length of proceedings.

Subsequently, in the case of *Balan v. the Republic of Moldova*, 24.01.2012 the new domestic remedy introduced in Moldova against non-enforcement of final domestic judgments and unreasonable length of proceedings, following the Court's pilot judgment in the above-mentioned case *Olaru and Others v. Moldova*. The Court concluded that Mr Balan had not instituted the new domestic remedy in Moldova, as he had been required, and therefore rejected his application for non-exhaustion of domestic remedies.³⁷

Finally, we find it appropriate to express our views on a category of cases initiated at the ECtHR by applicants from the Republic of Moldova against the actions of the self-proclaimed authorities in the Transnistrian region. Starting with the first case examined by the ECtHR, we follow how the High Court in Strasbourg admits the applications submitted against the governments of the Russian Federation and the Republic of Moldova, declaring them admissible, as they concern violations of the rights guaranteed by the Convention. Simultaneously, in establishing the jurisdiction of the Republic of Moldova under Article 1 of the Convention, the reasoning established in the case of *Ilaşco and Others v. Moldova* and

³⁷ Press Country Profile. Republic of Moldova. July 2024, [Online]. Available at: https://www.echr.coe.int/documents/d/echr/cp_republic_of_moldova_eng (Accessed: 22 August 2025).

Russia³⁸ is repeated, namely: the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the “Moldavian Republic of Transnistria”.

Specifically, in the spirit of this finding, the Russian Federation was held responsible both in the case of *Ilașcu and Others* and in the cases subsequently submitted to the jurisdiction of the ECtHR, where the applicants invoked violations on the left bank of the Dniester River of the *right to education*,³⁹ *the right to life*,⁴⁰ *protection of property*,⁴¹ etc.

In the case of *Mozer*,⁴² the applicant complained, among other things, that he was arrested and detained illegally by the “authorities of the Transnistrian Moldovan Republic (TMR)”. He also alleged that he was not provided with the medical assistance necessary for his health condition, as he suffered from bronchial asthma. He further claimed that he was held in inhuman detention conditions and was denied visits from his parents and his pastor. He argued that both states, Moldova and Russia, exercised jurisdiction and were therefore responsible for the alleged violations. The Russian Government asserted that the applicant was not within its jurisdiction, and therefore his application should be declared inadmissible *ratione personae* and *ratione loci* with respect to the Russian Federation. From the perspective of the Moldovan Government, the Republic of Moldova did not deny that it holds jurisdiction over the territory de facto controlled by the “TMR” but claimed that the applicant had failed to exhaust domestic remedies available in Moldova. In determining jurisdiction, the European Court of Human Rights (ECtHR) found no reason to distinguish this case from *Ivanțoc and Others*, *Catan and Others v. Republic of Moldova and Russia*, ultimately holding the Russian Federation responsible for violations of Articles 3, 5 §1, 5 §4, 8, 9, and Article 13 taken

³⁸ *Case of Ilașcu and Others v. Moldova and Russia*, App. No. 48787/99, 8 July 2004.

³⁹ *Case of Catan and Others v. the Republic of Moldova and Russia*, App. Nos. 43370/04, 8252/05 and 18454/06 19 October 2012.

⁴⁰ *Case of Pisari v. the Republic of Moldova and Russia*, App. No. 42139/12, 21 April 2015.

⁴¹ *Case of Turturica and Casian v. Moldova and Russia*, App. Nos. 28648/06, 18832/07, 30 January 2017; *Case of Pădureț v. Moldova and Russia*, App. No. 26626/11, 13 November 2017.

⁴² *Case of Mozer v. the Republic of Moldova and Russia*, App. No. 11138/10, 23 February 2016.

together with Articles 3, 8, and 9 of the European Convention on Human Rights.

5. Execution of ECtHR judgments by the Republic of Moldova

In 2023, the Committee of Ministers received 29 cases against the Republic of Moldova from the European Court for supervision of their execution (compared to 37 in 2022 and 54 in 2021). The cases in which the Russian Federation was held responsible for human rights violations in the Transnistrian region (in particular, *Catan and Others*, *Mozer*) have not been executed by that state, and the situation is being monitored by the Committee of Ministers of the Council of Europe.

In 2024, the Committee of Ministers decided to close its supervision of the execution of the *Catana v. the Republic of Moldova* judgment, concerning two disciplinary proceedings in 2012 against an investigating judge. The Court found a violation of the right to a fair trial on account of the lack of independence and impartiality of the Superior Council of Magistracy, which examined the disciplinary proceedings, due to the presence of the Prosecutor General and the Minister of Justice as ex officio members as well as the flawed procedure of selecting professors of law as members of this body. Following constitutional amendments in 2022, the Minister of Justice, the Prosecutor General, and the President of the Supreme Court of Justice were excluded from the Superior Council of Magistracy. The Council now comprises six judges, elected through a secret ballot by the General Assembly of Judges, and six lay members appointed by Parliament with a qualified majority, thus ensuring an open and transparent process. The Disciplinary Board of the Superior Council of Magistracy comprises four judges with at least two years' experience and three lay members from civil society, all of whom must have an impeccable reputation and at least seven years of experience in the field of law. Additionally, the Law on the Superior Council of Magistracy was amended in 2018, granting the Supreme Court of Justice the authority to examine both the admissibility and merits of decisions made by the Superior Council of Magistracy in disciplinary cases against judges. The Committee of Ministers also decided to close its examination of the case *A.C. v. the Republic of Moldova*, examined in the group *I.D. v. the Republic of Moldova*, concerning the breach of the applicant's right to file an individual application under Article 34 of the Convention due to the prison

administration's actions to intimidate or dissuade him from pursuing his case before the Court. To prevent such intimidation of detainees in the future the National Prison Administration (NPA), in 2022, issued a circular reflecting the Court's findings in the A.C. case. Additionally, regular inspections of penitentiary institutions are conducted to ensure compliance with the circular. Prisoners are interviewed, and their complaints are promptly investigated, enabling the NPA to take swift action if there are reasonable grounds to believe that intimidation has occurred.⁴³

In the context of examining the execution of judgments delivered by the European Court of Human Rights, the case of *Ozdil and Others v. the Republic of Moldova* (Application No. 42305/18, judgment of 11 June 2019) warrants particular attention. It exemplifies a serious breach by the State of Moldova in safeguarding fundamental legal protections under the European Convention on Human Rights, especially regarding arbitrary detention and expulsion.

In this case, five Turkish nationals – employed as teachers in private schools in Moldova – were detained and immediately deported to Turkey without being informed, provided legal representation, or afforded the opportunity to contest the decision. Their removal occurred before their asylum applications were adjudicated, raising significant concerns about due process and protection from arbitrary deprivation of liberty.

The European Court of Human Rights found that this operation violated Article 5 § 1, holding that the detention and transfer were neither lawful nor necessary and constituted arbitrary removal that contravened both national and international legal safeguards. Moreover, the Court determined that Article 8 was breached, as the applicants had established family and private life in Moldova, which was disrupted without lawful justification.

Despite the gravity of these violations, the Republic of Moldova has taken only limited steps towards implementation. A criminal case was opened, resulting in the ex-head of the Intelligence Service being fined for abuse of power. However, broader systemic remedies – such as the declassification of documents, a fully independent investigation, and

⁴³ Committee of Ministers. Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 18th Annual Report, 2024. [Online] Available at: <https://rm.coe.int/gbr-2001-18e-rapport-annuel-2024/1680b4d77d> (Accessed: 22 August 2025).

accountability for all officials involved – have been assessed as insufficient by organisations like Amnesty International.

On 13 November 2020, the Moldovan Constitutional Court declared unconstitutional several provisions of the Status of Aliens Act. This decision concerns notably provisions that do not provide for the notification of the reasons for which a third country national is declared an undesirable person on grounds of national security and do not allow the taking into account of justified concerns of ill-treatment in case of a forced return. The Constitutional Court sent a notification to the Parliament and set up provisional rules until the relevant legislative amendments are made. Under these rules, the aforementioned administrative decisions should contain a summary of the reasons, in a manner compatible with the legitimate interest of national security, which will be notified to the person concerned. Moreover, the Constitutional Court declared the Administrative Code's provision which limits the courts' competence to control the proportionality of administrative acts, as unconstitutional.⁴⁴

6. Conclusions

The general conclusions drawn from the study are that the Republic of Moldova has been and remains committed to democratic values and the ideals of human rights protection. The accession to the European Convention on Human Rights has enabled a thorough revision of the legal institutions inherited from the Soviet period, which were characterised by outdated concepts, rigid provisions, and burdened by an ideology, stereotypes, and prejudices that lagged behind those characteristics of European society at the end of the 1990s.

The cases analysed in this paper and the presented statistical data lead us to the conclusion that, despite the reforms undertaken – largely inspired by the objective of European integration pursued by the Republic of Moldova since its appearance on the political map of the world – systemic issues persist within the national legal system that severely impact the implementation of the provisions of the European Convention on Human

⁴⁴ Moldova: Constitutional Court's decision sparks review of law concerning expulsions and national security. [Online] Available at: <https://www.coe.int/el/web/execution/-/moldova-constitutional-court-s-decision-sparks-review-of-law-concerning-expulsions-and-national-security> (Accessed: 22 August 2025).

Rights. This has a negative effect both on the state's image and on the public perception of justice by the litigants.

Particularly in the realm of safeguarding the rights of individuals detained by the state, the jurisprudential developments of the European Court of Human Rights concerning cases against the Republic of Moldova have catalysed a significant transformation in both legal frameworks and institutional practices. These rulings have propelled the Moldovan authorities to move beyond reactive, ad hoc responses toward implementing comprehensive and systematic reforms. This gradual yet crucial shift reflects an ongoing alignment of the national criminal justice system with established European human rights standards governing the treatment and protection of persons deprived of liberty.

The cases examined by the High Court in Strasbourg against the Republic of Moldova have led to the establishment of general principles and have generated changes in the national legal framework through the general measures established by the Court or through the adoption of pilot judgments. Most of these decisions have been executed by the Republic of Moldova. However, the question of executing the judgments related to human rights violations in Transnistria – attributable to the Russian Federation – remains open, as does the uncertain effect of the European Convention on Human Rights in this part of the territory of the Republic of Moldova.

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BENJAMIN FLANDER*

The Protection of Human Rights under the European Convention on Human Rights in Slovenia **

ABSTRACT: This article explores the protection of human rights under the European Convention on Human Rights (ECHR) in the Republic of Slovenia. Beginning with a brief introduction to the Council of Europe (CoE) and its key legal instrument, the ECHR, the author examines the structure of the ECHR, the rights it guarantees, the mechanisms for enforcing those rights, and its influence on both domestic legal systems and international human rights norms. The author then outlines the historical development of human rights in Slovenia, describes Slovenia's relationship with the CoE from a human rights perspective, and reviews Slovenia's ratification of the Convention and other CoE treaties. In the core sections, the author discusses how the ECHR's human rights protection obligations are reflected in the Slovenian Constitution and provides an overview of the significant legislative processes that have occurred in Slovenia as a result of the implementation of the ECHR and ECtHR's judgments. Finally, the article analyses 15 landmark cases involving Slovenia before the European Court of Human Rights (ECtHR).

KEYWORDS: Convention for the Protection of Human Rights and Fundamental Freedoms, European system for protection of human rights, Council of Europe, constitutional protection of human rights obligations, Slovenia.

1. Introduction: The Council of Europe, the European Convention on Human Rights, and the European Court of Human Rights

The Council of Europe (CoE), founded in 1949, is the oldest political organisation on the European continent. Established in the aftermath of the

* Associate Professor of Law, Faculty of Criminal Justice and Security, University of Maribor; Senior Research Associate, Law Institute of the Science and Research Centre Koper, Slovenia. <https://orcid.org/0000-0002-2738-1590>, benjamin.flander@um.si.

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Second World War—a period marked by unprecedented human rights violations—the CoE was born from a desire to create a new order rooted in democratic values, protection of human rights, and the rule of law. It became the first international organisation in Europe focused on promoting democratic principles and human rights across the continent.¹

Since its founding, the CoE has established a common legal framework centred on the Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European Convention on Human Rights) and the European Court of Human Rights (ECtHR). The CoE currently has 46 member states, encompassing nearly all European countries and more than 700 million people. Its two main statutory bodies are the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

The Committee of Ministers, the CoE's decision-making body, consists of the foreign ministers of each member state or their permanent diplomatic representatives in Strasbourg. The Committee sets the CoE's policies, approves its budget and program of activities, and oversees the implementation of the ECtHR judgments and decisions. It also oversees committees dedicated to monitoring, including the European Committee on Legal Co-operation, the European Committee on Crime Problems, the Steering Committee on Media and Information Society, the Committee on Counterterrorism, and the Committee on Artificial Intelligence.²

The Parliamentary Assembly, composed of members of the national parliaments of each member state, elects the Secretary General, who leads and represents the organisation for a five-year term. It acts as a deliberative body, providing a platform for parliamentary representatives from the Council's member states to discuss, debate, and make recommendations on key political and social issues affecting the continent. It plays a crucial role in monitoring compliance with the Council of Europe's core values. It assesses whether member states are upholding democratic principles, protecting human rights, and maintaining rule-of-law standards.³

¹ Council of Europe, 2025. Though distinct from the European Union (EU), both organisations frequently collaborate, especially on issues related to human rights and legal reform. The EU and the CoE have developed a strong political and strategic partnership, including joint cooperation programmes in many countries, inside and outside Europe.

² Council of Europe, 2025a.

³ Council of Europe, 2025b.

Other key entities within the CoE are the Congress of Local and Regional Authorities, which is tasked with strengthening local and regional democracy in member states and brings together elected representatives of local and regional governments, and the Commissioner for Human Rights, an independent office established to advance human rights protection.⁴

The CoE's activities are wide-ranging, addressing various threats such as torture, violence (including violence against women, sexual abuse, and domestic violence), hate speech, extremism, terrorism, and corruption. It assists member states in protecting children from sexual exploitation and abuse, monitors the protection of minority rights and regional and minority languages, oversees elections, and supports judicial reforms within its member states. The CoE also advocates for equality and non-discrimination, freedom of expression, media freedom, and freedom of association and assembly.

The organisation has set standards in democratic citizenship education and developed a unique Youth Policy that brings together youth representatives and public authorities to amplify young people's voices in the democratic process. Confronted with a shrinking space for civil society in parts of Europe, the CoE also provides support for Belarusian democratic forces and civil society. Finally, the organisation is a leading provider of online human rights training for legal professionals, academics, and the public across Europe and beyond.⁵

The CoE promotes human rights primarily through international conventions, charters, agreements, protocols, and other legal instruments.⁶ Its key convention, the foundation of all its activities and a milestone in international human rights law, is the European Convention on Human Rights (ECHR).⁷ Altogether, the CoE has adopted nearly 230 conventions and other legally binding international treaties. Some of these instruments enable the CoE to monitor member states' progress in various areas and to make recommendations through the specialised monitoring bodies.

In addition to monitoring bodies, the CoE has several specialised advisory bodies addressing areas such as corruption prevention,

⁴ Council of Europe, 2025.

⁵ *Ibid.* The CoE's HELP Programme provides online training on human rights law for legal professionals, academics and the wider public across Europe and beyond.

⁶ *Ibid.*

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, Council of Europe, ETS 5, 4 November 1950.

constitutional matters, anti-racism efforts, doping in sports, and cultural matters. Notable monitoring and advisory bodies include the Committee for the Prevention of Torture (CPT), the Group of States against Corruption (GRECO), the European Commission for Democracy through Law (also known as the Venice Commission), and the European Commission against Racism and Intolerance (ECRI). Upon joining the CoE, all member states agreed to uphold human rights, democracy, and the rule of law, and to incorporate the standards, recommendations, and guidelines from CoE treaties and monitoring mechanisms into their national laws and practices.⁸

Drafted in the aftermath of the Second World War, the ECHR was created in response to the atrocities committed during the conflict, with the goal of safeguarding fundamental human rights and establishing a framework to prevent future violations. Signed in Rome in 1950,⁹ the Convention became the first instrument to give binding force to human rights protections in Europe, setting forth a range of enforceable rights and freedoms and establishing the ECtHR to ensure compliance. The ECHR has since become a cornerstone for human rights protection in Europe, directly influencing national legal systems and allowing individuals to seek redress at the international level through the ECtHR. Over the decades, the ECHR has evolved into a dynamic, living instrument of human rights protection, with the Court serving as its central enforcement mechanism.

The ECHR establishes a broad range of civil and political rights, as well as certain second-generation rights, which states parties are obligated to uphold and guarantee within their jurisdictions. Additionally, it includes provisions that, while not defining specific rights, are essential for the protection and enforcement of these rights. Over the decades, the Convention has been amended and supplemented by a series of Protocols that have expanded the rights guaranteed under the Convention and refined the procedures for their enforcement.

The ECHR provides for the establishment of the ECtHR, the judicial body responsible for enforcing the Convention.¹⁰ Individuals, groups, and states can bring cases before the Court if they believe that a state party has violated the rights guaranteed by the Convention. Although the ECtHR was established in 1959, individuals did not have direct access to the Court until

⁸ *Ibid.*

⁹ The ECHR came into force on 3 September 1953. Initially ratified by 12 states, the ECHR has grown in scope and membership, now applying to 46 states across Europe.

¹⁰ ECHR, Art. 19.

1998; prior to that, they had to apply to the European Commission of Human Rights. Protocol No. 11 to the ECHR, which came into force in 1998, abolished the Commission, expanded the Court, and allowed individuals to bring cases directly to it.

When a case is brought before the ECtHR, the Court initially determines whether the case is admissible. For a case to be deemed admissible, the applicant must have exhausted all domestic remedies, filed the application within six months of the final domestic decision, and raised a claim involving a violation of a right guaranteed by the Convention.¹¹ If the case is admissible, it moves to the merits stage, where the Court, together with representatives of the parties, examines the case, conducts investigations if necessary, and determines whether a violation of the ECHR has occurred.¹² At any stage of the proceedings, the Court may offer its assistance to the parties to facilitate a friendly settlement of the matter.¹³

The judges of the ECtHR are elected by the Parliamentary Assembly from a list of three candidates proposed by each State. They are elected for a non-renewable term of nine years.¹⁴ The Convention requires that candidates be under 65 years of age, possess high moral character, and have qualifications appropriate for high judicial office or be jurists of recognised competence. Although elected with respect to a specific State, judges perform their duties in an individual capacity, hear cases as individuals, and do not represent their State. They must remain independent and refrain from any activity incompatible with their duty of independence and impartiality.¹⁵ A judge may be dismissed from office only if the other judges, by a two-thirds majority, determine that the judge no longer meets the required conditions.¹⁶ The number of full-time judges serving on the Court is equal to

¹¹ *Ibid.*, Art. 35.

¹² *Ibid.*, Art. 38.

¹³ *Ibid.*, Art. 39.

¹⁴ *Ibid.*, Art. 22. Judges are elected by majority vote whenever a sitting judge's term has expired or when a new state accedes to the convention.

¹⁵ *Ibid.*, Art. 21. Judges are prohibited from having any institutional or similar ties with the state in respect of which they were elected. To ensure the independence of the court, judges are not allowed to participate in activities that may compromise the court's independence. Judges cannot hear or decide a case if they have a familial or professional relationship with a party.

¹⁶ *Ibid.*, Art. 23. Judges enjoy, during their term as judges, the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe.

the number of contracting states to the European Convention on Human Rights, currently 46.

The Court operates in several formations: as a single judge, in committees of three judges, in Chambers of seven judges, and in a Grand Chamber of seventeen judges. It may address both individual applications and inter-state cases. A single judge and a committee of three judges may declare an individual application inadmissible or remove it from the Court's list of cases when no further examination is required. While a Chamber decides on the admissibility and merits of both individual and inter-state applications, the decision on admissibility may be taken separately. If a case pending before a Chamber raises a serious question concerning the interpretation of the Convention or its Protocols, the Chamber may, at any time before issuing a judgment, relinquish jurisdiction in favour of the Grand Chamber.¹⁷ Within a period of three months from the date of the judgment of the Chamber, any party to the case may also request that the case be referred to the Grand Chamber, which delays the finality of the judgment until a new decision is rendered.¹⁸

The judgments may require the state to pay compensation or take specific remedial actions. States may be expected to implement the Court's rulings by making legislative or administrative changes to prevent future violations. In addition to regular judgments, which are binding on member states, the Court may, at the request of the Committee of Ministers, issue advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols.¹⁹ The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, under Rule 39 of its Rules of Court,²⁰ indicate interim measures to the parties to the proceedings before it. Such measures, applicable in cases of imminent risk of irreparable harm to a Convention right, which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation, may be adopted where necessary in the interests of the parties or the proper conduct of the proceedings.

¹⁷ *Ibid.*, Arts 27-30.

¹⁸ *Ibid.*, Art. 43.

¹⁹ *Ibid.*, Art. 47.

²⁰ Rules of Court, European Court of Human Rights, 28 March 2024, Strasbourg.

The Convention applies either directly or is incorporated into the national law of member states,²¹ and domestic courts often refer to the ECtHR's jurisprudence when interpreting national laws related to human rights. While the compliance of states with judgments is monitored by the Committee of Ministers,²² one of the most significant achievements of the ECHR is its influence on the domestic legal systems of its member states. The ECtHR has developed a vast body of case law that shapes how the Convention is applied across Europe. Its dynamic approach to interpretation—often referred to as the ‘living instrument’ doctrine—allows the Court to adapt its rulings to contemporary conditions and societal changes.²³

This article provides a comprehensive overview of how the ECHR is implemented in the Republic of Slovenia. It begins by outlining the historical development of human rights in Slovenia, emphasising that this development received significant impetus after the establishment of an independent and democratic Slovenia in 1991, followed by the promulgation of the new Constitution and the ratification or accession to key universal and regional international human rights instruments. The author then describes the relationship between Slovenia and the CoE from a human rights perspective, examines the ratification of the Convention and other CoE legal instruments by Slovenia, illustrates how human rights protection obligations arising from the ECHR are reflected in the provisions

²¹ In some states, such as the United Kingdom, the ECHR has been given legal effect through specific legislation, such as the 1998 Human Rights Act. In others, the ECHR takes precedence over national laws, meaning that domestic courts are required to ensure that national legislation conforms to the Convention's standards.

²² The supervision procedure over the execution and implementation of the judgment begins when the judgment becomes final. It lasts until the Committee of Ministers establishes that the state's measures are sufficient and decides to close the case.

²³ While most states comply with ECtHR judgments, some cases—particularly those involving systemic or structural issues – have resulted in delays or partial compliance. For example, in cases related to issues such as prison overcrowding, discrimination against minority groups, or restrictions on freedom of expression, states may be slow to implement necessary reforms. The Committee of Ministers plays a crucial role in overseeing the enforcement of judgments, but persistent non-compliance by certain states remains a challenge. Another significant issue is the ECtHR's growing caseload. The Court receives thousands of applications each year, leading to a backlog of cases and long delays. Protocol No. 14, which came into force in 2010, introduced reforms aimed at increasing the efficiency of the Court by allowing single judges to reject inadmissible applications more quickly and establishing a system for prioritising cases.

of the Slovenian Constitution, and outlines major law-making processes that have occurred in Slovenia as a result of the implementation of the ECHR and the ECtHR's judgments. Finally, the author analyses several landmark cases involving Slovenia before the European Court of Human Rights.

2. The historical context: A short outline of the development of human rights in Slovenia

The development of human rights in Slovenia took place within a Central European historical and cultural context. This development accelerated after the establishment of an independent and democratic Republic of Slovenia in 1991, followed by the promulgation of a new Constitution and the ratification or accession to key universal and regional international human rights instruments.

Until 1918, the territory of present-day Slovenia formed part of the Austrian Empire and, after 1867, the Austrian half of the dualist Austro-Hungarian Empire.²⁴ Throughout the Empire's existence, constitutional traditions and practices remained weak, as executive power – embodied above all in the emperor – was exercised with few real limitations. Nevertheless, on December 21, 1867, the so-called *December Constitution* was adopted. It comprised six fundamental laws, including the Fundamental Law on the General Rights of Citizens, which codified many of the rights and freedoms recognised in Europe at the time. These included the principle of ethnic equality among the 'tribes' of the Empire, who were entitled to preserve their own language, culture, and customs, as well as freedom of religion (for officially recognised faiths), freedom of worship, academic freedom, and the freedom to choose a profession. Other guarantees – such as protection against unlawful deprivation of liberty, the inviolability of the home, and the privacy of correspondence—were regulated in separate legislation.²⁵ However, according to Žontar, the frequent suspension of these rights during the final fifty years of the monarchy generated widespread discontent and undermined the legitimacy of Habsburg rule, particularly among the Slavic peoples. This erosion of trust and legitimacy

²⁴ The exception is the north-east region of Prekmurje, which belonged to the Kingdom of Hungary and later to the Hungarian part of the Empire.

²⁵ See Vilfan, 1996, p. 436.

may have contributed to the dissolution of the Empire in 1918, following the end of the First World War.²⁶

During the interwar period (1919–1941), Slovenia was part of the Kingdom of Serbs, Croats, and Slovenes, which was later renamed the Kingdom of Yugoslavia. On June 28, 1921, the Kingdom's Constitutional Assembly adopted the so-called Vidovdan (St. Vitus Day) Constitution (Serb. *Vidovdanski ustav*).²⁷ It formally proclaimed a parliamentary monarchy and, in Chapter II, titled Fundamental Rights and Duties of Citizens, broadly recognised numerous human rights and freedoms. Influenced by the Weimar and Belgian constitutions, Chapter III of the St. Vitus Day Constitution, titled Social and Economic Rules, stipulated several rights that are now recognised as human rights of 'the second generation' (e.g. economic and social rights). These articles appeared at the beginning of the Constitution, giving rights and freedoms a highly symbolic prominence.

Although regarded as progressive for its time, the St. Vitus Day Constitution's provisions on fundamental rights were often dismissed as little more than 'empty words on paper,' since they were rarely implemented in practice and were frequently undermined by subsequent legislation.²⁸ The right to vote, for example, was restricted to men over the age of 21, while no law was ever adopted to extend suffrage to women.²⁹ Even more problematic was the notorious Article 116, which empowered the king to declare or prolong a state of emergency – thus consolidating absolute power – in cases of war, mobilisation, public unrest, or rebellion, either throughout the Kingdom or in any of its parts, by decree and without parliamentary involvement. In practice, King Alexander I resorted to these extraordinary powers repeatedly, prompting criticism even from his closest advisors, who warned that the Kingdom had abandoned the rule of law and descended into a police state.³⁰

Overall, despite being modelled on some of the most progressive constitutions of its era, the St. Vitus Day Constitution in practice left the Karađorđević monarchy more closely aligned with the absolutist traditions

²⁶ Žontar, 2009, p. 57.

²⁷ St. Vitus Day Constitution (Ustav Kraljevine Srba, Hrvata i Slovenca – Vidovdanski ustav), adopted on June 28, 1921.

²⁸ Vilfan, 1996, p. 466. See also Ribičič, 1978.

²⁹ Bardutzky, 2022, p. 175.

³⁰ See Krkljuš, 2009, p. 324.

of the Habsburg and Ottoman Empires than with contemporary parliamentary monarchies. On January 6, 1929, King Alexander I dissolved the entire parliament and instituted the so-called January Sixth Dictatorship (Slov. *Šestojanuarska diktatura*). In 1931, the king unilaterally imposed the so-called September Constitution. Reintroducing monarchical absolutism, this constitution remained in power until the beginning of World War II.

In the post-war ‘Second Yugoslavia,’ a socialist-communist federal and multi-ethnic state, human rights were formally guaranteed in each of its three constitutions (1946/47, 1963, and 1974) at both the federal and republican levels. It is also worth noting that Yugoslavia was one of the 48 founding members of the United Nations. However, on December 10, 1948, it abstained from voting on the adoption of the Universal Declaration of Human Rights.

The Constitution of the Federal People’s Republic of Yugoslavia of 1946³¹ and the Constitution of the People’s Republic of Slovenia of 1947³² set out identical provisions on human rights in Chapter V, entitled Rights and Obligations of Citizens. These included several classical liberal rights, such as equality before the law, the prohibition of discrimination, protection against unlawful deprivation of liberty, the right of access to the courts, the prohibition of excessive punishment, the inviolability of the home, the privacy of correspondence, the right of asylum, and the rights to petition and appeal. In line with socialist principles, both constitutions also proclaimed a wide range of economic and social rights. Furthermore, they expressly guaranteed universal suffrage, granting all citizens over the age of 18 both the active and passive right to vote. Both constitutions also recognised the equality of men and women in all areas of life, including the right to equal pay.³³

However, in both documents, the chapter on rights followed sections on General Provisions, State Power, and the Socio-economic Order. This constitutional structure, and the notably authoritarian Article 42, which granted the state broad powers to protect the ‘freedoms and democratic

³¹ Constitution of the Federal People’s Republic of Yugoslavia (Ustav Federativne Narodne Republike Jugoslavije), adopted on 31 January 1946, Official Journal of the Federal People’s Republic of Yugoslavia, year -{II}-, No.10, Beograd, Friday, 1 February 1946.

³² Constitution of the People’s Republic of Slovenia, adopted on 16 January 1947, Official Gazette of the People’s Republic of Slovenia, year 4, No. 42, 11 October 1947. [Online]. Available at: https://www.sistory.si/cdn/publikacije/38001-39000/38564/ustava_ljudske_republike_slovenije.pdf (Accessed: 14 November 2024).

³³ See Bardutzky, 2022, p. 190.

order of the People's Republic and the federation,' effectively subordinated individual rights to the interests of the state. Even more problematic was the implementation of constitutional rights in practice, as in its early years, socialist Yugoslavia was a politically and economically centralised autocratic country, with power firmly held by Josip Broz Tito's Communist Party. Until 1952, a period of sharp political and penal repression took place across the entire country, including Slovenia.³⁴ Although the death penalty was used less frequently in Slovenia than in other republics, during this period (referred to as 'the darkest times of the Slovene criminal justice system'), Slovenian courts imposed the death penalty on more than two hundred people, most of whom were political dissidents. Hundreds of other political opponents, dissidents, and non-conformists were imprisoned or subjected to forced labour (even for minor offences) in Goli Otok, a special penal colony similar to the Soviet Gulag, which operated on a remote, desolate island off the Croatian coast.³⁵

In the late 1950s, following the Tito–Stalin split and the subsequent break with Soviet influence, Yugoslavia embarked on a path of political liberalisation, gradually moving away from the rigid 'iron communism' of the immediate post-war years toward a model of so-called 'welfare socialism.' The 1963 Constitution of the Socialist Federal Republic of Yugoslavia,³⁶ together with the 1963 Constitution of the Socialist Republic of Slovenia,³⁷ broadened the catalogue of human rights and introduced many significant innovations. While some rights reflected socialist ideology—most notably the primacy of labour and social rights—the constitutions also enshrined many universal rights that would not have been out of place in Western democracies.

Importantly, unlike the declaratory provisions of the 1947 Constitution, several fundamental rights in the 1963 Constitution were

³⁴ Flander et al., 2022.

³⁵ See Režek, 2002, p. 83. Only 3,4 % of those sent to Goli otok were Slovenians. Most political prisoners were Serbs or Montenegrins.

³⁶ Constitution of the Socialist Federal Republic of Yugoslavia, adopted on April 7, 1963, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 14, year XIX, April 10, 1963. [Online]. Available at: <https://www.pfsa.unsa.ba/pf/wp-content/uploads/2019/05/Ustav-SFRJ-iz-1963.pdf> (Accessed: 14 November 2024).

³⁷ Constitution of the Socialist Republic of Slovenia [*Ustava Socialistične Republike Slovenije*], adopted on 9 April 1963, Official Gazette of the Socialist Republic of Slovenia, No. 10/1963. [Online]. Available at: <https://www.iusinfo.si/zakonodajna-knjiznica/zakon/86305AAC/clen/1> (Accessed: 14 November 2024).

accompanied by explicit limitations on state interference. For instance, although the death penalty was formally retained, the new criminal law restricted its application to only a few serious offences and prohibited execution by hanging. Moreover, Slovenia, unlike the federation and other republics, became abolitionist after 1959, the year of its last execution. At the same time, the new Slovenian criminal code abolished life imprisonment, replacing it with a maximum custodial sentence of 20 years. Reforms to criminal procedure further strengthened defendants' rights by introducing additional procedural safeguards and expanding the role of defence attorneys, who had previously been largely symbolic participants in the process. Taken together, the reforms of the late 1950s and 1960s, which were more intensive in the northern than in other parts of the federation, positioned Yugoslavia among the most progressive countries in the world at the time with respect to criminal law and penal policy.³⁸

In keeping with the norms of a socialist state, the catalogue of rights in the 1963 constitutions began with labour and social rights. Article 37 limited working time to a maximum of 42 hours per week. Exceptions could only be temporary in some professions if this was absolutely necessary. The right to daily and weekly rest was a constitutional right. Also, there was the right to a yearly vacation which could not be shorter than 14 working days. There was also the right to a minimal salary. Article 38 guaranteed extensive social security for not only workers, but also for their family members.

Furthermore, both the federal and Slovenian constitutions included progressive provisions, particularly regarding gender equality. They established universal suffrage, granting both active and passive voting rights to all citizens aged 18 and older and granted women full equality with men in all spheres of life, including the right to equal pay and special workplace protections. This was the first time that Slovenian women were granted the right to vote. However, elections were largely a formality, offering little genuine choice as only state-approved candidates were permitted to run.

Notably, the 1963 Slovenian Constitution also introduced rights such as freedom of thought and opinion, which were absent in the 1947 Constitution. However, these freedoms were not absolute—they were restricted to prevent any 'abuse' that could undermine the socialist constitutional order. While some rights were ideologically driven, such as the right to social self-governance, solidarity, and the right to elect

³⁸ See Flander et al., 2023.

representatives within labour organisations, many other rights were genuinely universal and would not have been out of place in Western democracies.

While the 1974 constitutions of the Federal Socialist Republic of Yugoslavia³⁹ and the Socialist Republic of Slovenia⁴⁰ further expanded the catalogue of fundamental rights, the republican constitution introduced several novelties compared with the 1963 Constitution. For example, the Constitution recognised the right to make free choices regarding childbearing (e.g. a constitutional right to abortion), the right to a healthy environment, and several other provisions concerning rights and duties aimed at environmental protection. It was also the first time in Slovenian constitutional history that the protection of human dignity (in all phases of criminal procedure, including the execution of imprisonment) was expressly mentioned. Other new rights included the right to submit applications and make recommendations to state agencies (e.g. the right to petition) and a range of economic and social rights related to labour.

However, in general, both the federal and Slovenian constitutions of 1974 were imbued with the ideals of socialism and socialist values. Both constitutions stated in the chapter outlining their 'Fundamental Principles' that the freedoms, rights, and duties of individuals are the expression of 'socialist self-governing democratic relationships,' in which 'individuals liberate themselves from exploitation and all forms of arbitrary power, and through their work create the possibilities for holistic development, free expression, and the protection of their persons and human dignity.' The principles further stated that rights and freedoms could be limited only by the rights and freedoms of others and by the interests of the socialist community. The 1974 constitutions sought, at least in theory, to anchor human rights as a cornerstone of the self-governing socialist order.

³⁹ Constitution of the Socialist Federal Republic of Yugoslavia [*Ustav Socialističke federativne republike Jugoslavije*], adopted on 21 February 1974, Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 9/74. [Online]. Available at: https://www.yuhistorija.com/serbian/doc/Ustav_SFRJ_iz_1974.pdf (Accessed: 14 November 2024).

⁴⁰ Constitution of the Socialist Republic of Slovenia [*Ustava Socialistične republike Slovenije*], adopted on 20 February 1974, Official Gazette of the Socialist Republic of Slovenia, No. 6-44/74. [Online]. Available at: http://stres.a.gape.org/VTa/ustavna_pobuda_23_1_15/gradivo/18_1_ustava_SRS_1974.pdf (Accessed: 14 November 2024).

By the late 1980s, it had become evident that the legitimacy of the socialist regime was eroding and that popular aspirations for political freedom, progress, and the (idealised) values of the Western world could no longer be suppressed. Slovenia embarked on a path of transformation, signalling the democratisation of its political, economic, social, and legal systems. As part of the transition from socialism to democracy and capitalism, the country undertook extensive constitutional and legal reforms, introduced gradually through amendments to the 1974 Constitution.

Adopted even before the formal declaration of independence, these amendments established, among other things, a multi-party-political system and the promotion of entrepreneurship. In 1990, still within the Yugoslav Federation, Slovenia held its first democratic (multi-party) parliamentary elections. At the same time, the word “socialist” was removed from the official name of the republic.⁴¹

Among the reforms most directly related to human rights, the formal abolition of the death penalty—through constitutional amendments adopted by the Slovenian Assembly in 1989—was particularly significant. Although the death penalty had been prescribed and frequently applied throughout post-war Yugoslavia, the Slovenian judiciary, unlike its federal counterpart and those of other republics, had largely distanced itself from capital punishment by the 1960s.⁴²

By the early 1990s, it had become clear that a consensual dissolution of the Yugoslav Federation was unlikely, prompting the Slovenian authorities to take unilateral steps toward establishing a sovereign and independent state. On December 23, 1990, a plebiscite was held in which the citizens decisively voted for independence. Six months later, on June 25, 1991, the Slovenian Assembly proclaimed the Republic of Slovenia an independent state by adopting the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia.⁴³ In this Charter, the Assembly declared that ‘in the Socialist Federal Republic of Yugoslavia, human rights, national rights, and the rights of republics and autonomous regions are seriously violated, and that it does not function as a

⁴¹ See Grad et al., 2018, pp. 87-89. Despite the fact that the Federal Constitutional Court in Belgrade annulled these constitutional amendments, the Slovenian authorities continued with democratic reforms.

⁴² See Flander et al., 2022.

⁴³ Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije [*Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia*], Official Gazette of the Republic of Slovenia, No. 1/91-I.

legally regulated state.’ Furthermore, Paragraph III of the Charter explicitly guaranteed the protection of human rights and fundamental freedoms to all persons on Slovenian territory, irrespective of their ethnic origin and without any form of discrimination.

The events described above were followed by a ten-day war of independence, which culminated in the withdrawal of the Yugoslav People’s Army from Slovenian territory. These developments secured the de facto sovereignty of the newly independent Slovenian state and paved the way for the adoption of the new Constitution of the Republic of Slovenia on December 23, 1991.⁴⁴

The Constitution contains a comprehensive catalogue of human rights and fundamental freedoms, modelled on modern constitutional practice and international human rights standards. The commitment to protecting human rights is articulated in both the Preamble and the General Provisions, which declare that ‘within its own territory, the Slovenian state shall protect human rights and fundamental freedoms. It shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities.’ In its normative part, human rights and fundamental freedoms are codified in Chapters II and III.

Compared with the constitutions of the socialist era, which were marked by numerous political and ideological provisions, the new Constitution not only strengthened the protection of human rights and fundamental freedoms but also introduced several rights that were either newly regulated or defined in a different manner than in earlier constitutions.⁴⁵

In conclusion, the Slovenian Constitution stands on par with the modern constitutions of European states and with the leading international human rights instruments, particularly the two United Nations human rights covenants and the European Convention on Human Rights (ECHR). It provides a comprehensive framework for the protection of human rights and fundamental freedoms, in certain areas even surpassing internationally recognised standards.⁴⁶

⁴⁴ Ustava Republike Slovenije [*Constitution of the Republic of Slovenia*], Official Gazette of the Republic of Slovenia, No. 33/91-I.

⁴⁵ See Grad et al., 2018, p. 743.

⁴⁶ *Ibid.*

3. Slovenia and the Council of Europe's human rights mechanisms

3.1. Slovenia's membership of and participation in the Council of Europe

Slovenia joined the CoE on May 14, 1993. Representatives of the state, academia, and civil society widely agreed that accession marked a significant step in consolidating Slovenia's status as an independent and sovereign country within the international community. It also symbolised the country's commitment to protecting human rights and fundamental freedoms, as well as upholding democracy and the rule of law.

The prevailing view was that membership in the CoE affirmed Slovenia's recognition as a state capable of meeting established standards in the protection of human and minority rights, the functioning of democratic institutions, and the safeguarding of the rule of law. Over the past three decades, this perception has largely been confirmed. Nonetheless, this does not mean that Slovenia could not have performed better in implementing the European Convention on Human Rights (ECHR) and other CoE conventions during this period.

Before joining the CoE, the Slovenian Assembly adopted the *Declaration on Compliance with the Fundamental Conventions of the Council of Europe*.⁴⁷ In this document, the Slovenian parliament acknowledged the vital role of the CoE in strengthening cooperation and coexistence among European countries and underlined the organisation's particular emphasis on the preservation and advancement of human rights and fundamental freedoms as essential means of achieving this goal.

The Assembly further declared that Slovenia recognised the CoE's extensive body of conventions on human rights, which form an integral part of the system of modern democratic Europe. These conventions were described as embodying the generally recognised principles of European civilisation and complementing the global framework for human rights established by the *Universal Declaration of Human Rights*, as well as the two *International Covenants* and their additional protocols. At the time of Slovenia's accession to the CoE, these instruments already constituted part of Slovenia's domestic legal order.⁴⁸

⁴⁷ Declaration on Compliance with the Fundamental Conventions of the Council of Europe (*Deklaracija o spoštovanju temeljnih konvencij Sveta Evrope*), *Official Gazette of the Republic of Slovenia*, No. 45/90.

⁴⁸ *Ibid.*

The Assembly also emphasised that CoE human rights conventions are open only to states that genuinely ensure the realisation of the rights they enshrine. In this context, it expressed the conviction that the introduction of multi-party parliamentary democracy in Slovenia represented a decisive step toward guaranteeing the protection and fulfilment of fundamental rights and freedoms, in line with CoE standards.⁴⁹

Finally, the Assembly assessed that Slovenia had already met the conditions required of CoE member states, citing in particular the European Convention on Human Rights and its protocols and declarations as the most significant. The declaration concluded with a firm commitment that the Republic of Slovenia would fully respect the standards established by CoE conventions in its internal legal system.⁵⁰

The Republic of Slovenia is represented at the CoE by its Permanent Representative. At sessions of the Committee of Ministers, Slovenia is represented by the Minister of Foreign Affairs, while other sessions and meetings of CoE bodies are attended by the Permanent Representative and members of the diplomatic staff.⁵¹ The Permanent Representation closely follows the work of other CoE institutions, including the Parliamentary Assembly and the Congress of Local and Regional Authorities. It also monitors the implementation of judgments of the European Court of Human Rights (ECtHR) and actively promotes intergovernmental cooperation in the fields of human rights, the rule of law, and democracy. The current Permanent Representative of the Republic of Slovenia to the Council of Europe is Ambassador Berta Mrak.

In the Parliamentary Assembly, Slovenia is represented by a delegation of three representatives and three substitutes. While two representatives, including the chairperson, represent the government coalition, the third one represents the opposition. The national delegation to the Congress of Local and Regional Authorities also consists of three representatives and three substitutes.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ The work of the Permanent Representation of the Republic of Slovenia to the CoE can be followed on their website. [Online]. Available at: <https://www.gov.si/en/representations/permanent-mission-to-the-council-of-europe-strasbourg/about-the-permanent-mission-to-the-council-of-europe-strasbourg/> (Accessed: 14 November 2024).

By ratifying the ECHR, Slovenia recognised the right of individuals and other states to challenge decisions of its authorities before the ECtHR. The newly elected Slovenian judge at the ECtHR is Vasilka Sancin.

As a party to the vast majority of the treaties adopted by the CoE, Slovenia takes part in the monitoring and reporting procedures established under these treaties, which are carried out by the CoE Monitoring Committee and specialised monitoring bodies.

Although not on a regular basis, Slovenia—through its state institutions or, at times, private actors—also engages with the CoE's advisory bodies, such as the Venice Commission. In addition, it contributes to the reporting processes of the European Commission for the Efficiency of Justice and other specialised advisory bodies of the CoE.

3.2. The Council of Europe's pivotal human rights conventions ratified by Slovenia

Slovenia is a contracting party to the majority of the nearly 230 conventions and treaties adopted by the CoE. Unlike six of the nine core United Nations human rights instruments—already signed and ratified by the Socialist Federal Republic of Yugoslavia, Slovenia's predecessor state—all CoE treaties were ratified after 1991, following Slovenia's attainment of sovereignty and independence.

This section examines the timeline and process of ratification by the Republic of Slovenia of five CoE human rights conventions. These conventions have been selected as particularly significant, based on the criteria outlined by the Secretary General of the CoE in the *Report on the Review of Council of Europe Conventions*.⁵²

3.2.1. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms

The *European Convention on Human Rights* (ECHR), the CoE's central and most important treaty, was opened for signature on November 4, 1950, and entered into force on September 3, 1953, following ratification by ten

⁵² Council of Europe, 2012. Secretary General suggested in its Report to include under the criterion 'conventions considered as key' the conventions identified as 'core Council of Europe treaties' in the appendix to Parliamentary Assembly Resolution 1732(2010) on 'Reinforcing the effectiveness of Council of Europe treaty law' and for which the Committee of Ministers agreed that these were 'important conventions.'

member states. Slovenia signed the ECHR on May 14, 1993. Ratification followed on June 28, 1994, when the National Assembly of the Republic of Slovenia adopted, upon the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, the act on ratification of the Convention.⁵³ The Act ratified the Convention as amended by Protocols Nos. 2, 3, 5, and 8, and simultaneously ratified Protocols Nos. 1, 4, 6, 7, 9, 10, and 11.

Protocol No. 12, which establishes a general prohibition of discrimination, was signed on March 7, 2001. Ratification followed on July 7, 2010, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of Protocol No. 12.⁵⁴ Notably, Slovenia ratified the protocol before its entry into force.

Protocol No. 13, which prohibits the death penalty in all circumstances—including for crimes committed in times of war or imminent threat of war—was signed on May 3, 2002. Ratification followed on December 4, 2003, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of Protocol No. 13.⁵⁵ Slovenia ratified the protocol before its entry into force.

Protocol No. 14, which amended the Convention's control system, was signed on May 13, 2004. Ratification followed on June 29, 2005, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of Protocol No. 14.⁵⁶ Slovenia ratified the protocol before its entry into force.

⁵³ Zakon o ratifikaciji Konvencije o varstvu človekovih pravic in temeljnih svoboščin, spremenjene s protokoli št. 3, 5 in 8 ter dopolnjene s protokolom št. 2, ter njenih protokolov št. 1, 4, 6, 7, 9, 10 in 11 (MKVCP) [*Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11 (MKVCP)*], Official Gazette of the Republic of Slovenia – International Treaties, No. 33/94.

⁵⁴ Zakon o ratifikaciji Protokola št. 12 h Konvenciji o varstvu človekovih pravic in temeljnih svoboščin (MPKVCPB) [*Law on Ratification of Protocol No. 12 to the Convention on the Protection of Human Rights and Fundamental Freedoms (MPKVCPB)*], Official Gazette of the Republic of Slovenia – International Treaties, No. 46/10.

⁵⁵ Zakon o ratifikaciji Protokola št. 13 h Konvenciji o varstvu človekovih pravic in temeljnih svoboščin (MPKVCPB) [*Law on Ratification of Protocol No. 13 to the Convention on the Protection of Human Rights and Fundamental Freedoms (MKVCP13)*], Official Gazette of the Republic of Slovenia – International Treaties, No. 102/03.

⁵⁶ Zakon o ratifikaciji Protokola št. 14 h Konvenciji o varstvu človekovih pravic in temeljnih svoboščin, ki spreminja nadzorni sistem Konvencije (MPKVCP) [*Law on*

Protocol No. 15, which amends the Convention to help maintain the effectiveness of the European Court of Human Rights (ECtHR), was signed on June 24, 2013. Ratification followed on July 4, 2017, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of Protocol No. 15.⁵⁷ Slovenia ratified the protocol before its entry into force.

Protocol No. 16, which enables the highest courts and tribunals of contracting parties to request advisory opinions from the European Court of Human Rights (ECtHR) on questions of principle concerning the interpretation or application of the rights and freedoms defined in the Convention or its protocols, was signed on October 2, 2013. Ratification followed on March 26, 2019, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of Protocol No. 16.⁵⁸ Slovenia ratified the protocol before its entry into force.

In addition to the ECHR, the selection of the CoE's key human rights treaties includes the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Framework Convention for the Protection of National Minorities, the European Convention on the Exercise of Children's Rights, and the European Social Charter.

3.2.2. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which established a preventive, non-

Ratification of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (MPKVCP15)], Official Gazette of the Republic of Slovenia – International Treaties, No. 49/05.

⁵⁷ Zakon o ratifikaciji Protokola št. 15 o spremembah Konvencije o varstvu človekovih pravic in temeljnih svoboščin (MPKVCP15) [*Law on Ratification of Protocol No. 15 on amendments to the Convention on the Protection of Human Rights and Fundamental Freedoms (MPKVCP15)*], Official Gazette of the Republic of Slovenia – International Treaties, No. 28/17.

⁵⁸ Zakon o ratifikaciji Protokola št. 16 h Konvenciji o varstvu človekovih pravic in temeljnih svoboščin (MPKVCPB) [*Law on Ratification of Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (MPKVCP16)*], Official Gazette of the Republic of Slovenia – International Treaties, No. 1/15.

judicial mechanism as an important complement to the system of protection already provided under the ECHR, was signed by Slovenia on November 4, 1993. Ratification followed on February 2, 1994, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of the Convention.⁵⁹ Slovenia ratified the Convention before its entry into force.

Protocol No. 1, which ‘opens’ the Convention by allowing the Committee of Ministers to invite non-member states to accede to it, and *Protocol No. 2*, which provides that members of the European Committee for the Protection Against Torture (CPT) may be re-elected twice, were both signed on March 31, 1994. Ratification followed on February 16, 1995, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of the First and Second Protocols.⁶⁰ Both protocols were ratified by Slovenia before their entry into force.

3.2.3. The 1995 Framework Convention for the Protection of National Minorities

The *Framework Convention for the Protection of National Minorities*, the first legally binding multilateral instrument devoted to the protection of national minorities in general, was signed by Slovenia on February 1, 1995. Ratification followed on March 25, 1998, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of the Framework Convention.⁶¹ Slovenia ratified the Convention before its entry into force.

⁵⁹ Zakon o ratifikaciji Evropske konvencije o preprečevanju mučenja in nečloveškega ali ponižujočega ravnanja ali kaznovanja (MEKPM) [*Law on Ratification of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (MEKPM)], Official Gazette of the Republic of Slovenia – International Treaties, No. 2/94.

⁶⁰ Zakon o ratifikaciji Prvega in Drugega protokola k Evropski konvenciji o preprečevanju mučenja in nečloveškega ali poniževalnega ravnanja ali kaznovanja (MEKPMPDP) [*Law on Ratification of the*

The First and the Second protocol to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (MEKPMPDP)], Official Gazette of the Republic of Slovenia – International Treaties, No. 74/94.

⁶¹ Zakon o ratifikaciji Okvirne konvencije za varstvo narodnih manjšin (MKUNM) [*Law on Ratification of the Framework Convention for the Protection of National Minorities*

3.2.4. The European Convention on the Exercise of Children's Rights

The *European Convention on the Exercise of Children's Rights* was signed by Slovenia on July 18, 1996. Ratification followed on March 28, 2000, when the National Assembly, acting on the proposal of the Ministry of Justice and the Ministry of Foreign Affairs, adopted the act on ratification of the Convention.⁶² Slovenia ratified the Convention before its entry into force.

3.2.5. The European Social Charter (revised)

The *European Social Charter (Revised)* of 1996, which incorporates all the rights guaranteed by the 1961 Charter and its 1988 Additional Protocol while also introducing new rights and amendments, was signed by Slovenia on October 11, 1997. Ratification followed on May 7, 1999, when the National Assembly, acting on the proposal of the Ministry of Foreign Affairs, adopted the act on ratification of the revised Charter.⁶³ Slovenia ratified 95 of its 98 paragraphs. It accepted the system of collective complaints on 7 May 1999, but has not yet made a declaration enabling national NGOs to submit collective complaints. The Revised Charter was ratified before its entry into force.

3.3. Overview and assessment of reporting processes under the Council of Europe's conventions

Given that Slovenia is a contracting party to the vast majority of CoE conventions, including nearly all of the key human rights instruments, it is subject to extensive monitoring and reporting obligations before various treaty bodies and expert committees. These procedures—ranging from periodic reporting to state visits and follow-up recommendations—

(MKUNM)], Official Gazette of the Republic of Slovenia – International Treaties, No. 20/98.

⁶² Zakon o ratifikaciji Evropske konvencije o uresničevanju otrokovih pravic (MEKUOP) [*Law on Ratification of the European Convention on the Exercise of Children's Rights* (MEKUOP)], Official Gazette of the Republic of Slovenia – International Treaties, No. 86/99.

⁶³ Zakon o ratifikaciji Evropske socialne listine (spremenjene) (MESL) [*Law on Ratification of the European Social Charter (revised)* (MESL)], Official Gazette of the Republic of Slovenia – International Treaties, No. 24/99.

constitute a central mechanism for assessing compliance with CoE standards in human rights, democracy, and the rule of law.

3.3.1. The European Convention on Human Rights

Under the ECHR, Slovenia must report to the Committee of Ministers on the measures it has taken to implement judgments of the European Court of Human Rights. This reporting does not take the form of regular periodic submissions but is instead based on case-specific execution reports, supplemented by surveys of states' main achievements prepared by the Committee's Department for the Execution of Judgments of the ECtHR. According to the most recent survey, Slovenia has generally shown a cooperative approach, maintained a relatively strong record of execution, and undertaken significant legislative and institutional reforms. The principal achievements have been identified in the following areas: the actions of security forces and the conduct of effective investigations; conditions of detention and the availability of effective remedies; the right to liberty and security; the functioning of the justice system; freedom of expression; protection against discrimination on grounds of nationality; and the safeguarding of property rights.⁶⁴

Regarding the ongoing supervision of the execution of individual cases, the Committee's Department for the Execution of Judgments points out three cases. While two of these relate to the right to a fair trial, one case concerns the protection of property. For example, regarding the status of execution of *Bavčar v. Slovenia* (see *infra*, Section 6), the Department notes that the just satisfaction was paid and that in its decision of 7 January 2025, the Supreme Court decided not to grant the application's request for the protection of legality, as it held that the violation established cannot be remedied by amending or annulling the final judgment in the criminal proceedings. The judgment was translated, published and disseminated.⁶⁵

In sum, Slovenia tends to cooperate with the Committee of Ministers' supervision, submit required action plans or action reports, and generally take steps to implement both individual and general measures. In several areas where Slovenia passed legislation to redress past violations, it demonstrates readiness to respond to the demands of the Committee and the ECtHR. Nevertheless, the implementation process can be lengthy, with

⁶⁴ Committee of Ministers, 2025a.

⁶⁵ Committee of Ministers, 2025b.

delays in fully addressing complex or politically sensitive judgments (i.e. remedies for excessive length of proceedings, Roma and other minority rights issues, etc.).

3.3.2. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Under the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, following each periodic or *ad hoc* visit, the CPT issues a report with findings and recommendations. Member States must respond with a detailed report on measures taken. From recent and past visits (2012, 2017, 2024), the CPT's reports on Slovenia reveal several recurring strengths and areas of concern.

During the October 2024 visit, the CPT delegation examined the treatment of persons in two prisons, namely Koper and Ljubljana Prisons, and their conditions of detention. It also assessed the situation of persons living in the Lukavci Special Social Welfare Establishment. On the one side, the CPT established that the material conditions at Koper Prison are of a high standard. Treatment by staff (prison officers, welfare institution staff) was often assessed favourably (prisoners reported correct and professional treatment; there were no credible allegations of physical ill-treatment in recent periods in some visited institutions). Improvements were identified in regimes, such as increased efforts to provide out-of-cell time, organised activities for sentenced prisoners, and positive impressions in the social welfare establishments for care and treatment.⁶⁶

On the other hand, a pressing and persistent issue is overcrowding. Ljubljana Prison has cells below the CPT's minimum standard of 4 m² per prisoner in multiple-occupancy cells (some prisoners were on the floor, etc). Remand prisoners (those not yet convicted) under a "closed-door" regime are sometimes locked up 22 hours per day. This raises concerns about legitimate restrictions, mental health, meaningful access to exercise, etc. Living conditions in prisons are inadequate. Some multiple-occupancy cells are extremely cramped, so prisoners sleep on mattresses placed on floors where beds are insufficient, etc. These deficiencies are more than occasional; caused by structural overcrowding, they are of a systemic nature. Another concern is related to inter-prisoner violence and mixing of prisoners (these include tensions among prisoners, mixing of persons from

⁶⁶ CPT, 2025.

different cultural backgrounds without sufficient oversight or separation, verbal abuse and isolated incidents). There are also mental health and social welfare institution issues.⁶⁷

In its report, released in 2025, CPT further highlights that overcrowding negatively affects many other aspects of prison life (space, regime, staff performance). It notes both strengths (many prisoners said they were treated professionally; regime efforts) and persistent deficits (cells too cramped; long hours locked up; activity programmes too limited, especially for remand prisoners). At social welfare establishment Lukavci, while treatment was generally positive, CPT expressed concerns about the use of chemical restraint, unclear legal basis for certain restrictive measures, and risk to health from some medical practices.⁶⁸

Overall, many of the problems identified by CPT in its reports on Slovenia are not isolated but systemic (overcrowding, understaffing, insufficient space, etc.). This suggests that remedies need to be legislative, resourcing, and administrative. Slovenia has cooperated with CPT visits and has implemented several reforms (including improvements in detention conditions and the introduction of independent investigative mechanisms after *Matko v. Slovenia*). However, challenges persist in areas such as prison overcrowding and police accountability.

3.3.3. The Framework Convention for the Protection of National Minorities

Under the *Framework Convention for the Protection of National Minorities* (FCNM), Slovenia submits regular state reports, which are assessed by the Advisory Committee. Civil society contributions and shadow reports also play a role. In general, the country has received positive evaluations for its legal framework protecting the Italian and Hungarian minorities. Yet, recurring criticisms highlight insufficient attention to the Roma community, particularly in access to housing, education, and utilities. Implementation of recommendations in this field has been uneven.

Slovenia's Sixth Report on the implementation of the Framework Convention was received by the Advisory Committee on 25 July 2023. The report covers the implementation of the FCNM in Slovenia during the period from submission of the Fifth Report (6 February 2020) until 6 July 2023. It responds to the Fifth Cycle's recommendations by the Advisory

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

Committee and the Committee of Ministers, and includes legislative, policy, and practical measures taken. Key topics addressed include: legal and institutional framework, especially constitutional protections and definitions of national minorities; measures to protect minority identities, languages, culture, media and education; implementation of anti-discrimination protections; participation of minorities in public life, including representation, advisory bodies, and local self-governance; specific attention to the Roma community's living conditions, basic utilities, infrastructure, and equal treatment in municipalities; measures to combat hate speech and hate-motivated offences; enhancement of media broadcasting and public service offerings for minority communities; personal data protection, census methods, statistical surveys and disaggregation of data relating to ethnic affiliation/language competence; awareness-raising and outreach.⁶⁹

In sum, Slovenia's Sixth Report shows a generally strong commitment to implementing FCNM obligations, with many practical steps, legal reforms, and funding dedicated to minority rights. While the institutionally recognised protections for Italian and Hungarian national communities remain robust and Roma rights have been receiving increasing attention, persistent challenges revolve around ensuring equality in practice, not just in law, so that minority communities have actual access to services and infrastructure, that discrimination is effectively prevented and remedied, that minorities can fully participate in public life, and that data is available to track progress.⁷⁰

3.3.4. The European Social Charter (Revised)

According to the provisions of the *European Social Charter (Revised)*, Slovenia submits periodic thematic reports to the European Committee of Social Rights (ECSR). Additionally, Slovenia is subject to collective complaints, although it has not accepted all related procedures (see *supra*, Section 3.2.). The reporting process has highlighted, *inter alia*, deficiencies in labour rights, health, social security and social protection, children and families, migrants, and non-discrimination.

The latest findings of the ECSR on Slovenia from March 2024 concern key findings, strengths, non-conformities, and recommendations on

⁶⁹ Advisory Committee on the Framework Convention for the Protection of National Minorities, 2023.

⁷⁰ *Ibid.*

Children, Families and Migrants (the conclusions relate to Articles 7, 8, 16, 17, 19, 27, and 31). The ECSR found 23 instances of conformity in Slovenia under the reviewed provisions. Some of these include: maternity protections (paid maternity leave provisions, protection against dismissal for pregnant women or on maternity leave, and safe working conditions for maternity); protection for young persons (prohibition of dangerous or unhealthy work for under-18s; other protections for minors in work); safe schooling and education (free primary and secondary education with equal access for foreign, stateless or temporary protection children under same conditions as citizens); child protection and welfare (examples include prohibition of corporal punishment in all settings, measures for assisting children in distress, and public awareness and services for victims of exploitation including digital). Additionally, the ECSR noted specific improvements in: (a) nursing breaks (legislative amendments were introduced so that nursing mothers up to 18 months old are entitled to paid nursing breaks – this was a prior non-conformity under Article 8 para. 3) and (b) mediation services for family law disputes (mediation is now mandatory in various stages of proceedings under the Family Code where relevant and state-funded mediation for families is available).⁷¹

The ESCR also identified 13 situations of non-conformity. Key ones include: (a) children under 15 may perform ‘light work’ during school holidays for seven hours/day and 35 hours/week, which the Committee considers excessive, hence non-conformity; (b) the duration of light work for children subject to compulsory education during holidays is still excessive (this may interfere with their education and welfare); (c) for young persons under 16, the permitted working hours are still excessive (exceeding acceptable daily/weekly limits); (d) apprentices’ remuneration at the end of their apprenticeship period is not always sufficiently high (allowance schemes are not always aligned with the thresholds the Committee considers fair); (d) family benefits do not provide a sufficient income supplement for a significant number of families (in many cases the financial support is inadequate given cost of living); (e) a serious non-conformity was found with respect to immediate expulsion of children in irregular migration situations without providing them assistance.

⁷¹ ESCR, 2024.

Based on the Conclusions, the Committee recommends that Slovenia should:

- review and adjust working-hour limits for children (especially under 15 or those in compulsory education) to comply with ‘light work’ limits in terms of hours/day and week;
- ensure apprentice remuneration at the end of training is sufficient relative to adult wage/minimum wage benchmarks;
- strengthen family benefit systems to ensure that they provide adequate income for families, particularly low-income ones;
- enhance protection and assistance for children in irregular migration situations, ensuring they are not expelled without assistance and receive legal/social support;
- continue to monitor implementation of existing reforms in education and health, particularly ensuring non-discrimination and inclusive access.

In sum, the ESCR report reflects both legal compliance (laws and amendments) and ongoing practical gaps. Slovenia performs well in many areas, including maternity rights, education access, certain protections for children and young persons, and legal and regulatory reforms in some domains. Nevertheless, some issues remain persistent: child labour standards (hours of light work, school holiday work), apprentice pay, and family benefits adequacy. The non-conformity findings tend to relate to quantitative limits (hours, amounts) and to vulnerable groups (young children, migrants).

3.3.5. Other Specialised Bodies

Venice Commission:

To date, the Venice Commission has issued only one opinion specifically concerning Slovenia: the 2000 *Opinion on the Constitutional Amendments Concerning Legislative Elections in the Republic of Slovenia*.⁷² The Commission was asked to assess whether the amendments and proposed constitutional changes were compatible with democratic principles and consistent with European constitutional practice.

In this case, a qualified parliamentary majority had adopted a constitutional amendment establishing a proportional electoral system at the

⁷² Venice Commission of the Council of Europe, 2000.

constitutional level. The political opposition—including part of the parliamentary minority and segments of the professional public—argued that the amendment conflicted with a prior Constitutional Court decision, which had held that the majority electoral system had received the strongest support in a legislative referendum.⁷³

The Venice Commission found that the National Assembly's adoption of amendments to the Constitution, in strict compliance with the latter's relevant provisions, was not in conflict with European democratic standards.⁷⁴ This opinion is frequently cited in debates on electoral fairness and the constitutional role of elections in Slovenia. It continues to serve as a key reference point in subsequent scholarship and practice on electoral reform.

European Commission against Racism and Intolerance (ECRI):

Through country monitoring cycles, ECRI issues reports that require government responses. Slovenia has engaged constructively, though criticisms persist, *inter alia*, regarding the integration of Roma and the treatment of migrants.

The latest conclusions of the ECRI on the implementation of the recommendations in respect of Slovenia (adopted on 7 December 2021 and published on 3 March 2022)⁷⁵ deal with two interim follow-up recommendations chosen from ECRI's Fifth Monitoring Cycle: (a) recommendation on hate speech and incitement and its effective prosecution, and (b) recommendation on disaggregated equality data. These conclusions assess what Slovenia has done up to 30 June 2021 to implement them.

ECRI had noted serious shortcomings in prosecuting hate speech in Slovenia, particularly that potential hate-speech acts which could amount to criminal offences are rarely prosecuted. Legal barriers included a requirement under Article 297(1) of the *Criminal Code* that the conduct must 'jeopardise or disturb public law and order, or [use] force or threat, verbal abuse or insult' and a legal opinion interpreting these conditions cumulatively. In relation to this recommendation, ECRI noted the following developments: (a) a working group on hate speech was established in the Supreme State Prosecutor's Office (2018), later transformed into a working

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ ECRI, 2022.

group on hate crime (2021); (b) the Supreme Court's judgment of 4 July 2019 broadened the interpretation of Article 297, allowing for alternative (rather than cumulative) interpretation of conditions and removing the requirement that there be a concrete danger to public order; (c) guidelines have been issued from the Prosecutor General's Office to prosecution and police authorities reflecting the Supreme Court's interpretation.⁷⁶

ECRI concluded that this recommendation has been only partially implemented for several reasons: (a) a proposal to formally align prosecutorial practice (via guidance) fully with the 2019 Supreme Court decision was rejected by the Council of Senior State Prosecutors; (b) though police handling of hate speech cases increased substantially, the number of indictments issued by prosecutors remains low; (c) victims still face difficulties in obtaining remedies when complaints are dismissed or prosecutions not initiated (there remains legal uncertainty about who qualifies as a victim, especially when speech is directed at a community rather than an individual).⁷⁷

Regarding the recommendation on disaggregated equality data, ECRI recommended that Slovenia collect disaggregated equality data to help counter racial discrimination. Such data must be collected with respect for data protection rules, confidentiality, voluntary self-identification, etc. The following developments were identified: (a) Slovenia established an informal working group in 2019 including various bodies (Ministry, Information Commissioner, Equality Advocate, Ombudsman, NGOs) to examine data collection; (b) Prosecutor General's Office adopted a practice to mark prosecutorial files for criminal offences involving bias motives, which helps with identification for possible data processing; (c) a draft Personal Data Protection Act (May 2021) was published, including provision to allow processing of personal data on national or ethnic origin (with consent, etc.).⁷⁸

Notwithstanding these developments, ECRI concluded that this recommendation has not been implemented. It noted several reasons for such a conclusion. First, the informal working group met only once (in 2019) and did not continue (institutional momentum appears weak). Second, the file-labelling system is in place, but data from it is not systematically analysed or made publicly available. And third, there is no legislation

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

ensuring that disaggregated equality data is collected in all relevant cases; in particular, authorities express concerns about constraints imposed by personal data protection laws.⁷⁹

Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) (Istanbul Convention monitoring):

Since ratifying the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*, Slovenia is subject to Grevio's baseline evaluation procedure. Early reports emphasise the need for more robust support services for victims of domestic violence and gender-based violence.

Grevio adopted its latest (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Istanbul Convention in Slovenia in 2021⁸⁰. This first full review of legislative and other measures examines how Slovenia has implemented its obligations under the Istanbul Convention. The report reflects developments up to about mid-2021, including a written state report, meetings with stakeholders, and a country visit.

According to Grevio, Slovenia had already enacted in 2008 the *Domestic Violence Prevention Act*, which moved domestic violence into a public sphere in law, introduced victim-centred protections, defined roles of state authorities and NGOs, etc. There have been amendments to this law (e.g. the law was amended in 2016 to widen definitions to include former partners and additions to criminal offences such as stalking and forced marriage) to align more closely with Convention requirements. Slovenia created a network of support services for victims of domestic violence, operating in cooperation with NGOs. Furthermore, rules and regulations have been adopted to define cooperation between authorities (rules for social work centres, police, health institutions, ministries, etc., for detecting, reporting, prevention, and responding to domestic violence). Grevio identified an increased attention to intersectional discrimination (Roma women, migrant women, women with disabilities) and introduced several measures targeting those vulnerabilities.⁸¹

Grevio also welcomes the fact that constitutional guarantees of equality and anti-discrimination legislation (e.g. the *Protection against*

⁷⁹ *Ibid.*

⁸⁰ Grevio, 2021.

⁸¹ *Ibid.*

Discrimination Act) have been introduced, and an interministerial working group (IWG) since about 2016 to coordinate implementation, monitoring, and evaluation across ministries and stakeholders, has been established. Importantly, Grevio appreciates the participation of NGOs in policy making, service provision, awareness raising and victim support. Finally, Grevio noted that Criminal code reforms (stalking, forced marriage, and broader definitions of rape/sexual violence) moved away from force-based definitions toward consent-based or broader gendered understanding.⁸²

Grevio assessed as a deficiency the fact that domestic violence is relatively well addressed, while other forms of violence against women (e.g. sexual harassment, sexual violence, forced abortion/sterilisation) are less comprehensively covered in policies and practice. Training of professionals (police, prosecutors, judges, social workers, health professionals) is mandatory for domestic violence, but less so or non-existent for many other forms of violence against women. The national programme on family/domestic violence (Resolution 2009-2014) expired and was not replaced in time. A broader ‘umbrella’ strategy covering all forms of violence against women was being drafted but not yet adopted as of 2021.

There is no strategic policy yet that covers prevention, protection, prosecution, and all forms of violence in an integrated way, and variation in inter-institutional cooperation depends on region, personalities, or specific local actors (some areas are better coordinated than others). Grevio also found out that data collection is fragmented, tracking of cases through the criminal justice system is weak, and there is a lack of comprehensively disaggregated data (by form of violence, victim-perpetrator relationship, etc.). Monitoring and evaluation are still underdeveloped (since there is no fully separate evaluation body, there could be a conflict of interest if implementing authorities evaluate their own work). According to Grevio, vulnerable groups (women with disabilities, migrant or asylum-seeking women, and Roma women) face additional barriers (information, language, access, fear, and legal status) in accessing support services.⁸³

According to Grevio’s overall assessment, Slovenia has made strong progress in developing laws, policies, and services, especially regarding domestic violence and a cohort of protection for victims. The legal framework is relatively well advanced. However, implementation lags in certain respects: coordination, resources, evaluation, data, and coverage of

⁸² *Ibid.*

⁸³ *Ibid.*

all forms of violence. To meet full obligations under the Istanbul Convention, Slovenia needs to push beyond domestic violence and address sexual violence, stalking, harassment, etc., in a gender-sensitive way throughout its legal, institutional, and service infrastructure.⁸⁴

3.3.6. Conclusion

In conclusion, Slovenia submits reports on time and participates in dialogue with monitoring bodies, showing overall goodwill toward the CoE system. However, while reporting is regular, reporting processes are often technocratic, with limited public or parliamentary debate, and the domestic translation of recommendations into law and practice is inconsistent. More particularly, ECtHR judgments, backed by binding authority and the Committee of Ministers' supervision, receive sustained follow-up, while reports from 'softer' monitoring bodies (e.g. ECSR, ECRI) are less systematically implemented (i.e. politically sensitive issues—such as Roma rights, systemic judicial reforms, and prison conditions—often see slower implementation). Overall, Slovenia can be considered a constructive and generally compliant participant in the CoE reporting processes; however, its implementation remains uneven—stronger in judicially supervised areas, but weaker in the socio-economic and minority rights domains.

3.4. The scholarly discussion on the implementation of the European Convention on Human Rights

Slovenian scholars have made significant contributions to the study and discussion of the implementation of the ECHR in Slovenia. Their work spans books and scientific monographs, peer-reviewed and professional journal articles, as well as diplomas and master's theses, doctoral dissertations, and other academic writings. In addition, a range of practical publications—such as manuals, brochures, reports, and commentaries – address the ECHR and the case law of the ECtHR, and, to a lesser extent, other CoE conventions. Given the breadth of this body of scholarship, this section does not attempt to provide a comprehensive or systematic review. Instead, it highlights a selection of publications that the author considers particularly relevant.

Engaging with Strasbourg case law and its domestic impact, Slovenian scholarship covers a wide spectrum of issues. On one hand, doctrinal and

⁸⁴ *Ibid.*

constitutional studies – by authors such as Andraž Teršek, Matej Avbelj, Jernej Letnar Čerňič and Saša Zagorc – examine the status of the ECHR and ECtHR case law within the national legal system, their interpretive use by domestic courts, and the dialogic relationship between the Slovenian Constitutional Court and the ECtHR. On the other hand, much of the literature takes a case-driven approach, structured around landmark ECtHR judgments against Slovenia that have prompted legislative and institutional reforms. While the Constitution grants ratified treaties precedence over statutes and provides for their direct applicability, most authors agree that formal incorporation has not always translated into effective practice, even though Slovenian courts are generally viewed as receptive to Strasbourg jurisprudence.

A common theme in Slovenian scholarship is the call for the state not merely to comply reactively with ECtHR judgments, but to internalise Strasbourg standards proactively in its legislation, judicial reasoning, and administrative practice. Some authors—most notably Andraž Teršek, a constitutional law scholar and public intellectual who frequently engages with ECHR issues from the perspectives of constitutional theory, rights adjudication, and social justice—go further, arguing that Slovenia should treat the ECHR as a springboard for developing stronger positive obligations in areas such as social rights, equality, and welfare.

Teršek has written extensively on how the doctrine of positive obligations under the ECHR and constitutional law could be more vigorously applied in Slovenia. He places this discussion in the context of social rights, welfare, and periods of economic crisis. His central argument is that the state should not merely refrain from violating rights but must also take active steps to secure egalitarian social conditions, thereby protecting dignity, equality, and related values. In his view, the doctrine of positive state obligations should serve as a vehicle for the more determined and effective realisation of the constitutional principles of sociality, solidarity, and social equality. Within this framework, Teršek emphasises the crucial role of lawyers – especially legal scholars and judges – in advancing these objectives.⁸⁵

The same author also examines the role of public administration – particularly in the post-pandemic context – in relation to human rights and constitutional duties. He addresses issues such as mental health, suicide prevention, the right to protection from fear, and the state's legal obligations

⁸⁵ Teršek, 2009.

in emergencies, emphasising the responsibility of public authorities to safeguard citizens' constitutional and human rights. In this regard, he highlights the relevance of the ECHR case law and constitutional doctrine in shaping the standards by which public administration should operate.⁸⁶

In response to the COVID-19 pandemic, Teršek, together with co-authors, critically examined legislation and Constitutional Court decisions that restricted constitutional rights, questioning whether such measures satisfied the requirements of necessity, proportionality, and conformity with both the ECHR and the Slovenian Constitution. He argued that certain measures – such as quarantine and lockdowns – were unconstitutional, as they failed to meet the standards of legality, necessity, and proportionality.⁸⁷ In addition, through an online blog, he explored the issue of whether a general vaccination mandate against COVID-19 could be justified under constitutional and ECHR principles.⁸⁸

Teršek has also made significant contributions to the analysis of freedom of expression as protected under both the Slovenian Constitution and ECHR jurisprudence. He examines how concepts such as 'hate speech' and 'incitement' are regulated and questions whether Slovenia's constitutional and legislative restrictions are properly aligned with Strasbourg standards.⁸⁹

Overall, in his reflections on Slovenia's implementation of the ECHR, Teršek emphasises that the country's constitutional framework provides solid tools for compliance – direct applicability of treaties, constitutional priority, and constitutional court review. Yet he frequently stresses that a strong legal framework does not always translate into effective practice. In his view, public administration, local authorities, and other state bodies sometimes fail to comply fully, implement measures in a timely manner, or provide effective remedies to individuals whose rights have been violated. For Teršek, many of Slovenia's human rights challenges—particularly in the areas of social rights, equality, and dignity – require not merely passive respect for rights but active, positive measures by the state. He argues that ECHR jurisprudence is underutilised in Slovenia, especially with regard to socio-economic rights and structural discrimination. Rather than treating ECtHR case law only as an external judicial authority, Teršek regards it as

⁸⁶ Teršek, 2020a, pp. 1-4.

⁸⁷ Teršek et. al., 2021, pp. 147-173.

⁸⁸ Teršek, 2020b.

⁸⁹ Teršek, 2020c.

an essential resource for domestic constitutional debate. He calls on courts, legislatures, and civil society to engage more actively with Strasbourg jurisprudence as a means of refining and, where necessary, challenging domestic legal norms.

Another important author writing on the implementation of the ECHR in Slovenia is Matej Avbelj, originally an expert in constitutional law and European Union law. While not all Avbelj's works deal directly with the ECHR, his scholarship provides valuable context, critique, and doctrinal analysis relevant to how the Convention is internalised in Slovenian law and practice. For example, in a 2010 monograph chapter on the role and status of the ECHR and EU law within Slovenia's legal order, he described the position of supranational law in metaphorical terms:

The atmosphere in the Slovenian legal fortress is, however, filled with disparate emotions. Some have gotten overexcited about the brave new European world, others are happy to let the supranational currents in, but insist on preserving national legal troops as well, whereas the majority is not sure of what to expect and quietly stands at the side, hoping that not much will change and that the old, familiar and cosy national law will ultimately continue to provide them with the essential normative frame of reference.⁹⁰

Addressing the direct applicability of the ECHR, its priority over statutes, and its judicial interpretation, Avbelj provides a nuanced analysis structured around three dimensions: the legal, the judicial, and the academic.

In *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond*, a monograph co-authored with Jernej Letnar Čerňič, Avbelj examines the broader influence of European institutions on the rule of law in Slovenia. Although not limited to the ECHR, the book provides an alternative perspective on the state of democracy and the rule of law in the country. The authors argue that Slovenia's rule-of-law challenges are not recent phenomena and contend that the country should have been subject to the EU's strictest scrutiny from the moment of its accession. They further maintain that Slovenia's core problems stem from state capture by leftist post-communist elites who, in their view, have dominated and controlled nearly every sphere of Slovenian

⁹⁰ Avbelj, 2010.

society – including the economy, judiciary, media, higher education, and civil society – since independence.⁹¹

Avbelj is also very active as a blogger. In *The Inherent Limits of Law – the Case of Slovenia*, published in 2013, he reflects on the capacity of law to enforce constitutional and human rights norms, particularly considering political culture and institutional constraints. He offers insights into why, even where ECHR compliance exists de jure, practical implementation may face bottlenecks, delays, or resistance.⁹²

Perhaps even more relevant is his 2018 blog *Slovenia's Supreme Court Rejects the European Court of Human Rights*. Here, Avbelj comments on a statement published on the website of the Supreme Court of the Republic of Slovenia regarding the ECtHR's judgment in *Produkcija Plus storitveno podjetje d.o.o. v. Slovenia* (no. 47072/15). To the surprise of professional, academic, and wider audiences, the Supreme Court declared that it respects the rulings of other courts only insofar as it finds them persuasive, and that such rulings may then be integrated into its case law. Although not phrased explicitly in these terms, the statement implied that rulings deemed unpersuasive—most notably the ECtHR judgment in question – would not be respected or incorporated into Slovenian jurisprudence.⁹³

Veronika Fikfak and Ula Aleksandra Kos explore in their article *Slovenia – An Exemplary Complier with Judgments of the European Court of Human Rights?* the behaviour of the Republic of Slovenia with respect to the Court's judgments. They observe the actions of the state from two perspectives: first, they analyse the nature and pace of Slovenia's compliance with the Court's judgments, which often leads to a quick and successful closing of the case by the Committee of Ministers, and second, they investigate Slovenia's actual implementation and internalisation of adverse judgments into its (legal) system, aiming to remedy past and prevent similar future violations. The author portrays Slovenia as a comparatively high-compliance jurisdiction, tracing why and how the state implements Strasbourg judgments by pointing to systemic reforms, legislative fixes, and institutional learning. Their country study is the most-cited single overview in English.⁹⁴

⁹¹ Avbelj and Letnar Čerňič, 2020. See also Kukavica, 2022, pp 267-278.

⁹² Avbelj, 2013.

⁹³ Avbelj, 2018.

⁹⁴ Fikfak and Kos, 2021, pp II-XI.

Saša Zagorc's essay *Double Wake-up Call for Slovenian Authorities: Effective Legal Remedies for the Violation of the Right to a Trial within a Reasonable Time – Now What?*, published in *Revus*, is a key Slovenian-language analysis of *Lukenda v. Slovenia* (see *infra*, Sections 5 and 6), read together with a Constitutional Court decision that catalysed the Act on the Protection of the Right to a Trial without Undue Delay (2006).⁹⁵ It is frequently cited for showing how pressure from the ECtHR was translated into concrete remedial legislation.

Goran Klemenčič, a renowned criminal justice scholar and former Minister of Justice, uses *Matko v. Slovenia* (see *infra*, Sections 5 and 6) to argue for independent investigations into police ill-treatment and for institutional reforms that go beyond case-by-case solutions – scholarship that anticipated later structural changes in prosecution and oversight.⁹⁶

In an article published in the *Central European Academy Law Review*, Maja Skočir focuses on Slovenia's convictions before the ECtHR for violation of Art. 3 of the ECHR and revisits the torture and ill-treatment statutory framework by evaluating legislative developments and domestic courts' uptake. By closely examining the genesis and the content of incrimination of torture, as it is known in the Slovenian *Criminal Code*, the article presents to foreign readers and the international professional audience the specific features of Slovenian incrimination of torture and its deviations from the international legal framework. Concluding with an analysis of the case law on torture, the author establishes that Slovenian courts have not yet encountered the crime of torture.⁹⁷

In a 2012 monograph chapter, Jan Zobec, a judge of the Slovenian Supreme Court who also writes academically, discusses the political-historical circumstances in which the ECtHR pilot judgments were introduced. The author argues that the pilot judgment was imposed by the ECtHR and that it is not regulated by the Convention. In his opinion, the reasons for introducing the pilot judgment are the same as its purpose: to control the relevant cases and to assist states in implementing convention rights and thus to protect rights more effectively. The author presents the

⁹⁵ Zagorc, 2005, pp. 45-53. See also *infra*, Sections 5 and 6. Zagorc's study is complemented by empirical and management-oriented reflections of Zvonko Skubic on judicial reform in Slovenia by examining capacity, case-flow, and court organisation in the post-Lukenda era. See Skubic, 2011, pp. 1-19.

⁹⁶ Klemenčič, 2006. See also *infra*, Sections 5 and 6.

⁹⁷ Skočir, 2023, pp. 221-239.

institutional development of the institute, the actual (practical) course of the pilot procedure and some open questions. Zobec's monograph chapter concludes with a brief analysis of the advantages and disadvantages of the pilot judgment and its impact on the relationship between the Court and the constitutional courts of the member states.⁹⁸

In another book chapter entitled *Just a Glass Bead Game?* a title likely inspired by Hermann Hesse's famous novel – the same author examines the impact of the ECHR on democratic change in Slovenia. He situates Slovenian constitutional practice within the broader regional narrative of democratic transformation and explains how domestic courts internalise the ECHR standards and case law in their adjudication.⁹⁹

Recent work of the Slovenian scholarship has revisited the question of the international and supranational rule of law within Slovenia's legal system, examining how ECHR standards interact with constitutional and EU-law commitments. For example, Benjamin Flander (the author of this article) analyses how disparities between Slovenian domestic law and international or supranational law are addressed in both theory and practice, drawing on the "lessons" conveyed to Slovenia by European courts such as the European Court of Human Rights and the Court of Justice of the European Union. Placing particular emphasis on the role of the Constitutional Court, he explores whether this court sometimes positions itself as a guardian of Slovenian constitutional identity, noting that its interpretation of the rule of law does not always coincide with international and supranational understandings of the concept.¹⁰⁰

In sum, these and many other writings of Slovenian (and international) authors present Slovenia as a country with a comparatively strong legal and institutional openness to the ECHR, yet one that has often relied on ECtHR judgments to catalyse reforms in practice. More precisely, Slovenian scholars' works tend to balance appreciation of Strasbourg's corrective function with concern for recurring challenges and practical implementation in areas such as excessive length of proceedings, effectiveness of investigations into ill-treatment, and systemic redress for minorities protection issues (e.g. Roma and the 'erased' residents). Scholars underline the gap between constitutional promise and administrative/judicial practice,

⁹⁸ Zobec, 2012.

⁹⁹ Zobec, 2016, pp. 425-456.

¹⁰⁰ Flander, 2024, pp. 53-80.

noting that reforms often follow external pressure from Strasbourg rather than proactive domestic initiative.

4. Protection of fundamental rights under the European Convention on Human Rights and the Constitution of the Republic of Slovenia

This section examines how, and to what extent, the human rights obligations arising from the ECHR are reflected in the 1991 Constitution of the Republic of Slovenia and in key national legislation. A comparison of fundamental rights protections in these foundational legal documents shows that the guarantees under the Slovenian Constitution are largely comparable to those of the Convention, and in certain areas even exceed the standards set by the ECHR. Nevertheless, case law before the ECtHR demonstrates that, in practice, the protection of fundamental rights afforded by domestic law and Slovenian courts has at times fallen short of the standards required under the ECHR.

Although some constitutional provisions are more concise than those in the ECHR, this does not diminish the scope or level of protection of fundamental rights and freedoms, as the Constitution incorporates essential safeguards. In Slovenia's legal system, international treaties – including the ECHR – ratified by the National Assembly must conform to the Constitution, but they take precedence over laws, government regulations, and other general legal acts. All legislation and general acts must comply with universally accepted principles of international law and ratified treaties. Ratified treaties, including the ECHR, are directly applicable. Where certain provisions of international treaties cannot be applied directly, they must be normatively clarified by the competent national authorities to ensure their effective legal applicability.¹⁰¹

Furthermore, the Constitution stipulates that no human rights or fundamental freedoms established in international legal instruments in force in Slovenia may be restricted on the grounds that they are not recognised by the Constitution, or are recognised to a lesser extent than in international human rights instruments.¹⁰² This so-called non-enumeration clause implies that where an international treaty provides a higher standard of human rights

¹⁰¹ Constitution, Art. 8. See also Grad et al., 2018, p. 743, Avbelj et al., 2019, pp. 82-87 and Committee Against Torture, 1999, para 27.

¹⁰² Constitution, Art. 15, para. 5.

protection or rule of law than the Slovenian Constitution, the treaty takes precedence.¹⁰³

Notably, under the *Constitutional Court Act*,¹⁰⁴ the Constitutional Court of the Republic of Slovenia is tasked not only with reviewing the compliance of laws and other general acts with the Constitution¹⁰⁵ but also with assessing their conformity with ratified international treaties and the general principles of international law.¹⁰⁶ In practice, when reviewing constitutionality, the Constitutional Court frequently examines the alignment of laws with both the Constitution and the ECHR. When laws are found to be inconsistent with the Constitution, the Court usually also identifies inconsistencies with the ECHR.¹⁰⁷

The ECHR establishes a wide range of civil and political rights that member states are obliged to respect and guarantee within their jurisdictions. These rights include: the Right to Life (Art. 2); the Prohibition of Torture (Art. 3); the Right to Liberty and Security (Art. 5); the Right to a Fair Trial (Art. 6); the Right to Respect for Private and Family Life (Art. 8); Freedom of Thought, Conscience, and Religion (Art. 9); Freedom of Expression (Art. 10); Freedom of Assembly and Association (Art. 11); the Right to an Effective Remedy (Art. 13); and the Prohibition of Discrimination (Art. 14).

Additional rights are guaranteed by the Protocols to the Convention. For example, Protocol No. 1 guarantees the Right to Property, the Right to Education, and the Right to Free Elections, while Protocols Nos. 6 and 13 abolish the death penalty. Most protocols expand the catalogue of rights guaranteed under the Convention, while others refine the procedures for their enforcement.

Several provisions of the Convention are also of particular importance for the protection of rights, including Art. 7 (No punishment without law), Art. 15 (Derogation in time of emergency), Art. 16 (Restrictions on political activity of aliens), Art. 17 (Prohibition of abuse of rights), and Art. 18 (Limitation on the use of restrictions on rights). In addition, Art. 12

¹⁰³ See Avbelj et al. 2019, pp. 82-87.

¹⁰⁴ Constitutional Court Act (*Zakon o Ustavnem sodišču* [ZUS-1]), Official Gazette of the Republic of Slovenia, No. 15/94 of 18 March 1994.

¹⁰⁵ ZUS-1, Art. 21, para. 1, item 1.

¹⁰⁶ *Ibid.*, item 2.

¹⁰⁷ See, for example, Constitutional Court decision no. U-I-18/92, dated April 11, 1996.

guarantees two so-called second-generation rights: the right to marry and the right to found a family.

In the remainder of this section, selected provisions of the ECHR will be compared with corresponding human rights provisions in the Slovenian Constitution, with particular attention to similarities and differences in wording, substance, and standards of protection. Owing to space constraints, the analysis will be illustrative, focusing only on Articles 2 and 3.

4.1. The Right to Life

The definitions of the right to life in the ECHR and the Slovenian Constitution differ significantly. The ECHR's text is notably longer and more detailed. Article 2 of the Convention stipulates that everyone's right to life shall be protected by law and specifies the conditions under which deprivation of life is not considered a violation of the Convention (such as when it results from the use of force that is necessary to achieve certain legitimate objectives). The original text of the Convention also allowed for the death penalty as an exception to the right to life, provided it was prescribed by law and imposed by a court. This exception was later abolished by Protocol No. 13.

In comparison to the ECHR, Article 17 of the Slovenian Constitution is much more concise: 'Human life is inviolable. There is no capital punishment in Slovenia.'¹⁰⁸ The 'inviolability of life' is one of the so-called absolute fundamental rights – among the highest and most strongly protected constitutional rights and freedoms – which the Constitution forbids from being suspended or restricted, even in times of war or emergency. The protection of human life is essential for upholding human dignity, the supreme value and guiding principle of the Slovenian Constitution. Human life is a necessary prerequisite for the protection of the dignity of the human person, which is regarded as the supreme value and idea of the Slovenian Constitution. Without effective protection of life, the enjoyment of other rights and fundamental freedoms would not be possible.¹⁰⁹

The scope of protection for the right to life under the Slovenian Constitution is identical to that provided by the ECHR. The Constitution imposes a general obligation on the legislature to enact laws that safeguard

¹⁰⁸ Article 17 of the Slovenian Constitution is titled 'Inviolability of Life', not 'Right to Life', as Article 2 of the ECHR.

¹⁰⁹ See Ivanc, 2019.

human life and ensure effective protection for all individuals throughout the national territory. The state is required to refrain from interfering with life, except in explicitly permitted exceptional cases. Additionally, the state must protect individual rights against unlawful interference by third parties.¹¹⁰

The constitutional right to life, therefore, mandates the enactment of appropriate legal regulations governing the operations of the police, judicial authorities, military, and other security agencies. These regulations protect the inviolability of human life and establish conditions for the use of firearms and other coercive measures. In cases of death resulting from the use of force by state authorities (e.g. police or military), the state is obligated to ensure an effective and independent investigation into the circumstances of the death. This requirement relating to the procedural aspect of the right to life also applies to deaths occurring during deprivation of liberty (e.g. detention or imprisonment), disappearances, or suicides during detention or imprisonment.¹¹¹

Although the Constitutional Court's jurisprudence on the right to life is not as extensive or nuanced as that of the Strasbourg Court, it can generally be asserted that the substance and scope of the right to life under the Slovenian Constitution are equivalent to those under the ECHR.¹¹²

Notably, if the state fails to meet its obligations under the Constitution, the ECHR, or the EU Charter regarding the protection of the right to life, Article 26 of the Constitution establishes the state's liability for damages.¹¹³ This liability also generally extends to cases of death caused by

¹¹⁰ *Ibid.* See also Korff, 2006.

¹¹¹ *Ibid.*

¹¹² See, for example, Constitutional Court Decision No. Up-555/03, Up-827/04, dated July 6, 2006. The case concerned the death of an individual during the deprivation of liberty and the police search of his apartment. The Constitutional Court held that, in accordance with the fourth paragraph of Article 15 of the Constitution, in relation to Articles 2 and 13 of the ECHR, the procedural protection of the right to life includes the state's duty to ensure an independent investigation into the circumstances of the event and to enable the relatives to have effective access to such an investigation. The Constitutional Court also emphasised the procedural aspect of the protection of the right to life and the duty to conduct an independent and effective investigation in Constitutional Court Decision No. Up-679/12, dated October 16, 2014.

¹¹³ See Constitutional Court Decision No. Up-680/14, dated May 5, 2016. The Constitutional Court emphasised that failure to fulfil the state's constitutional and convention obligations regarding the protection of the right to life leads to its liability for compensation under Article 26 of the Constitution, and the burden of proof rests with the state. In Up-680/14, the Constitutional Court highlighted the importance of the state's

environmental pollution or medical errors by third parties, provided it is shown that the state did not provide an adequate legal framework or sufficient oversight.

4.2. Prohibition of torture

The prohibition of torture in the Slovenian Constitution closely mirrors the language of Article 3 of the ECHR. Article 18 of the Constitution states that ‘no one may be subjected to torture or to inhuman or degrading punishment or treatment.’ Furthermore, the Constitution explicitly prohibits conducting medical or other scientific experiments on any person without their free consent.

The prohibition of torture is positioned similarly in the Slovenian Constitution as it is in the ECHR. It appears among the first provisions on human rights, immediately following Article 17 on the inviolability of human life and preceding Articles 19 and 20, which guarantee personal freedom. This provision is related to that from Article 34 of the Constitution, which ensures the right to personal dignity and security.

Since the prohibition of ‘humiliating behaviour’ outside of repressive procedures is already addressed by the right to personal dignity in Article 34 of the Constitution, the right under Article 18 of the Constitution should be interpreted more narrowly. It specifically prohibits the conduct of state agents when dealing with individuals deprived of their liberty.¹¹⁴

The Constitution, like Article 3 of the ECHR, distinguishes between three concepts: torture, inhuman treatment, and degrading treatment (or punishment), which vary significantly in terms of the intensity and cruelty of the treatment. In explaining the content and scope of the prohibition of torture under Article 18, including the definitions of torture, inhuman treatment, and degrading treatment or punishment, the new Commentary on the Constitution of the Republic of Slovenia fully aligns with the ECtHR’s doctrine and jurisprudence.¹¹⁵

constitutional and convention obligations to provide, within the procedural aspect of the protection of the right to life, an effective and independent investigation into the causes of a patient’s death during hospital care. The Constitutional Court reached this conclusion only after the judgment of the ECtHR Grand Chamber in *Šilih v. Slovenia* (see footnote 160). In proceedings before the Slovenian courts and other institutions, the appellants, the Šilih couple, unsuccessfully argued that their son died due to medical error and sought to hold the doctor and the medical institution accountable.

¹¹⁴ See Constitutional Court Decision No. Up-183/97, dated July 10, 1997.

¹¹⁵ Šepec, 2019.

The scope of Article 18 of the Constitution, like that of Article 3 of the Convention, extends beyond the 'mere' obligation of the state to ensure that its authorities do not engage in torture, inhuman or degrading treatment, or punishment. Under the Slovenian Constitution, the state is prohibited from handing over, extraditing, or deporting an individual to a country where they are at risk of torture, inhuman or degrading treatment, or punishment, including the death penalty or police brutality. The extradition of an individual infected with AIDS to a country where they do not have access to adequate medical care can also constitute a violation of Article 18 (and Article 3 of the ECHR). However, the extradition of a sick person does not constitute a violation if the country requesting the extradition has poorer medical facilities or standards.

In accordance with Article 18 of the Constitution, the state must take special care to protect individuals who have been deprived of their liberty and ensure that adequate living conditions are provided in prisons. This includes addressing issues such as prison overcrowding, insufficient space for movement and sleeping, inadequate sanitary facilities, lack of food, poor ventilation, and inadequate lighting. Failure to provide essential or urgent medical assistance to an incarcerated person when their health visibly deteriorates, inadequate prison conditions for individuals with special needs, and the forced feeding of a prisoner – when not medically necessary to preserve their life – would constitute inhumane treatment. Additionally, the state has a positive obligation to protect individuals from domestic violence.¹¹⁶

Any evidence or statement obtained under torture in criminal proceedings must be excluded, and a judgment must not be based on such evidence. Evidence obtained through original illegality must also be excluded, in line with the doctrine of 'fruit of the poisoned tree.' However, exclusion is not required if the evidence was obtained through inhumane treatment that did not result in an unfair trial.¹¹⁷

When addressing the prohibition outlined in Article 18, the Commentary on the Constitution references ECtHR case law, including *Soering v. United Kingdom*, *Chahal v. United Kingdom*, and *D. v. United Kingdom*.¹¹⁸ However, regarding jurisprudence, a similar conclusion can be drawn regarding the constitutional prohibition of torture as was made in

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ See *ibid.*

relation to the inviolability of life: the Slovenian Constitutional Court's case law is not as extensive as the jurisprudence of the ECtHR. This is, at least in part, due to the fact that the Constitutional Court in Slovenia has never found torture to be the most serious form of violation under Article 18 in proceedings involving constitutional complaints. The Slovenian cases concerning Article 18 – some of which were later adjudicated by the ECtHR – primarily involve instances of excessive use of force during police arrests. In these cases, the Court in Strasbourg characterised the violations of Article 3 as inhuman treatment.¹¹⁹

5. Major law-making processes driven by the European Convention on Human Rights

Since ratifying the ECHR in 1994, Slovenia has progressively aligned its constitutional framework and legislation with Strasbourg standards. Following a review conducted by the Department for the Execution of Judgments of the European Court of Human Rights,¹²⁰ these reforms addressed the functioning of the justice system (including excessive length of proceedings), effective investigations and police accountability, conditions of detention, effective remedies, the right to liberty and security, protection of private and family life, freedom of expression, and protection against discrimination on grounds of nationality and property rights.

5.1. Functioning of justice

In *Lukenda v. Slovenia*,¹²¹ the ECtHR found that violations of the applicant's right to a trial within a reasonable time were not an isolated incident but a systemic problem, stemming from court backlogs caused by inadequate legislation and ineffective judicial practice.¹²² The Court called on the Slovenian authorities either to amend the existing legal framework or

¹¹⁹ These cases will be addressed in Section 6.

¹²⁰ ECtHR, 2025b.

¹²¹ *Case of Lukenda v. Slovenia*, App. No. 3032/02, 6 October 2006.

¹²² By 2021, the Court found violations of Article 6 and Article 13 in 264 separate applications due to the unreasonable length of domestic judicial proceedings. The first judgment in this series was *Case of Majarič v. Slovenia*, App. No. 28400/95, 2 February 2000. With one leading (e.g. *Lukenda*) and 263 repetitive cases, judgments concerning the right to a fair trial within a reasonable time represent 72% of all adverse judgments against Slovenia. See Fikfak and Kos, 2021, p. 5.

introduce new mechanisms to ensure effective enforcement of this right in line with Convention standards.

Analysing the *Lukenda* judgment, Saša Zagorc argued that this ECtHR decision—together with a ruling of Slovenia's Constitutional Court declaring the *Administrative Dispute Act* unconstitutional—provided a solid basis for the National Assembly to adopt legislation guaranteeing effective remedies for violations of the right to a trial within a reasonable time. He strongly maintained that the Slovenian judiciary should, on its own initiative, begin resolving such cases to prevent further condemnations by the Strasbourg Court. Moreover, he argued that, had appropriate and non-discriminatory legislation been enacted and followed by effective administrative and judicial practice, the ECtHR could have declared many pending cases inadmissible for failure to exhaust domestic remedies.¹²³

The law was adopted less than a year after the *Lukenda* judgment, on 26 April 2006, when the National Assembly passed the *Act Regulating the Protection of the Right to a Trial without Undue Delay*.¹²⁴ This act grants parties to all court proceedings the right to file an appeal accompanied by a motion to accelerate the proceedings, as well as the right to compensation if the “reasonable time” requirement has been exceeded.

Such an appeal must be submitted to the president of the court, who – if the appeal is admissible – must request a report on the case from the judge-rapporteur. The president may also order that the case be given priority or assign it to another judge-rapporteur.

Just satisfaction for a violation of the right to a trial within a reasonable time may take the form of monetary compensation, a written statement by the State Attorney acknowledging the infringement, or the publication of a court judgment recognising the violation.¹²⁵

Following the *Lukenda* judgment, and in addition to adopting the Act on the Protection of the Right to a Trial without Undue Delay, Slovenia introduced numerous reforms and adjustments to its judicial system to ensure compliance. The state implemented a wide range of measures,

¹²³ See Zagorc, 2005, pp. 45-53.

¹²⁴ Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja (ZVPSBNO) [*Act regulating the protection of right to trial without undue delay* (ZVPSBNO)], Official Gazette of the Republic of Slovenia, No. 67/12 – officially refined text.

¹²⁵ See Supreme Court of the Republic of Slovenia, 2010. [Online]. Available at: https://www.aca-europe.eu/colloquia/2010/Slov%C3%A9nie_EN_conference_june_2010.pdf (Accessed: 14 November 2024).

including amendments to existing laws and the adoption of new ones, targeted projects, the expansion of judicial staff and resources, and changes in the functioning of the judiciary.

Nevertheless, despite this progress, judicial proceedings in Slovenia remain, in some instances, unreasonably lengthy even today.¹²⁶

5.2. Police accountability and effective investigations

Significant legislative changes followed the ECtHR judgment in *Matko v. Slovenia*.¹²⁷ The Court found Slovenia responsible for inhuman treatment due to the excessive use of force during the applicant's arrest, as well as for the inadequate, slow, and negligent investigation of his allegations of police brutality by the police, prosecution, and judiciary.

In an article published in Slovenia's leading legal journal shortly after the *Matko* judgment, criminal justice expert Goran Klemenčič cautioned that it would be a serious mistake for the Slovenian state to "ignore the message from Strasbourg". He emphasised that, following *Rehbock* in 2000, *Matko* represented the second ECtHR conviction of Slovenia for a violation of Article 3— 'the most notorious and absolute prohibition of the Convention.' He also noted that the Constitutional Court had unequivocally reaffirmed the constitutional duty of state authorities to conduct an independent investigation into any incident in which torture or inhuman or degrading treatment by the police is suspected.¹²⁸

Klemenčič further highlighted the concerns raised by international monitoring bodies and domestic non-governmental organisations regarding Slovenia's insufficient implementation of international standards on police oversight, as well as repeated calls for ensuring the independence of investigations into alleged police violence. He was critical of the police, who argued that the *Matko* case should not receive much attention because the events had occurred more than a decade earlier.¹²⁹

¹²⁶ See Fikfak and Kos, 2021, p. 18.

¹²⁷ *Case of Matko v. Slovenia*, App. No. 43393/98, 2 November 2006.

¹²⁸ See Constitutional Court Decision No. Up-555/03 and Up-827/04, dated 6 July 2006.

¹²⁹ Klemenčič, 2006, pp. 3-4; Bečir Kečanović, an expert in police law, also contributed to the debate. He suggested that an efficient and fair investigation can serve as a powerful psychological motivator, encouraging police officers to act legally, proportionately, professionally, and efficiently. Proactive supervision can help make the risks of violations in police procedures as predictable and manageable as possible. See Kečanović, 2006, p. 20.

According to Klemenčič, the *Matko* judgment was likely the most detailed and well-reasoned decision Slovenia had received from Strasbourg up to that point. Its scope, he argued, went beyond the implications of both the Rehbock and Mandić cases. The ECtHR held that the institution of the subsidiary prosecutor, as regulated in Slovenia, did not constitute an effective legal remedy for addressing violations of rights under Article 3 of the ECHR. Civil lawsuits were likewise deemed inadequate as effective remedies.¹³⁰

Furthermore, given the hierarchical structure of the Slovenian police and its dependence on the Ministry of the Interior, investigations carried out by the police or the Ministry failed to meet the ECHR standard of independence. Klemenčič stressed that the message from Strasbourg was unequivocal: investigations into allegations of ill-treatment must be capable of identifying those responsible and establishing their criminal liability.¹³¹

Klemenčič outlined two possible solutions: the establishment of a police ombudsman with extensive investigative powers, or the creation of systemic and institutional conditions enabling the prosecution to effectively address suspected serious human rights violations committed by state authorities. The legislature chose the latter approach and, in 2007, established the Department for the Investigation and Prosecution of Officials with Special Powers. Its purpose was to ensure independent, impartial, timely, transparent, thorough, and effective investigations into criminal acts committed by police officers and other officials vested with repressive powers.

This structure was consolidated in 2011 with the adoption of the new *State Prosecutor's Office Act*.¹³² The Department for the Investigation and Prosecution of Officials with Special Powers now functions as an independent organisational unit within the Specialised State Prosecutor's Office. Although it includes specially selected police officers – appointed by the State Prosecutor's Office – the department is organisationally separate from the Police. These officers work directly under the Prosecutor's Office and are not part of the Police's internal structure or chain of command. The department operates on the principle of professional and operational

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Zakon o državnem tožilstvu (ZDT-1) [State Prosecutor's Office Act (ZDT-1)]*, Official Gazette of the Republic of Slovenia, No. 58/11.

autonomy, explicitly guaranteed by the provisions of the 2011 State Prosecutor's Office Act.¹³³

In addition to legislative changes aimed at improving the effectiveness of investigations, the Matko judgment spurred other important reforms in Slovenian law. The 2008 Criminal Code¹³⁴ defined ill-treatment, including by the police, as an independent criminal offence. In 2013, the National Assembly adopted a new Law on Police Tasks and Powers,¹³⁵ which requires police officers to respect human rights and to adhere to the principles of equal treatment, legality, and proportionality in the performance of their duties.¹³⁶

5.3. Protection of property rights

Significant legislative developments followed the ECtHR pilot judgment in *Ališić and Others*.¹³⁷ The Court ruled that Slovenia must take all necessary measures to enable the applicants, as well as others in similar circumstances, to recover their 'old' foreign-currency savings held in Ljubljanska Banka branches in Bosnia and Herzegovina under the same conditions as those with savings in Slovenian domestic branches. A law implementing the judgment and introducing a repayment scheme was drafted and entered into force on 4 July 2015.¹³⁸

¹³³ A national survey conducted by the author of this article has shown that, in the three and a half decades since it became an independent and sovereign country, Slovenia has managed to establish a comprehensive system of police oversight, which is comparable to arrangements in other countries. Despite some shortcomings and weaknesses, a satisfactory level of synergy has been achieved between various forms of independent external control on the one hand and internal control on the other. The result of this synergy is a relatively consistent and efficient decentralised control system that maintains a high level of professional autonomy and, with the involvement of external supervisors, ensures a high level of independence. See Flander et al., 2021. p. 136.

¹³⁴ Kazenski zakonik (KZ-1) [*Criminal Code (KZ-1)*], Official Gazette of the Republic of Slovenia, Nos. 50/12 – officially refined text, 54/15, 6/16 and 16/23.

¹³⁵ Zakon o nalogah in pooblastilih policije (ZNPOL) [*Law on Police Tasks and Powers (ZNPOL)*], Official Gazette of the Republic of Slovenia, No. 22/25 – officially refined text.

¹³⁶ In addition to the legislative changes, regular education and training sessions as well as awareness-raising activities were organised for police staff. Instructions and manuals for all police units relating to the use of coercive measures were issued and are regularly updated.

¹³⁷ *Case of Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and 'The former Yugoslav Republic of Macedonia'*, App. No. 60642/08, 16 July 2014.

¹³⁸ Zakon o načinu izvršitve sodbe Evropskega sodišča za človekove pravice v zadevi številka 60642/08 (ZNISEŠČP) [*Act on the Implementation of the judgment of the*

This law set out the procedures for enforcing the ECtHR judgment, requiring the Republic of Slovenia to undertake all necessary measures to repay unpaid foreign-currency deposits to depositors of Ljubljanska Banka. It explicitly excluded deposits—or parts of deposits—already paid out, transferred to other legal entities, or allocated for specific purposes under the regulations of the successor states of the former Socialist Federal Republic of Yugoslavia or on other legal grounds. More specifically, the law regulates the method of calculating payment amounts, identifies eligible beneficiaries, details the verification procedure, specifies the competent decision-making authority, and sets the method, deadlines, and record-keeping requirements for payments.

Approximately fifty cases remain pending before the ECtHR. In these proceedings, applicants argue that under the law implementing the Ališić judgment, they have been unable to recover their savings, alleging a violation of Article 1 of Protocol No. 1 to the Convention.

5.4. Legislative changes (and institutional measures) regarding protection against discrimination on the grounds of nationality, conditions of detention, effective remedies, the right to liberty and security, protection of private and family life and freedom of expression

In *Kurić and Others v. Slovenia*,¹³⁹ the Grand Chamber held that the ‘erasure’ of thousands of residents from the register breached Articles 8 and 13 (and 14) of the ECHR, identifying a structural problem. The case remains central in scholarly discussions of Slovenia’s transitional justice and the role of Strasbourg in catalysing comprehensive domestic remedies. Follow-up legislative measures included status regularisation and compensation schemes with the adoption of the *Act on Compensation for Damages to Persons Deleted from the Permanent Population Register*.¹⁴⁰

Following the *Mandić and Jović*¹⁴¹ case, a preventive remedy was introduced in 2015 to provide judicial protection against poor detention

European Court of Human Rights in the case no. 60642/08 (ZNISESČP)], Official Gazette of the Republic of Slovenia, No. 48/15.

¹³⁹ *Case of Kurić and Others v. Slovenia*, App. No. 26828/06, 26 June 2012 and 12 March 2014.

¹⁴⁰ Zakon o povračilu škode osebam, ki so bile izbrisane iz registra stalnega prebivalstva (ZPŠOIRSP) [Act on Compensation for Damages to Persons Deleted from the Permanent Population Register (ZPŠOIRSP)], Official Gazette of the Republic of Slovenia, Nos. 99/13, 85/18.

¹⁴¹ *Case of Mandić and Jović*, App. No. 5774/10, 22 October 2011.

conditions for convicted prisoners, as well as a compensatory remedy for released prisoners. Additionally, in 2018, convicted and remanded prisoners were granted the right to claim compensation in court for non-pecuniary damages, with criteria for settling such claims established by the government.

The case of *L. M. v. Slovenia*¹⁴² led to significant reforms regarding psychiatric confinement. The 2008 *Mental Health Act*¹⁴³ established procedures and time limits for decisions on involuntary confinement. Additionally, the Mental Health Act introduced regular monitoring of these time limits by the National Preventive Mechanism (Human Rights Ombudsperson). The 2009 *Patients' Rights Act*¹⁴⁴ introduced safeguards and regulations concerning admission to and medical treatment in open wards.

The cases of *Eberhard and M. v. Slovenia*,¹⁴⁵ *Furmann v. Slovenia and Austria*,¹⁴⁶ *A.V. v. Slovenia*,¹⁴⁷ and *S.I. v. Slovenia*¹⁴⁸ contributed significantly to legislative and normative changes regarding the protection of private and family life. In 2004, administrative access orders by Social Welfare Centres were abolished, partly due to a Constitutional Court decision that found several provisions of the 1976 *Marriage and Family Relations Act*,¹⁴⁹ applicable to custody and access arrangements, unconstitutional. The 2004 *Act on Amendments to the Marriage and Family Relations Act*¹⁵⁰ granted domestic courts the authority to adjudicate on child custody and access matters, giving priority to cases involving parent-child relationships. Additionally, the *Claim Enforcement and Security Act*¹⁵¹ has

¹⁴² *Case of L. M. v. Slovenia*, App. No. 32863/05, 12 June 2014.

¹⁴³ *Zakon o duševnem zdravju (ZDZdr)* [*Mental Health Act (ZDZdr)*], Official Gazette of the Republic of Slovenia, No. 77/08.

¹⁴⁴ *Zakon o pacientovih pravicah (ZPacP)*.

¹⁴⁵ *Case of Eberhard and M. v. Slovenia*, App. No. 8673/05, 1 December 2009.

¹⁴⁶ *Case of Furmann v. Slovenia and Austria*, App. No. 16608/09, 5 February 2015.

¹⁴⁷ *Case of A. V. v. Slovenia*, App. No. 878/13, 9 April 2019.

¹⁴⁸ *Case of S. I. v. Slovenia*, App. No. 45082/05, 13 January 2012.

¹⁴⁹ *Zakon o zakonski zvezi in družinskih razmerjih* [*Marriage and Family Relations Act*], Official Gazette of the Socialist Republic of Slovenia, No. 15/76.

¹⁵⁰ *Zakon o spremembah in dopolnitvah zakona o zakonski zvezi in družinskih razmerjih (ZZZDR-C)* [*Act on Changes and Amendments to Marriage and Family Relations (ZZZDR-C)*], Official Gazette of the Republic of Slovenia, No. 16/04.

¹⁵¹ *Zakon o izvršbi in zavarovanju (ZIZ)* [*Claim Enforcement and Security Act (ZIZ)*], Official Gazette of the Republic of Slovenia, Nos. 93/07 – officially refined text, 28/09, 51/10, 26/11, 53/14.

been amended to allow fines to be imposed in cases where a parent obstructs the enforcement of court decisions regarding contact and access rights.

Under the amendments to the *Social Security Act*,¹⁵² social work centres now also provide care services, professional counselling, and support to family members and children, as well as practical training for families. Succeeding the Marriage and Family Relations Act, the *Family Code*,¹⁵³ in effect since 2019, introduced, *inter alia*, mediation as a means of resolving family-related disputes.

In 2014, the Constitutional Court advanced its case law, expressly aligning it with the European Court's judgment in *Mladina d.d. Ljubljana*.¹⁵⁴ According to this judgment, domestic courts must convincingly establish a pressing social need to prioritise the protection of an individual's reputation over a publishing company's right to freedom of expression and the public interest in promoting freedom of expression, especially in matters of public interest.

6. Slovenia before the European Court of Human Rights – An outline of selected landmark cases

Before 2006, Slovenia was convicted by the ECtHR for violating Convention rights only six times. After that year, both the number of filed complaints and the number of convictions increased significantly. By 2021, a total of 10,136 complaints had been filed against Slovenia with the ECtHR. Of these, 9,634 appeals were declared inadmissible or struck out. The ECtHR issued 392 judgments in total, finding no violation in 24 of them, while at least one violation was found in 342 cases.¹⁵⁵

In 2022, 287 complaints were filed against Slovenia. The Court dealt with 275 applications, of which 271 were declared inadmissible or struck out. It delivered four judgments (concerning four applications), all of which found at least one violation of the ECHR.¹⁵⁶

In 2023, the Court received 978 complaints against Slovenia. It dealt with 205 applications, of which 203 were declared inadmissible or struck

¹⁵² Zakon o socialnem varstvu (ZSV) [*Social Security Act*], Official Gazette of the Republic of Slovenia, Nos. 3/07 – officially refined text, 57/12, 39/16, 54/17, 28/19, 82/23.

¹⁵³ Družinski zakonik (DZ) [*Family Code*], Official Gazette of the Republic of Slovenia, Nos. 15/17, 22/19, 5/23.

¹⁵⁴ *Case of Mladina d.d. Ljubljana v. Slovenia*, App. No. 20891/10, 17 April 2014.

¹⁵⁵ ECtHR, 2022a.

¹⁵⁶ ECtHR, 2025a.

out. The Court delivered two judgments (concerning two applications), both of which found at least one violation of the Convention. By the end of 2023, the Court had issued judgments in 379 cases concerning Slovenia, finding a violation in 348 cases (less than 4% of all appeals filed during this period were successful for the appellants).¹⁵⁷

From January to July 2024, the ECtHR dealt with 64 applications concerning Slovenia, of which 62 were declared inadmissible or struck out. It delivered two judgments (concerning two applications), both of which found at least one violation of the Convention. By July 1, 2024, 1,079 applications concerning Slovenia were pending, with 174 before a single judge, 878 before a committee of three judges, and 27 before a chamber of seven judges. No applications concerning Slovenia were pending before the Grand Chamber.¹⁵⁸

Between 1994 and 2021, the Court found that the most frequently violated rights were the right to an effective remedy (267 violations) and the right to a fair trial due to the length of proceedings (263 violations). The Court also identified 25 violations of the right to a fair trial for reasons other than the length of proceedings, 21 violations of the prohibition of inhuman or degrading treatment, 12 violations of the right to respect for private and family life, and 8 violations of the protection of property. Additionally, there were 6 violations of the right to liberty and security, 6 violations of the authorities' obligation to conduct an effective investigation in cases concerning the prohibition of inhuman or degrading treatment, 3 violations of freedom of expression, and 3 violations of the prohibition of discrimination. The ECtHR found that, on three occasions, domestic court decisions were not implemented by Slovenian authorities. Finally, the Court found 3 violations of the obligation to carry out an effective investigation in cases concerning the right to life, but it did not find any violation of the right to life itself (i.e., it found no deprivation of life in contravention of the ECHR). The ECtHR found no violations concerning other Convention rights.¹⁵⁹

This section provides an overview of Slovenia's landmark cases before the ECtHR. The 'landmark cases' selected for this outline are those identified by the ECtHR Press Unit as 'noteworthy cases' involving Slovenia. The presentation begins with three of the four cases decided by

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

the Grand Chamber, as well as one inter-state case. The remaining cases are categorised and discussed according to the relevant articles of the Convention (Articles 3, 5, 6, 7, 8, and 10) and its Protocol No. 1 (Articles 1 and 3). The section concludes with the outline of two pending cases.

6.1 Cases decided by the Grand Chamber and inter-state cases

In the case of *Šilih v. Slovenia*,¹⁶⁰ which I briefly drew upon in Section 4, the applicants complained that their son had died because of medical negligence and that their rights under Article 2 (right to life) and several other articles of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for his death. More particularly, the applicants complained that the criminal and civil proceedings they had instituted did not allow for the prompt and effective establishment of responsibility for their son's death. The ECtHR held, *inter alia*, that if in the specific sphere of medical negligence there may be obstacles or difficulties that prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law. It found that there has been a violation of Article 2 of the Convention in its procedural limb.

*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The former Yugoslav Republic of Macedonia*¹⁶¹ concerned 'old' foreign-currency savings in the Sarajevo branch of Ljubljanska Banka, which were, following the dissolution of the Socialist Federal Republic of Yugoslavia and the enactment of the 1997 Claims Settlement Act in the Federation of Bosnia and Herzegovina (the FBH), transferred to a privatisation account administered by the relevant authorities of the FBH. The transfer appeared to have taken place *ex lege* for the citizens of Bosnia and Herzegovina who resided there on 28 November 1997. Following the amendments of the 1997 Act in 2003, the savers with unused claims on the privatisation account had, under section 20a of the amended 1997 Claims Settlement Act, the right to request their transfer back to their bank account. Subsequent legislative changes in Bosnia and Herzegovina expressly excluded its liability for savings in, *inter alia*, the Sarajevo branch of Ljubljanska Banka. In the Grand Chamber judgment, the ECtHR held unanimously that there had been a violation of Article 1 of Protocol No. 1

¹⁶⁰ *Case of Šilih v. Slovenia*, App. No. 71463/01, 9 April 2009.

¹⁶¹ Cited *supra* (footnote 137).

(protection of property) and Article 13 (right to an effective remedy) by Slovenia. The Court confirmed that Slovenia (and Serbia) had been responsible for the debts owed to the applicants by the two banks, Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka and held that there had been no good reason for the applicants to have been kept waiting for so many years for repayment of their savings. It pointed out that this was a special case, as it was not a standard case of rehabilitation of an insolvent private bank, the banks in question having always been either State- or socially owned.

In *Kurić and Others v. Slovenia*,¹⁶² the applicants belong to a group of persons known as the 'erased,' who on 26 February 1992 lost their status as permanent residents following Slovenia's declaration of independence and passing of the 'independence legislation', including a new law on aliens in 1991. On the basis of this new law, the Slovenian authorities erased 25,671 people from the Register of Permanent Residents because they had failed to apply for Slovenian citizenship within the prescribed time limit. After becoming aliens with no legal status in Slovenia, they experienced years of hardship: their identity papers were destroyed; they could not work, have health insurance or renew their identity documents and driving licences; they had difficulties securing pension rights; and some were even deported from Slovenia. The Court found a violation of Article 8 (right to respect for private and/or family life), Article 13 (right to an effective remedy) in combination with Article 8, and Article 14 (prohibition of discrimination) in combination with Article 8. The Court found that the Slovenian authorities had failed to regulate the issue of 'erased' people and to provide them with adequate redress for the years during which they had been in a position of vulnerability and legal insecurity. The Court also decided to apply the pilot judgment procedure, holding that the Government should, within one year, set up a compensation scheme for the 'erased' in Slovenia. It decided it would adjourn examination of all similar applications in the meantime. In the same case, by a Grand Chamber judgment of 12 March 2014 on the just satisfaction, the Court held, unanimously, that the Slovenian Government was to pay the six applicants whose rights under the ECHR had been violated amounts between 29,400 and 72,770 euros each.

Two years after the Grand Chamber judgment, the Court issued the decision in *Anastasov and Others v. Slovenia*,¹⁶³ another case concerning

¹⁶² Cited *supra* (footnote 139).

¹⁶³ *Case of Anastasov and Others v. Slovenia*, App. No. 65020/13. 17 November 2016.

the so-called 'erased'. Relying on Articles 8,13, 14 and 46, 121 applicants complained about their unsettled situation for several years because of having been arbitrarily deprived of their status as permanent residents of Slovenia. Having lodged their applications before the European Court in October 2013, they also complained that the Slovenian authorities had failed to set up a compensation scheme within the deadline (June 2013) indicated in the judgment *Kurić and Others* and that, in any event, the financial redress proposed had been neither prompt nor adequate. The Court observed that following the *Kurić and Others* judgment, the compensation scheme was set up in Slovenia by the legislation which entered into force in December 2013. This legislation essentially provides for financial compensation to the 'erased' to be claimed in administrative proceedings, so the remaining 'erased' persons who had regularised their legal status – such as the 212 applicants in this case – have a reasonable prospect of receiving compensation for the damage caused by the systemic violation of their Convention rights. It noted that the Committee of Ministers of the Council of Europe, responsible for supervising the implementation of the European Court's judgments, had recently closed its examination of *Kurić and Others* as it was satisfied that all measures required in that judgment had been adopted. Thus, the Court believed the matter giving rise to the present application and the remaining applications against Slovenia lodged by the 'erased' – where the applicants had regularised their legal status – had thus been resolved at the national level. The Court did not find any special circumstances regarding respect for human rights as defined in the Convention and its Protocols, which required the continued examination of the case. In those circumstances, the Court decided to close the pilot-judgment procedure initiated in *Kurić and Others*, considering that it was no longer justified.

In *Slovenia v. Croatia*,¹⁶⁴ the Slovenian Government lodged an inter-State application against the Croatian Government, alleging a series of violations of the fundamental rights of Ljubljana Bank, founded in 1955 under the laws of the then Socialist Federal Republic of Yugoslavia and reorganised in the framework of the 1989-90 reforms, later being restructured by the Slovenian State after its declaration of independence. The Slovenian government complained that the Croatian authorities, including courts, had prevented and continued to prevent Ljubljana Bank from enforcing and collecting the debts of its Croatian debtors (mainly

¹⁶⁴ *Case of Slovenia v. Croatia*, App. No. 54155/16, 16 December 2020.

companies operating in the agricultural and food sectors) in Croatia. They alleged multiple violations of the right to a fair hearing and the right to an effective remedy, as well as the prohibition of discrimination and the protection of property. They also requested just satisfaction corresponding to the losses incurred by Ljubljana Bank as a result of the alleged violations. The ECtHR had previously established the general factual and legal background to the case in its judgments and decision in *Kovačić and Others v. Slovenia, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia, and Ljubljanska Banka D.D. v. Croatia*. In the latter case, the Court had declared inadmissible an individual application lodged by Ljubljana Bank itself, finding that, as it did not have sufficient institutional and operational independence from the State, it was not 'non-governmental' within the meaning of Article 34 of the Convention. The idea behind this principle was to ensure that a State Party could not act as both an applicant and a respondent in the same matter. Relying on its previous decisions, the Grand Chamber held that Article 33 of the Convention (inter-State applications) did not allow an applicant Government to defend the rights of a legal entity which did not qualify as a 'non-governmental organisation' and which, therefore, would not be entitled to lodge an individual application under Article 34. Accordingly, Article 33 did not empower the Court to examine an inter-State application alleging a violation of any Convention right in respect of this legal entity. The Court therefore lacked jurisdiction to hear the case.

6.2 Cases dealing with inhumane and/or degrading treatment or punishment (Article 3)

*Rehbock v. Slovenia*¹⁶⁵ concerned the applicant, a German national, who was arrested by the Slovenian police, detained on remand and accused of dealing with narcotics and smuggling. The applicant claimed that during the arrest, in the course of which he suffered injuries, the Slovenian police used excessive force. A doctor examined the applicant and diagnosed a double fracture of the jaw and facial contusions. The applicant refused to undergo the immediate surgery recommended by a doctor. During his detention, his first request for release was dismissed after 23 days. Another request for release lodged by the applicant on 29 November 1995 was dismissed on 22 December 1995. While in detention, the applicant's correspondence with the

¹⁶⁵ *Case of Rehbock v. Slovenia*, App. No. 29462/95, 28 November 2000.

European Commission of Human Rights was monitored. He contended that, during this time, he was also subjected to inhuman and degrading treatment as he had not been provided with adequate medical care. The applicant was convicted of drug-related offences and sentenced to 17 months' imprisonment. The appellate court upheld the first instance judgment. The Court found that the treatment to which he had been subjected during his arrest had been inhumane and in violation of Article 3. The Court also ruled that there had been a violation of the right to liberty and security because the applicant had not been able to initiate proceedings to determine the lawfulness of his detention speedily, as required by Article 5 § 4, and that his right to compensation in this respect, as guaranteed by Article 5 § 5, had been violated. Finally, the ECtHR established a violation of Article 8 in that the applicant's correspondence with the Commission had been monitored during his detention.

In *Matko v. Slovenia*,¹⁶⁶ the ECtHR reviewed a 1995 police operation in Slovenj Gradec. During this operation, police stopped the applicant, who was driving fast, and injured him during the arrest. He sustained bruises, abrasions, and a broken bone. Following brief detention and questioning, he was released but charged with obstructing an official act. The Slovenian government claimed his injuries were due to lawful police force in response to resistance. The applicant, however, alleged that two vehicles blocked his path, and armed, masked men violently pulled him from his car, threatened to kill him, and used a taser. His complaint to the State Prosecutor's Office was dismissed after eight months on the basis of the findings of an internal investigation carried out by the Police and the Ministry of Interior. Although initially acquitted for lack of evidence, he was convicted on retrial. Neither the state prosecutor's office nor the court identified the officers who allegedly used excessive force. In his appeal to the ECtHR, the applicant claimed that he was the victim of inhuman treatment during his arrest and that the state authorities did not seriously investigate his statements, supported by a medical certificate. The Slovenian government argued that the applicant had not exhausted all legal remedies, as he could have continued proceedings as a subsidiary prosecutor or filed a civil suit after his complaint against the police was dismissed. The Court found Slovenia responsible for violating Article 3 due to ill-treatment during the police proceedings and the failure to perform an effective investigation into the applicant's allegations that he was ill-treated by the police. The ECtHR

¹⁶⁶ Cited *supra* (footnote 128).

dismissed claims under Articles 5 and 6, noting that the applicant missed the 6-month deadline to challenge his detention and ruled that the trial duration was reasonable, concluding within five years across four instances.

6.3 Cases regarding the right to a fair trial (Article 6)

6.3.1. Right to a fair hearing

*Dolenc v. Slovenia*¹⁶⁷ concerned an Israeli citizen who had been left paralysed after being operated on by the applicant, a well-known neurosurgeon, in a Ljubljana hospital and the ensuing proceedings in both Israel and Slovenia. After the patient brought proceedings in Israel seeking damages for medical negligence, the applicant refused to attend the trial in Israel or be examined via video link, insisting from the beginning that Slovenian law should apply in the dispute and that he and his witnesses be examined by the Slovenian courts via the Hague Evidence Convention procedure. The applicant was eventually found fully liable in 2005. He was ordered to pay approximately 2.3 million euros (EUR) in damages. In 2011, the patient applied to have the Slovenian courts recognise the Israeli court decisions, and in 2018, the Supreme Court found in his favour. A constitutional complaint by the applicant was subsequently rejected in 2019. In those proceedings, the Slovenian courts considered that the applicant had been given sufficient opportunities to present the evidence and defend himself in Israel. Relying on Article 6 (right to a fair trial), the applicant alleged that the Slovenian courts should have refused to recognise the Israeli judgments because they had been rendered in unfair proceedings. The ECtHR found in particular that, before recognising the Israeli judgments awarding the applicant's former patient more than 2 million euros, the Slovenian courts had failed to duly satisfy themselves that the trial in Israel had been fair. There had, in particular, been issues concerning evidence-gathering. The court in Israel did not hear crucial witnesses, such as the hospital staff and a Slovenian law expert, and excluded their statements from the case file. There had accordingly been a violation of Article 6 § 1 of the Convention.

¹⁶⁷ *Case of Dolenc v. Slovenia*, App. No 20256/20, 20 October 2022.

Delivered on 19 December 2024, the judgment in *X and Others v. Slovenia*¹⁶⁸ concerned custody decisions and contact rights following the separation of X from her children's father in 2018. It also concerned the reassignment of X's court case to a particular judge. The applicants were the mother (the first applicant) and her three children (the second, third and fourth applicants). Following the separation of the first applicant and the applicant children's father in 2018, the applicant children lived with the first applicant based on an interim care order by a judge, which was later overturned by another judge, to whom the case had in the meantime been allocated, in favour of the father. The latter order was based on a finding that the first applicant had obstructed the execution of the applicant children's contact with their father and had probably sought to alienate them. On 16 March 2020, the same judge issued a decision ordering the removal of the applicant children from the first applicant and the removal was carried out the next day despite the applicant children's strong resistance. One of the applicant children even required medical attention during this event. Since then, the applicant children have had either no or very limited contact with the first applicant. The first applicant's requests for a new interim care order were dismissed by the same judge on 17 November 2020 and 8 January 2021. During the proceedings concerning the custody and contact rights, which are still ongoing, the first applicant made several requests for the exclusion of the judge from dealing with the case. She alleged and continues to allege that the judge is biased and has not been appointed in line with the rules set out in the applicable legislation. The first applicant's requests were dismissed first by the president of the Ljubljana District Court and later by the Ljubljana Higher Court. The Constitutional Court decided not to accept for consideration the first applicant's constitutional complaints relating to the Ljubljana Higher Court's decision by observing that the first applicant's allegations concerning the allegedly unlawful allocation of her case to the judge and the latter's bias were unfounded. It also noted that the applicant children's wish expressed to the welfare authorities had not necessarily reflected their true opinion and that the first applicant had failed to make a request for an extended contact. The Constitutional Court also dismissed her petition in which she challenged the legislation regulating the enforcement of care orders. In their complaint to the ECtHR, referring to the proceedings which ended by the Constitutional

¹⁶⁸ *Case of X and Others v. Slovenia*, App. Nos. 27746/22 and 28291/22, 19 December 2024.

Court's decision, the applicants complained, under Article 6 paragraph 1 of the Convention, that the case was allocated to judge at stake unlawfully, that the judge lacked impartiality, and, under Article 8 of the Convention, that the applicant children have been unable to enjoy family life with the first applicant. The applicants also complained that the applicant children were subjected to treatment incompatible with Article 3 during their forcible removal based on the decision of 16 March 2020. The European Court of Human Rights held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, as regards X's right to a tribunal established by law, and violations of Article 8 (right to respect for private and family life) with respect both to: (a) the applicant children, as regards the order to remove them from X's (their mother's) care in March 2020, their lack of representation in the contact and custody proceedings, and their not being allowed contact with their mother; and (b) X, for not being allowed contact with her children. The Court found in particular that the President of the District Court, in assigning the applicants' cases to a particular judge, contrary to objective pre-established criteria, had defied the clear purpose of the law – namely, to ensure randomness in the assignments of cases. It also considered that two interim orders and a judgment prohibiting contact between the children and their mother had not been justified and that the removal of the children from X had not been supported by relevant and sufficient reasons. Moreover, the national courts' failure to ensure proper representation of the children's interests during the contact and custody proceedings had amounted, in itself, to a breach of the children's right to respect for their family life.

6.3.2. Right to a fair hearing within a reasonable time

*Lukenda v. Slovenia*¹⁶⁹ is a key Slovenian case regarding the right to a fair trial within a reasonable time. In 1994, the applicant was injured while working in a mine. Due to the consequences of the injury, partial disability was established (13 percent). He received compensation for partial disability from the insurance company. His claims for an increase in compensation were repeatedly rejected by the insurance company. In December 1998, on the basis of an expert opinion, he initiated proceedings against the insurance company before the District Court in Celje for an increase in compensation by 7 percent and later by an additional 2.5 percent. In the court proceedings

¹⁶⁹ Cited *supra* (footnote 121).

at the first instance, which lasted four years, the court partially granted his claim. The applicant appealed to the higher court, where the proceedings lasted a year and three months. The court granted his claim again, only partially. The applicant filed an appeal with the ECtHR before exhausting the remaining legal means in Slovenia, i.e. appeals at the Administrative Court, the Supreme Court and the Constitutional Court. In the appeal, he claimed a violation of the right to a fair trial within a reasonable time due to the excessively long duration of the proceedings and a violation of the right to an effective legal remedy, which would enable the elimination of the violation of the right to a trial within a reasonable time. The court rejected the Slovenian government's objection that the applicant had not exhausted domestic legal remedies. It concluded that the remaining remedies neither individually nor in combination meet the efficiency criteria set by the ECtHR in past decisions. On the main point, it ruled that the procedures, in which the courts and other authorities decided on the applicant's case, were unreasonably long. The ECtHR found violations of the first paragraph of Article 6 (the right to a fair trial within a reasonable time) and Article 13 (the right to an effective legal remedy) of the Convention. The Court additionally found that these violations in Slovenia at that time were not an isolated case, but a systemic problem of dealing with court backlogs due to inadequate legislation and ineffective judicial practice.

6.3.3. Presumption of innocence

*Bavčar v. Slovenia*¹⁷⁰ concerned the applicant Mr Bavčar, a former Government minister, who was found guilty of abuse of a position or rights when carrying out an economic activity and money laundering in 2016. He received a prison sentence and was ordered to return the illegally obtained assets. In 2015, the Supreme Court ordered a retrial as it was not clear that all the elements of the offence had been met in the case. In September 2016, the Ljubljana District Court acquitted the applicant of the criminal offence of inciting abuse of a position or rights but found him guilty of money laundering. The applicant's prison sentence had been stayed owing to his poor state of health. However, footage later emerged of him allegedly playing basketball. On the day the footage emerged the then Minister of Justice, Goran Klemenčič, gave a television interview to POP TV (a commercial television station) where he stated, *inter alia*, that '[If] the

¹⁷⁰ *Case of Bavčar v. Slovenia*, App. No. 17053/20, 7 September 2022.

Bavčar case becomes time-barred, a lot of people will have to answer for that' and that he, as the minister, '*will be the first to demand answers.*' The applicant appealed against the retrial judgment, arguing that money laundering could not be a result of indirect intent and that the televised statements by the minister had exerted pressure on the Higher Court judges. That appeal was dismissed, and so were his application for the protection of legality to the Supreme Court and two complaints to the Constitutional Court. Considering the applicant's complaint, the ECtHR reiterated that the presumption of innocence was violated when public officials made statements that an individual was guilty before he or she had been tried. As regards the influence of those statements on the proceedings before the Slovenian courts, the Court noted that the cumulative effect of those statements had been capable of prejudicing the Higher Court in its judgment in the case. As the presumption of innocence had been violated in the applicant's case, there had therefore been a violation of Article 6, paragraph 2.

6.4 Principle of legality (Article 7) and property rights (Article 1 of Protocol No. 1)

*Rola v. Slovenia*¹⁷¹ concerned the applicant, Mr Štefan Rola, who was granted a licence to work as a liquidator in insolvency proceedings. However, in 2011, the Minister of Justice revoked his licence because he had been convicted of two counts of violent behaviour in 2003 and 2004. He was thus struck off the register of liquidators and could no longer be assigned any insolvency proceedings. He brought an administrative action before the Slovenian courts against this decision by arguing that at the time he had acquired the licence, the law had not provided for revocation if convicted of a criminal offence. He argued that the revocation of his licence had been based on new legislation introduced in 2008. The national courts dismissed his action in 2012, finding that the revocation had been entirely lawful. In 2013, the applicant applied for a new liquidator's licence, which the Ministry of Justice rejected because, under the new 2008 legislation, a licence could not be granted once it had been revoked. He lodged another administrative action, which was also ultimately unsuccessful, in a decision before the Supreme Court in 2015. After unsuccessfully challenging previous decisions before the Constitutional Court, the applicant filed a petition at the ECtHR. He claimed that the Slovenian authorities violated

¹⁷¹ *Case of Rola v. Slovenia*, App. No. 12096/14, 4 June 2019.

Article 7 (no punishment without law), Article 1 of Protocol No. 1 (protection of property) and Article 4 of Protocol No. 7 (right not to be punished twice for the same offence). The Court found that the measure had been imposed under administrative law, completely separately from the ordinary sentencing procedure and that therefore the revocation of the applicant's licence had not amounted to a criminal punishment. According to the Court, Article 7 was not applicable and there had, therefore, been no violation of that provision. The Court also rejected as inadmissible the applicant's complaint that the revocation of his licence and his conviction for violent behaviour had constituted double jeopardy (Article 4 of Protocol No. 7). However, the ECtHR considered that Mr Rola could not have reasonably foreseen that his conviction would have automatically led to the revocation of his licence. The revocation had thus not been lawful, and Slovenia violated his rights under Article 1 of Protocol No. 1.

In *Ribič v. Slovenia*,¹⁷² the ECtHR held that the overall prison sentence of thirty years imposed on the applicant by the judgment of a national criminal court was in breach of the principle of legality enshrined in Article 7 of the Convention. The Court noted that the provisions of the Criminal Code were deficient and that the domestic courts interpreted them by resorting to the canons of interpretation that were clearly to the detriment of the applicant and led to the conclusion that the provisions should be understood as imposing a sentence of thirty years. The domestic courts did so despite the fact that such a penalty was heavier than the maximum sentence explicitly provided for in the applied legal provision and that, having regard to the actual wording of that provision, it was clearly to the detriment of the applicant. Accordingly, the Court concluded that the domestic courts failed to ensure the observance of the principle of legality enshrined in Article 7 of the Convention. It further found that the overall penalty imposed on the applicant was in violation of both the principle that only the law can prescribe a penalty and the principle of retrospectivity of the more lenient criminal law. The Court stated, *inter alia*, that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction

¹⁷² *Case of Ribič v. Slovenia*, App. No. 20965/03, 19 October 2010.

and punishment (the Court referred to *Del Río Prada v. Spain* and *Vasiliauskas v. Lithuania*).

6.5. Private and family life cases (Article 8)

*Benedik v. Slovenia*¹⁷³ concerned the applicant, Mr Igor Benedik, who was involved in a peer-to-peer file-sharing network, which included the sharing of child pornography pictures or videos. After being informed by their Swiss counterparts about a dynamic IP address that was being used in a peer-to-peer file-sharing network, the Slovenian police asked the local Internet service provider for information about the user who had been assigned that IP address, which the company handed over. The police used a provision of the Criminal Procedure Act, which allowed them to request subscriber data from an electronic communication provider without a court order; however, this provision had no rules covering the link between subscriber information and a dynamic IP address. Although the IP address at first identified the applicant's father as the subscriber to the Internet service in question, it transpired that it was the applicant who used the service himself and had downloaded files with child pornography. He was formally placed under investigation, and in December 2008, he was convicted of the offence of the display, manufacture, possession or distribution of child pornography. He made unsuccessful appeals to the Ljubljana Higher Court, the Supreme Court, and the Constitutional Court. The latter found, inter alia, that such information was in principle protected by constitutional data privacy safeguards, but that Mr Benedik had waived his right to protection by revealing his IP address and the content of his communications on the file-sharing network. The applicant alleged throughout the domestic proceedings, as well as in his petition to the ECtHR, that the evidence about his identity had been obtained unlawfully because the authorities did not have a court order to obtain subscriber information associated with the dynamic IP address in question. The ECtHR found that the provision of the Criminal Procedure Act used by the police to access subscriber information relating to the dynamic IP address had lacked clarity and had not offered sufficient safeguards against arbitrary interference with his Article 8 rights. The Court drew upon the Constitutional Court, which had ultimately found that it had not been necessary to get a court order in the applicant's case as he had effectively waived his right to privacy by revealing his IP address and the contents of his communication on the file-sharing network. The

¹⁷³ *Case of Benedik v. Slovenia*, App. No. 62357/14, 24 April 2018.

ECtHR did not find that decision to be reconcilable with the scope of the right to privacy under the Convention, and that the police should have obtained a court order, as nothing in the law had prevented them from seeking one. The interference with the applicant's rights had therefore not been 'in accordance with the law' and had led to a violation of Article 8 of the Convention.

*Škoberne v. Slovenia*¹⁷⁴ concerned the applicant Mr Milko Škoberne, a former district-court judge who was arrested in January 2011 following an undercover operation into his allegedly accepting bribes to intervene in proceedings against E.Č. for fraud and prostitution related crimes. Two others, E.R. and M.S., were arrested at the same time for acting as intermediaries. The applicant, who had received EUR 8,000 from M.S. in repayment of a loan, said in his defence that he had meetings with E.Č., E.R. and his friend, M.S., and had given legal explanations regarding their criminal case, but at no point had there been any talk of money. On 23 December 2013, the first-instance court found the applicant guilty as charged. The applicant's challenges to his conviction, ultimately before the Constitutional Court in 2015, were all unsuccessful. The applicant argued that he had been denied the possibility of putting questions to E.R. and M.S. in court, and that the trial judge had not stepped down, despite her having accepted his co-defendants' admission of guilt, raising doubts over her impartiality. The applicant also complained that the first-instance court had relied on data to convict him, which had been obtained from electronic communication providers who had been obliged by law at the time to retain data for a period of 14 months. The courts dismissed that complaint, however, concluding that the data in question had been accessed before this retention regime had been declared invalid by a Constitutional Court ruling of 2014. Relying on Articles 6 and 8, the applicant complained that the first-instance court had refused to allow the examination of two witnesses, that the judge in the trial had been partial as she had been involved in the proceedings against those witnesses, and of the retention of his telecommunications data. The ECtHR found that although the retention regime had been declared invalid by the Constitutional Court and the CJEU after his data had been accessed, that did not mean that it had complied with Article 8 at the time and that he had enjoyed the legal protection to which he had been entitled under the Convention. Overall, the retention, access and processing of telecommunications data at the time of the applicant's

¹⁷⁴ *Case of Škoberne v. Slovenia*, App. No. 19920/20, 15 February 2024.

conviction had been in violation of Article 8 of the Convention. Regarding the fact that the applicant had been deprived of the opportunity to effectively adduce witness evidence and that the higher courts had not redressed that shortcoming, the Court found that this had rendered the trial proceedings unfair. There had accordingly been a violation of Article 6 paragraphs 1 and 3 of the Convention. Following that finding, the Court considered that it was not necessary to examine the merits of the complaint under Article 6 paragraph 1 concerning the trial judge's alleged lack of impartiality.

Another case pertaining to the protection of private and family life and also the minorities' rights was *Hudorovič and Others v. Slovenia*.¹⁷⁵ The case concerned complaints by the applicants, who are all Slovenian nationals of Roma origin, about an alleged lack of access to drinking water and sanitation, taking into consideration their lifestyle and minority status. Relying on Article 3 (prohibition of inhuman or degrading treatment), Article 8 (right to respect for private and family life), and Article 14 (prohibition of discrimination) in conjunction with Articles 3 and 8, the applicants complained of a lack of access to basic public utilities, notably drinking water and sanitation. They also argued that they had been subjected to a negative and discriminatory attitude by the local authorities. The Court noted that access to safe drinking water was not, as such, protected by Article 8; however, water was necessary for human survival and a persistent and long-standing lack of access to it could have adverse consequences for health and human dignity, effectively eroding the core of private life and the enjoyment of a home. The Court was therefore unable to exclude that a convincing allegation of such stringent conditions could trigger the State's positive obligations under Article 8. In the given case, a diesel generator and a water tank were purchased and placed in the settlement and water was provided by the fire brigade. However, the applicants stated that the tank had become mouldy and unusable and that residents had had to replace it. Some applicants argued that they have not even taken part in that system, partly due to opposition from a neighbour to their accessing it. They obtained water from a fountain in the village. The ECtHR noted that the municipal authorities had taken some concrete steps to ensure the applicants had access to safe drinking water and that the applicants were also in receipt of social welfare benefits and were not living in a state of extreme poverty.

¹⁷⁵ *Case of Hudorovič and Others v. Slovenia*, App. Nos. 24816/14 and 25140/14, 10 March 2020.

The Court considered that the authorities had recognised the applicants' situation and, through their system of social benefits, had ensured that they were guaranteed a certain basic level of subsistence which was, or could have been, used, among other things, for improving their living conditions. It was thus found that the measures adopted by the State in order to ensure their access to safe drinking water and sanitation had taken account of their vulnerable position and had satisfied the requirements of Article 8 of the Convention. It also considered that even assuming that Article 14 applied, there had been no violation of that provision in conjunction with Article 8. Finally, the Court stated that it could not exclude the possibility that State responsibility could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found himself or herself faced with official indifference when in a situation of serious deprivation. However, establishing that the positive measures taken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, it found no violation of Article 3, taken alone and with Article 14.¹⁷⁶

A noteworthy Article 8 case, as identified by the ECtHR's Press Unit, is *Eberhard and M. v. Slovenia*.¹⁷⁷ In this case, the Court found a violation of the Convention after a father was unable to see his daughter for more than four years owing to the prolonged inactivity of the Slovenian authorities.

6.6. Freedom of expression (Article 10)

*Cimperšek v. Slovenia*¹⁷⁸ concerned the applicant Mr Jernej Cimperšek, who applied for the title of court expert on the assessment of the effects of natural and other disasters. He passed the test and was waiting to take his

¹⁷⁶ The *Hudorović* case attracted a number of third-party interventions (e.g. from the European Roma Rights Centre and the Human Rights Centre of Ghent University). This was the first time that the ECtHR had to examine whether the right to access safe drinking water and sanitation is protected by the ECHR (particularly under Article 8). Although the judgment does not question the restrictions imposed by Slovenian legislation on access to water and sanitation services, it recognises that such legislation may have disproportionate effects on members of the Roma community who, like the applicants, live in illegal settlements and rely on social benefits for their subsistence. In this particular case, the ECtHR found that those risks had been sufficiently mitigated. However, the precedent may prove significant for future complaints brought by Roma or other disadvantaged groups living without access to basic utilities. See Juhart and Sancin, 2022, pp. 446–447.

¹⁷⁷ Cited *supra* (footnote 145).

¹⁷⁸ *Case of Cimperšek v. Slovenia*, App. No. 58512/16, 30 June 2020.

oath in 2014, when the Minister of Justice refused his application as he did not have the personal qualities required to be an expert under the *Court Act*. The Minister found that comments in the applicant's blog, which were about social and political issues, and in emails to other candidates, which were about delays in the oath ceremony, had been offensive and incompatible with the work of a court expert. Mr Cimperšek contested this decision in the courts, alleging that it had breached his freedom of expression. He also argued that the assessment of his personal qualities should not be limited to his emails and blog and requested that the court hear witnesses on his moral character and about the fact that the blog was read only by his friends. The Administrative Court's dismissal of the applicant's claim, which upheld the Minister's conclusion about his fitness to be a court expert, was followed by the Supreme Court rejection of his appeal and the Constitutional Court's decision in 2016 not to accept a constitutional complaint for consideration. The ECtHR considered that the decision in question had essentially related to the exercise of freedom of expression and not access to public service. Finding out that there had been no detailed reasons in the Minister's decision or the Administrative Court's judgment as to why the applicant's exercise of his right to free expression had been offensive and incompatible with the work of a court expert, the ECtHR could not accept an argument by the Government that the Minister's decision had been necessary to secure morals and the reputation of court experts. Neither the Minister nor the Administrative Court had carried out any assessment of whether a fair balance had been struck between the competing interests at stake, and the Court had thereby been prevented from effectively exercising its scrutiny as to whether the domestic authorities had implemented the standards established in its case-law on the balancing of such interests. That was sufficient for the ECtHR to conclude that the interference with the applicant's freedom of expression had not been 'necessary in a democratic society' and that there had been a violation of Article 10. Additionally, the Court concluded that there had been a violation of Article 6, paragraph 1, on account of the lack of an oral hearing in the proceedings before the Administrative Court.

6.7. Right to free elections (Article 3 of Protocol No. 1)

*Zevnik and Others v. Slovenia*¹⁷⁹ concerned three Slovenian nationals and two political parties, which formed a coalition and submitted lists of

¹⁷⁹ *Case of Zevnik and Others v. Slovenia*, App. No. 54893/18, 5 December 2019.

candidates for the early parliamentary elections in 2018. The electoral commissions of two out of eight election constituencies rejected the coalition's lists, which included the two applicants, as they had not met the required level of 35% gender representation, in this case for females, as a share of the total actual number of candidates on each list. The applicants appealed to the Supreme Court by arguing that the number of women on both lists was more than 35% of the total number of candidates, as the same female candidates would run in more electoral districts in the constituencies in question. Alternatively, the electoral commissions should have given the party time to correct the problem. The Supreme Court dismissed their appeals, and the Constitutional Court voted seven to two against considering the case. It found that election lists had to be submitted in good time and be in conformity with the law, which was clear on the quota requirements. In its decision in the case, the ECtHR stated that rejection of the two lists had thus interfered with the passive electoral rights guaranteed by the Convention. However, it held that the advancement of equality of the sexes was a major goal among Council of Europe States and that the interference in question had pursued the legitimate aim of strengthening democratic legitimacy by ensuring a better balance of women and men in political decision-making. The Court also noted that Slovenia's two highest domestic courts, relying on a literal reading of the Election Act and on their own case-law, had held that the provisions and the penalties for non-compliance with them were clear and foreseeable. The ECtHR has unanimously declared the application inadmissible. It found, in particular, that the rules on gender representation for party lists on which the rejections had been based and the penalties for non-compliance with the rules were clear, and that the coalition party should have been aware of them. According to the Court, such quotas helped ensure democratic legitimacy and were compatible with the Convention. The ECtHR also rejected the applicants' claim that the electoral commissions should have given the party time to correct the problem. The Court accepted the Slovenian government's argument that the decision not to allow the corrections had been based on the legislature's legitimate concern to ensure the timely completion of the electoral process and respect for the principle of equal suffrage.

6.8. Noteworthy pending cases

*Landika v. Slovenia*¹⁸⁰ is related to the ECtHR judgment in *Ališić and Others* delivered in 2014 (see above). The applicants' predecessor (husband and father), L., had foreign-currency savings in the Sarajevo branch of Ljubljanska Banka. Neither he nor the applicants have recovered any of these savings nor used them in the privatisation process. In *Ališić and Others*, the Grand Chamber adopted a pilot judgment regarding 'old' foreign-currency savings in, *inter alia*, the Sarajevo branch of Ljubljanska Banka. It found, in respect of Slovenia, a breach of Article 13 of the Convention and Article 1 of Protocol No. 1 and held that Slovenia should make all necessary arrangements in order to allow the respective applicants and all others in their position to recover their savings under the same conditions as those who had such savings in domestic branches of Slovenian banks. On 4 July 2015, the law on the implementation of the *Ališić and Others* judgment entered into force. Relying on its provisions, L. made a request for verification with a view to recover his 'old' foreign-currency savings. The Succession Fund of Slovenia rejected his request by finding that the savings which had been transferred to the privatisation account were excluded from the repayment scheme. L. and, after his passing, the applicants challenged that decision before the domestic courts, including, ultimately, the Constitutional Court. The latter found that the applicants' constitutional complaint should not be accepted for consideration. The majority of the Constitutional Court judges opined that in *Ališić and Others*, the Grand Chamber had not addressed the situation such as the one in the present case because the savings of the applicants in that case had not been transferred to a privatisation account. It further found that the debtor-creditor relationship between L. and the bank had ceased to exist on the basis of the FBH's action – that is, the transfer of the savings to the privatisation account – and not the actions of the Ljubljanska Banka or Slovenia. Relying on *Ališić and Others* (outlined above), the applicants complain that they have been unable to recover L.'s 'old' foreign-currency savings, alleging a breach of Article 1 of Protocol No. 1 to the Convention. About fifty similar applications are currently pending before the Court.¹⁸¹

*Janković v. Slovenia*¹⁸² concerns the findings of the specialised Anti-Corruption Commission (the Commission) regarding the applicant, a well-

¹⁸⁰ *Case of Landika v. Slovenia*, App. No. 45987/22, 23 September 2022.

¹⁸¹ ECtHR, 2025a.

¹⁸² *Case of Janković v. Slovenia*, App. No. 15118/22, 4 October 2022.

known politician who has served as mayor of Ljubljana since 2006. In 2011, under the framework of anti-corruption legislation, the Commission reviewed the assets of the presidents of all parliamentary parties in Slovenia. It published its conclusions in 2012, but in respect of the applicant, these were set aside by the Supreme Court on the grounds that he had not been given the opportunity to comment on them beforehand. On 26 November 2015, the Commission issued fresh conclusions concerning the applicant, finding that between 2006 and 2012 he had violated the law by failing to report property (or changes thereto) relating to real estate, shares, and cash. The Commission also concluded that certain business transactions carried out during that period presented a high risk of corruption and conflict of interest, as they had been initiated by a company that was simultaneously engaged in business with the Ljubljana Municipality. It was further determined that the applicant had received EUR 208,000 in his bank account as a result of those transactions. On 5 January 2018, the Administrative Court dismissed the applicant's appeal against the Commission's conclusions, holding that there had been no violation of his rights in the proceedings. His further appeal to the Supreme Court was rejected on 3 July 2019, and the Constitutional Court declined to consider the case. The applicant complains, under Article 6 of the Convention, that the Administrative Court's review of the Commission's conclusions was too limited in scope and, therefore, did not afford him genuine access to a court.¹⁸³

According to statistics from the CoE's Department for the Execution of Judgments of the European Court of Human Rights, a total of four Slovenian cases are currently pending.¹⁸⁴

7. Conclusion

The Slovenian Constitution explicitly recognises the primacy of international law and treaties, including the ECHR, over national laws and other general acts within the domestic legal system. Article 8 of the Constitution states that *'laws and other regulations must conform to generally accepted principles of international law and to international*

¹⁸³ ECtHR, 2022c.

¹⁸⁴ Council of Europe Department for the Execution of Judgments of the European Court of Human Rights (2025) Slovenia and the Council of Europe' [Online]. Available at: <https://www.coe.int/en/web/execution/slovenia> (Accessed: 29 March 2025).

treaties that are binding on Slovenia.' This constitutional setting ensures the direct applicability of ECHR (and other CoE conventions') provisions in domestic law and the enforceability of ECtHR decisions within the Slovenian legal system.

While all CoE treaties were ratified after 1991, following Slovenia's attainment of sovereignty and independence, the reporting processes under CoE instruments have significantly contributed to strengthening human rights and the rule of law in Slovenia. They have facilitated major legislative reforms (e.g. judicial remedies for delayed proceedings, establishment of independent investigative mechanisms for police misconduct, minority protection frameworks, etc.). However, persistent challenges highlight that reporting alone is not enough, given that reporting processes are often technocratic, with limited public or parliamentary debate. Without strong domestic political will and institutional capacity, recommendations risk remaining on paper and without broader impact on political culture and public awareness. Accordingly, academic experts (and NGOs) play an increasingly important role in providing expertise and shadow reports that help international bodies identify blind spots in state self-reporting.

With only four cases currently pending before the ECtHR and a compliance rate of 96% for adverse ECtHR judgments, Slovenia has one of the highest compliance rates among all current member states and may be considered an example of 'good practices,' especially given the thousands of cases pending before the Committee of Ministers. A closer look at the state's compliance record reveals that Slovenian authorities have taken concrete steps to improve the promotion and coordination of the enforcement of ECtHR judgments.

In 2014, an amendment to the *State Administration Act*¹⁸⁵ designated a body (the Ministry of Justice) responsible for promoting and coordinating the enforcement of judgments from international courts. This was followed in late 2015 by the adoption of a resolution establishing the Interministerial Working Group for the Coordination of the Enforcement of ECtHR Judgments.

In 2015 and 2016, the Ministry of Justice, in cooperation with the Ministry of Foreign Affairs, sent a national expert to Strasbourg for an internship at the Council of Europe's Department for the Enforcement of

¹⁸⁵ Zakon o sprememba in dopolnitvah zakona o državni upravi (ZDU-1I) [*Act on changes and amendments to the State Administration Act (ZDU-1I)*], Official Gazette of the Republic of Slovenia, No. 90/14.

ECtHR Judgments to acquire the necessary skills. Additionally, the legal advisor from the Ministry of Justice at the Permanent Representation of the Republic of Slovenia to the Council of Europe is actively involved in the field of judgment enforcement.¹⁸⁶

Furthermore, the *Act on the State Attorney's Office*¹⁸⁷ introduced more detailed provisions regarding the representation of Slovenia before international courts and international arbitrations. This law defined the role of the international department within the State Attorney's Office, including co-representation of Slovenia before the ECtHR, the enforcement of financial obligations related to settlement procedures before the ECtHR, and participation in the enforcement of ECtHR decisions. According to this law, only a Slovenian citizen may represent Slovenia before the ECtHR and other international bodies.

Slovenia's strong compliance record may also be related to the compensation provided to successful applicants. On average, the country pays €7,000 to compensate victims of human rights violations, with the most common amount awarded in cases against Slovenia being €4,200. This sum includes both pecuniary and non-pecuniary damages, along with costs related to the ECtHR procedure. Since the first adverse judgment in 2000, the state has paid a total of €2.4 million in just satisfaction awards.¹⁸⁸ While compensation amounts awarded to applicants before the ECtHR are generally too low to significantly encourage faster and more efficient compliance or to prevent future violations, Slovenia presents a different case, showing that compensation can indeed act as an incentive for compliance.¹⁸⁹

¹⁸⁶ Government of the Republic of Slovenia, 2025.

¹⁸⁷ *Zakon o državnem odvetništvu (ZDOdv)* [*Act on the State Attorney's Office (ZDOdv)*], Official Gazette of the Republic of Slovenia, No. 23/17. See Chapter 2, Section 3, Arts. 20-23.

¹⁸⁸ See Fikfak and Kos, 2021, p. 6. That amount does not include the additional compensation schemes that the state was required to create under the Court's express order in response to two pilot judgment procedures in the *Kurić* and *Ališić* cases. The sum of 400,199.42 EUR was paid in the *Kurić* case, where the Court ruled that the erasure of residents was not in accordance with the Convention.

¹⁸⁹ *Ibid.* For example, since the first adverse ruling in 1959, the UK has paid a total of 11 million EUR to compensate victims of human rights violations. Generally, these violations have cost the UK more than they have cost Slovenia. However, compared to Slovenia, the UK compensates its victims more than twice as quickly—on average, in less than a year, while in Slovenia it takes two years for just satisfaction awards to be paid. See *ibid.*

However, compliance with, or the execution and enforcement of, ECtHR decisions must be distinguished from their implementation, which occurs only when the state adopts (rather than merely plans) appropriate measures that lead to changes within the domestic system, preventing future violations. While Slovenia's record of compliance with the ECHR is generally very positive, there have been several significant cases in which the ECtHR found violations of the Convention. These cases have resulted in legislative reforms, policy changes, and/or administrative measures that have enhanced the protection and respect of human rights. As Slovenia continues to evolve within the European human rights framework, ongoing and future reforms will be essential to ensure the full realisation of the rights guaranteed under the ECHR.

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TOMÁŠ GRYGAR*

**The Protection of Human Rights under the ECHR and Central Europe:
the Czech Republic****

ABSTRACT: This paper examines the protection of human rights under the ECHR in the Czech Republic, emphasizing the historical evolution of human rights protection in the territory of the present-day Czech Republic, constitutional aspects of the application of the ECHR, the nation's relationship with the Council of Europe (CoE) and landmark cases involving the Czech Republic before the ECtHR. Czechoslovakia was the first post-communist country that ratified the ECHR. However, the process of readmission of the independent Czech Republic to the Council of Europe after the dissolution of Czechoslovakia and the subsequent retroactive binding of the ECHR on the Czech Republic has been associated with several problematic issues from the perspective of public international law doctrine. This article points out that this retroactive application of the ECHR effectively violated Art. 59 (1) of the ECHR [former Art. 66 (1)], which provides that the ECHR shall be open to the signature of the members of the Council of Europe only. The paper also discusses in more detail a position of the ECHR in the Czech legal order and, above all, the constitutional background to its application. It draws attention to the problematic jurisprudence of the Czech Constitutional Court, according to which human rights treaties, including the ECHR, are not only part of the Czech legal order, but even of the “constitutional order”. This conclusion is contrary to Article 10 and Article 112(1) of the Czech Constitution. Landmark cases involving the Czech Republic before ECtHR reveal its evolving legal landscape. Notable cases include *D.H. and Others v. Czech Republic*, concerning alleged discrimination against Roma children in education. It is one of the first cases ever decided (not unanimously) by the Grand Chamber.

* JUDr. Tomáš Grygar, Ph.D. – The Constitutional Court of the Czech Republic; Faculty of Law, Palacký University in Olomouc, Czech Republic. tomas.grygar@upol.cz.

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KEYWORDS: ECHR – human rights in the Czech Republic – Czech constitution – monitoring visits to the Czech Republic – D.H. and Others v. Czech Republic.

1. Introduction

The political changes associated with the so-called Velvet Revolution (1989), the subsequent ratification (1992) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “ECHR”) and the establishment of the independent Czech Republic (1993) marked major milestones in the development of the rule of law and the protection of human rights and freedoms in the territory of the present-day Czech Republic. Czechoslovakia was the first post-communist country that ratified the ECHR. The historical framework provides a basic context for understanding the country’s current approach to human rights, including its commitment to the ECHR. Therefore, the development of human rights in the area of the contemporary Czech Republic is first discussed in this paper, with an emphasis on the historical constitutional catalogues of human rights. The next chapter deals with the membership of the Czech Republic in the Council of Europe (from the perspective of the protection of human rights). This chapter also mentions the various CoE human rights conventions to which the Czech Republic is a State Party, underscoring its broader commitments beyond ECHR. In the subsequent section, we discuss the process of ratification of the ECHR by Czechoslovakia and the Czech Republic, its position in the Czech legal order and, above all, the constitutional background to its application, in more detail. Moreover, obligations derived from the ECHR have also inspired significant legal reforms, fostering a more robust protection of individual rights. Finally, this paper provides an in-depth review of landmark cases brought by the Czech Republic before the European Court of Human Rights (hereinafter referred to as “ECtHR”).

2. Historical development of human rights in the Czech Republic

2.1. The period up to 1918

The creation of the first catalogues of fundamental rights in the territory of the present-day Czech Republic is inextricably linked to the development of law in the Austrian (later Austro-Hungarian) Empire. Probably the most

significant legislative step taken before the constitutionalist movement in the Monarchy (besides extending certain fundamental rights¹ by the monarch's patents) can be considered the adoption of the General civil code – ABGB² (1811). This code, which was in force in Czechoslovakia until 1950,³ established, among other matters, the legal personality of every person and the prohibition of slavery or the prohibition of retroactivity of the law.⁴ Simultaneously, the ABGB subscribes to the concept of natural human rights and “*natural principles of law*”, which were to be applied when the text of the law could not be used even by analogy.⁵ In the area of criminal law, the first indications of the enshrinement of fundamental rights can be observed in *Constitutio criminalis Josephina* (1787), which fully respected the application of the *nullum crimen sine lege* and *nulla poena sine lege*.⁶

The first constitution which contained a catalogue of some fundamental rights (personal and religious freedom, freedom of speech and press, national equality, publicity of court proceedings etc.)⁷ was the so-called Pillersdorf Constitution (April 1848). However, it was never implemented; only the *Reichstag* was convened on the basis of it.⁸ The so-called Stadion Constitution (March 1849) had a similar misfortune, as only some of its provisions were implemented by patents.⁹ The Schmerling Constitution (February 1861) did not contain a catalogue of human rights. The polylegal December Constitution (1867), which also included the *Basic Law on the General Rights of Nationals*,¹⁰ marked a significant breakthrough. This constitution established many “classical” human rights

¹ See for example *The Patent of Toleration* (1781) or the *Serfdom Patent* (1781) issued by the Joseph II.

² From German words *Allgemeines bürgerliches Gesetzbuch*.

³ The ABGB (1811) was replaced in Czechoslovakia by the Civil Code of 1950, which was highly ideological and written in the spirit of socialism. In many ways (legal equality between the subjects of law, protection of property rights etc.) it meant a reduction in the protection of fundamental rights. See Dvořák In Malý and Soukup., 2004, pp. 472-492.

⁴ The interpretation of the fundamental § 5 of the ABGB has been in the interest of legal doctrine in our country, in particular, the publication Procházka, 1928 can be referred to.

⁵ Tilsch, 1925, p. 68.

⁶ Malý, 2010, pp. 193-194.

⁷ Social rights and, with certain exceptions (e.g., freedom of speech), political rights were not guaranteed. Kühn, 2022, p. 24.

⁸ Malý, 2010, p. 212.

⁹ Ibid., p. 214.

¹⁰ No. 142/1867 Coll.

(1st generation of human rights), including selected political rights. It should be emphasised that the author of the (much later formulated) theory of three generations of human rights¹¹ is a French lawyer of Czech origin Karel Vašák (see also chapter 2.3 *in fine*).

2.2. The period 1918-1948

The independent Czechoslovak Republic was established on 28 October 1918. The first Czechoslovak law adopted after the collapse of the Austro-Hungarian Empire was the so-called Reception Norm¹², which left the existing land and empire laws and regulations into force for the time being.¹³ On 13 November 1918, the so-called provisional constitution was adopted, but it did not contain a bill of fundamental rights and freedoms. This was changed by the Czechoslovak Constitution of 1920,¹⁴ which contained a broad catalogue of fundamental rights, particularly in Title V.¹⁵ and in Title VI. The Constitution of 1920 also formally established the world's first independent Constitutional Court built on the model of a concentrated constitutional judiciary, partly following the ideas of Hans Kelsen.¹⁶ In fact, it was then established as the second concentrated constitutional court in the world after the Austrian Constitutional Court (*Verfassungsgerichtshof*).¹⁷ Nevertheless, its practical significance during this period was small and the results of its activities were, for a number of reasons, quite marginal.¹⁸

Compared to many other foreign constitutions of the same period, the Constitution of 1920 can be highlighted,¹⁹ for example, by the establishment of an universal equal and secret voting right for all citizens without distinction of sex (in case of elections to the Chamber of Deputies), the

¹¹ See Domaradzki, Khvostova and Pupovac, 2019, pp. 423-443.

¹² Coll. means „Collection of Laws“ (the main source of law in the Czechoslovakia and the Czech Republic).

¹³ For details, see Vojáček, 2018, pp. 157-184; Schelle, p. 41.

¹⁴ Formally "Constitutional Charter of the Czechoslovak Republic (Act No 121/1920 Coll.).

¹⁵ An example is the duty to defend the state (§ 127). For details, see Weyr, 1937, pp. 276-277.

¹⁶ Sládeček In Pavlíček et al., 2011, p. 938.

¹⁷ For a detailed discussion of the development of Czechoslovak constitutional justice, see the monograph Langášek, 2011.

¹⁸ Schelle, 2019, p. 112.

¹⁹ For a comparison of contemporary constitutions, see e.g., Broková, 2020, pp. 89-102.

abolition of the privilege of noble birth,²⁰ or the broad guarantee of freedom of religion.²¹ It was explicitly mentioned that all religions were equal. The protection of marriage, family, and motherhood was also explicitly mentioned.²² However, the Constitution of 1920 did not yet provide for social rights in any way.²³

In relation to the rights of national minorities, the Constitution of 1920 and laws were largely based on the requirements of the minor Treaty of Saint-Germain.²⁴ Nevertheless, the entirety of Title VI of the Constitution was later considerably affected by Constitutional Decree No. 33/1945 issued by the President of the Czechoslovak Republic.²⁵ For the rest, the bill of rights in the Constitution of 1920 was broadly comparable to most other European constitutions of the same period. On the other hand, it is significant that the constitutional regulation of fundamental rights was (and had to be) followed by a number of sub-acts which implemented the individual constitutional rights.²⁶ Notably, according to the prevailing view of legal theory and practice at the time,²⁷ the provisions of the Constitution on fundamental rights and freedoms were not directly applicable.²⁸ Overall, from our point of view, Constitution of 1920 was a very accomplished constitutional text, which was in many ways a source of inspiration²⁹ for the current Constitution of the Czech Republic and the Czech Charter of Fundamental Rights and Freedoms.

2.3. The period 1948-1989

After the Communist Party came to power in Czechoslovakia, a new Constitution, which also included a catalogue of fundamental rights and

²⁰ Weyr, 1937, p. 251. In this sense, the Constitution of 1920 [§ 106 (3)] was ideologically related to the earlier Law 61/1918.

²¹ For a contemporary critique of the theoretical ambiguity of the relationship between the state and the religious denominations, see Weyr, 1937, pp. 272-274.

²² However, according to František Weyr, the most renowned Czechoslovak constitutionalist of the time, this provision of the constitution had no normative significance. Rather, it was a political emphasis on the importance of family and marriage. The Weimar Constitution of 1919 was probably the reference model. Weyr, 1937, p. 275.

²³ Critically, see e.g. Kühn, 2022, pp. 26-27.

²⁴ Gronský, 2005, p. 104.

²⁵ *Ibid.*

²⁶ See Gronský, 2005, pp. 99-104.

²⁷ Weyr, 1937, pp. 248-250.

²⁸ Critically, see Kühn, 2022, pp. 27-28.

²⁹ Jirásková In Pavlíček et al., 2011, p. 322.

freedoms, was adopted on 9 May 1948. The text of the Constitution of 1948 and the regulation of human rights were in many ways related to the Constitution of 1920,³⁰ but the regulation of social rights was added. On the other hand, the Constitution of 1948 no longer provided for the protection of national and ethnic minorities. The new Constitution was not yet substantially influenced by the Marxist theory of the state and law and differed in its formal democratic conception from many constitutions of Eastern European states of the time, which often followed the Soviet Constitution (1936).³¹ The difference between the text of the Constitution and the actual (real) level of human rights protection was all the more noticeable. In the words of German legal theory, it was a fictitious constitution, where the constitutional reality (*Verfassungswirklichkeit*) differed from the text of the Constitution. In practice, the period after 1948 was associated with the suppression of many human rights, especially property rights (large-scale collectivisation and expropriation) and political rights. A number of laws, especially from 1948-1951 (e.g., the law on forced labour camps,³² the law for the protection of the people's democratic republic, the law on population reporting etc. were in a flagrant contradiction with the constitutional principles and human rights enshrined in the Constitution of 1948.³³ The political trials against the opponents of the communist regime should also be mentioned in this context.³⁴

On 11 July 1960, the new socialist Constitution of the Czechoslovak Socialist Republic was adopted. Constitution of 1960 regulated fundamental rights and duties in Articles 19 to 38. While the text of the 1948 Constitution still conformed to democratic traditions, the 1960 Constitution was already a highly ideological text that enshrined the leading role of the Communist Party in the State.³⁵ Judges were obliged to interpret legislation "*in accordance with socialist legal consciousness*".³⁶ One may also point to the hitherto unusual systematics of human rights regulation in the Constitution.³⁷ In the first place, economic, social, and cultural rights were regulated. It must be emphasised that all cultural policy, education, and

³⁰ Gronský In Pavlíček et al., 2011, p. 222.

³¹ Gronský, 2006, p. 329.

³² In detail, e. g. Soukup In Malý and Soukup, 2004, pp. 415-427.

³³ Gronský, 2006, p. 334.

³⁴ See the monograph [11] Bláhová et al., 2015.

³⁵ Article 4.

³⁶ Article 102(2).

³⁷ Gronský, 2007, p. 27.

training had to be conducted according to the Marxist-Leninist philosophy. Subsequently, political rights were regulated. Freedom of speech and freedom of assembly were guaranteed only “*in accordance with the interests of the working people*”, which in practice allowed for substantial restrictions on these rights. Political rights were only provided for at the end of the catalog of fundamental rights. Moreover, the legislation on the protection of the property right succumbed to strong ideological pressure; state ownership and (socialistic) cooperative ownership were preferred.

At this time, the constitutional theory in Czechoslovakia was influenced by the Marxist theory of the state and law. However, some outstanding constitutional lawyers of Czech origin worked in exile and contributed to the development of human rights even on an international scale. Karel Vašák (1929 – 2015), who emigrated to France, obtained French citizenship and later became the first Secretary-General of the International Institute of Human Rights (Strasbourg) founded by René Cassin, has already been referenced.³⁸ In addition to being the author of the above-mentioned generation of human rights (see chapter 2.1), he was, among other things, the general editor of the publication *Dimensions internationales des droits de l'homme* (The International dimensions of human rights).³⁹

2.4. Post-1989 period

Shortly after the Velvet Revolution (November 1989), Article 4 on the leading role of the Communist Party was removed from the Constitution of 1960, followed by a change in the name of the state (removal of the word “socialist”) and the equalisation of all forms (of protection) of property rights. In January 1991, the Charter of Fundamental Rights and Freedoms was adopted (as a constitutional Act No. 23/1991), which is still in force in the Czech Republic. The Charter of Fundamental Rights and Freedoms is in many aspects based on international human rights treaties,⁴⁰ particularly the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), International Covenant on Civil and Political Rights (ICCPR), and

³⁸ Radio Prague International (2025) Trois générations de droits humains: retour sur le parcours du juriste tchéco-français Karel Vašák. [Online]. Available at: <https://francais.radio.cz/trois-generations-de-droits-humains-retour-sur-le-parcours-du-juriste-tcheco-8850260> (Accessed: 15 July 2025).

³⁹ Vasak and Philip, 1982. Electronic version. [Online]. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000056230> (Accessed: 15 July 2025).

⁴⁰ Filip, 2010, p. 316.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR). Considering the length of the paper, the content of the Charter of Fundamental Rights and Freedoms will not be discussed in detail; its English translation is available on the website of the Constitutional Court of the Czech Republic.⁴¹ Compared to the previous regulation of the socialist Constitution of 1960, the following should be emphasised: adequate protection of the right to property (expropriation is permitted in the public interest, on the basis of law, and for compensation only),⁴² the right to judicial and other legal protection, the rights of national and ethnic minorities or the right to a favourable environment. The 2021 amendment⁴³ to the Charter of Fundamental Rights and Freedoms provides that everyone *'has the right to defend his or her life or the life of another person, even with a weapon, under conditions established by law'*. Of note is the guarantee of political rights,⁴⁴ with limitations possible in essentially the same situations as under the ECHR. Compared to many other foreign constitutions, there is a specific prohibition of censorship or a guarantee of the right of assembly, whereby assemblies are not dependent on state authorisation⁴⁵ Outside the political rights area, the prohibition on forcing a citizen to leave the territory of the homeland or the provision that *"inheritance is guaranteed"* should be mentioned.⁴⁶ In these matters, the regulation goes beyond the requirements of the ECHR.

The independent Czech Republic was established on 1 January 1993 by the defederalisation of Czechoslovakia. By a constitutional norm⁴⁷, the existing Czechoslovak legislation was transferred into the legal system of the newly established Czech Republic. On 1 January 1993, the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.) also entered into force, which regulated the relations between the constitutional organs of

⁴¹ Constitutional Court (2020) Charter of Fundamental Rights and Freedoms – english ver. [Online]. Available

at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (Accessed: 7 August 2024).

⁴² For details, see Grygar et al., 2020, pp. 29-43.

⁴³ Constitutional act No. 295/2021 Coll.

⁴⁴ For detail, see the monograph: Molek, 2014.

⁴⁵ Assemblies are merely notifiable and not authorised by the State. For more details, see: Grygar, 2022, pp. 151-175.

⁴⁶ The interpretation of this right has been particularly problematic in relation to the so-called European Arrest Warrant and has also been the subject of the Constitutional Court's decision-making.

⁴⁷ Constitutional Act No. 4/1993 Coll.

the State and, *inter alia*, the relationship of Czech law to international law, in particular. The regulation of human rights continued to be contained in the Charter of Fundamental Rights and Freedoms (see above), which was re-enacted as part of the constitutional order (semi-legal constitution *sensu lato*) under No. 2/1993 Coll.

3. Czech Republic as a member of the Council of Europe: a human rights perspective

3.1. In general

The Czech and Slovak Federal Republic (the name of Czechoslovakia in 1990-1992) was admitted as a member of the Council of Europe at the Committee of Ministers meeting in Madrid on 21 February 1991. However, due to the establishment of the independent Czech Republic and the independent Slovak Republic (through the defederalisation of the common Czechoslovak state), both countries had to formally reapply for admission to the Council of Europe. The Council of Europe has not used the possibility of “succession” of membership in the international organisation to newly created states,⁴⁸ which would not have to go through a new admission procedure. Although “automatic succession” was not possible because of the need to decide again on the number of newly acceded States represented in the Parliamentary Assembly or on the level of membership fees, the re-assessment of the conditions for membership in the Council of Europe was not avoided.⁴⁹ This practice has been heavily criticised in the legal doctrine of international law.⁵⁰

The Czech Republic was admitted as a member of the Council of Europe on 30 June 1993 (the meeting of the Committee of Ministers was held in Strasbourg).⁵¹ Together with the European Union (EU) and the North Atlantic Treaty Organisation (NATO), the Council of Europe is the most important international organisation of which the Czech Republic is a member. As will be pointed out in Chapter 4 of this paper, the Czech Republic was still obligated by the ECHR in the period between 1 January

⁴⁸ In the case of the possibility of “succession” of membership in an international organisation, the membership of Egypt and Syria in the United Nations, which together formed the United Arab Republic in 1958, is referenced. See Malenovský In Kmec et al., 2013, p. 13.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Resolution (93)32.

1993 (the establishment of the independent Czech Republic) and 30 June 1993, although the ECHR “*shall be open to the signature of the members of the Council of Europe*”.⁵²

3.2 The Czech Republic and the human rights treaties of the Council of Europe

The Czech Republic has ratified the following treaties of the Council of Europe, their annexes and protocols (each annex and protocol is counted and listed separately), which the Office of the Council of Europe⁵³ categorises as human rights treaties (in order from most recent):

- Protocol No. 15 amending the ECHR (CETS No. 213)
- Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197)
- Protocol No. 14 to the ECHR, amending the control system of the Convention (CETS No. 194)
- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of racist and xenophobic nature committed through computer systems (ETS No. 189)
- Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances (ETS No. 187)
- European Agreement relating to persons participating in proceedings of the European Court of Human Rights (ETS No. 161)
- Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158)
- Framework Convention for the Protection of National Minorities (ETS No. 157)
- Protocol No. 11 to the ECHR, restructuring the control machinery established thereby (ETS No. 155)
- Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 152)

⁵² Art. 59 (1) of the ECHR; former Art. 66 (1).

⁵³Treaty Office – Council of Europe (2024). Treaty list for a specific State: the Czech Republic. [Online]. Available at: <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=CZE&CodeSignatureEnum=&DateStatus=07-23-2024&CodeMatiere=44> (Accessed: 12 August 2024).

- Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 151)
- European Charter for Regional or Minority Languages (ETS No. 148)
- Protocol No. 9 to the ECHR (ETS No. 140)
- Additional Protocol to the European Social Charter (ETS No. 128)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126)
- Protocol No. 8 to the ECHR (ETS No. 118)
- Protocol No. 7 to the ECHR (ETS No. 117)
- Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (ETS No. 114)
- European Agreement relating to Persons participating in the Proceedings of the European Commission and Court of Human Rights
- Protocol No. 5 to the ECHR, amending Articles 22 and 40 of the Convention
- Protocol No. 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 046)
- Protocol No. 3 to the ECHR, amending Articles 29, 30 and 34 of the Convention (ETS No. 045)
- Protocol No. 2 to the ECHR, conferring the right to give advisory opinions upon the European Court of Human Rights (ETS No. 044)
- European Social Charter (ETS No. 035)
- Protocol (No. 1) to the ECHR (ETS No. 009)
- Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR (ETS No. 005)

The Czech Republic has also ratified Protocol No. 10 to the ECHR, but this has never entered into force.⁵⁴

Several treaties have been negotiated (signed) by the Czech Republic but have not yet been ratified and are therefore not legally binding on the Czech Republic. A recent example is the so-called Istanbul Convention (Convention on preventing and combating violence against women and domestic violence – CEST No 210). The ratification of international treaties in the Czech Republic is carried out by the President of the Republic. However, in order to ratify certain international treaties (see the next part of

⁵⁴ Kmec et al., 2012, p. 9.

this article for more details), he needs the consent of both chambers of the Parliament. The Senate of the Parliament of the Czech Republic refused to give its consent to ratify the Istanbul Convention. Thus, the ratification process of the already negotiated treaty had to be stopped. The Czech Republic has still not ratified the Protocol No. 12 to ECHR. When ratifying some treaties, the Czech Republic made reservations, or stipulated that it would commit itself to respecting only certain provisions of the treaty (e.g., the European Social Charter).⁵⁵

It should be noted that the scope of human rights is, of course, also influenced by a number of other international treaties that are not primarily classified as human rights treaties and are therefore not listed above (e.g., treaties in the field of biomedicine, environmental protection, etc.). A complete list of treaties with the date of signature and ratification by the Czech Republic is available on the website of the Office of the Council of Europe.⁵⁶

3.3 National reports

In relation to the legal framework for the monitoring of the Czech Republic's membership obligations in the Council of Europe, Recommendation No. 1338 (1997) of the Parliamentary Assembly on the obligations and commitments of the Czech Republic as a member state should be referenced. The Commissioner for Human Rights of the Council of Europe carried out three monitoring visits to the Czech Republic, namely in 2003, 2010 and 2012. Since the report on the last visit to the Czech Republic is more than 10 years old, providing a detailed overview of its content is not worthwhile. Many of the problematic issues mentioned in these reports have, in our opinion, already been remedied by the Czech Republic.

Even in the first national report (2003), the Czech Republic was already criticised for the situation of the Roma (Gypsy) community, which represents an ethnic minority, comprising an estimated 2 % of the

⁵⁵ In the Czech Republic published under No. 14/2000 Coll.

⁵⁶ Treaty Office – Council of Europe (2024). Treaty list for a specific State: the Czech Republic. [Online]. Available at: <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=CZE&CodeSignatureEnum=&DateStatus=07-23-2024&CodeMatiere=44> (Accessed: 12 August 2024).

population.⁵⁷ This criticism was repeated in some way in later reports from 2010 and 2012. The main issues raised were problems in the area of education, compensation for forced sterilisation in the past, access to housing, or violence⁵⁸ towards the Roma community. Alleged violations of the rights of the members of the Roma community were mentioned in all the national reports and was the one that received the most attention. The national report from 2010 concerned only the situation of the Roma and did not point out any other problematic areas in the protection of human rights in the Czech Republic.

According to the national report (2003) *'the young members of the Roma/Gypsy community were drastically over-represented in special schools and classes for children suffering from slight mental disability'*.⁵⁹ National reports have warned that the excessive placement of Romani children in "special schools" may have the hallmarks of racial segregation. This is particularly relevant to education in so-called socially excluded localities (North Bohemia, North Moravia). This was confirmed in principle by the ECtHR in its landmark judgment in *D. H. and Others v. Czech Republic* (2007),⁶⁰ which found a violation of Article 14 (Prohibition of Discrimination), in conjunction with Article 2 of Protocol No. 1 (Right to Education) of the ECHR. In this case, according to the ECtHR, 18 children of Roma origin had been placed in schools for children with intellectual disabilities because of their ethnic origin. In fact, the ECtHR has not been uniform in its assessment of the issue of a discrimination against Roma children, as it was one of only 25 cases in which the Grand Chamber of the ECtHR reversed a previous decision on the merits during the first eight years of the 11th Protocol to the European Convention.⁶¹ On the other hand, there has been a noticeable inclusion of socially excluded and mildly

⁵⁷ Government of the Czech Republic (2018). Zpráva o stavu romské menšiny v České republice za rok 2017, p. 4. [Online]. Available at: <https://vlada.gov.cz/assets/ppov/zalezitosti-romske-komunity/dokumenty/Zprava-o-stavu-romske-mensiny-2017.pdf> (Accessed: 27 August 2024).

⁵⁸ For the sake of completeness, we must emphasise that „from a total of 313 387 offences detected on the territory of the Czech Republic in 2010, only 252 had an extremist subtext, i. e. 0.08 % of the total number of offences“. See Comments of the Czech Republic on the Report by the Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 17 to 19 November 2010, p. 23.

⁵⁹ Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 4.

⁶⁰ *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007.

⁶¹ Malenovský, 2008, p. 300.

mentally disabled children in mainstream schools in recent years. Simultaneously, national reports have acknowledged that *'the authorities have implemented a series of measures in order to remedy this unfortunate situation, in particular the introduction of Roma/Gypsies as assistant teachers in regular classes and the provision of preliminary classes'*,⁶² although the situation was not satisfactory even in the last monitoring visit in 2012.⁶³

The 2010 and 2012 national reports also mentioned the frequent placement of Roma children in institutional care, mainly due to the unsuitable family background (financial and housing problems etc. Therefore, the ECtHR found a violation of Article 8 (Private and Family Life) of the ECHR in its judgement *Wallová and Walla v. the Czech Republic* (2006).⁶⁴ The 2010 national report highlighted the recommendation that *'in accordance with the judgments of the Strasbourg Court, the Czech authorities should ensure that no child is placed in institutional care solely on grounds relating to the poor housing conditions or financial situation of his or her family'*.⁶⁵

In one of his reports, the Commissioner for Human Rights drew attention to the issue of compensation for (mostly Roma) women who have been forcibly sterilised since 1966. The Commissioner emphasised that women affected by this sterilisation were

without an effective remedy to obtain reparation, including compensation, a situation that should be urgently remedied in line with international law standards. In order to prevent the re-occurrence of coercive sterilisations, the Commissioner also calls on the Czech authorities to ensure that healthcare legislation clearly defining the requirements of free, prior and

⁶² Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 4.

⁶³ Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 12 to 15 November 2012, CommDH (2013)1.

⁶⁴ *Wallová and Walla v. the Czech Republic*, App. Nos. 23848/04 and 33571/04, 26 October 2006.

⁶⁵ Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, following his visit to the Czech Republic from 17 to 19 November 2010, CommDH (2011)3, p. 22, point 103.

*informed consent with regard to sterilisation is in place by mid-2011.*⁶⁶

For the sake of completeness, it should be noted that in the Czech Republic, Act No. 297/2021 Coll., on the provision of compensation to women sterilised in violation of the law, entered into force in 2021.⁶⁷

In relation to the judicial system (delays in proceedings, access to the Constitutional Court etc., comments were made only in the 2003 national report.⁶⁸ On the current length of court proceedings in the Czech Republic, it can be noted that the estimated time required to resolve civil, commercial, administrative, and other cases, is not out of line with the EU average. According to the CEPEJ study and EU Justice Scoreboard (2024) the Czech Republic even ranks third best place in the category, “estimated time needed to resolve litigious civil and commercial cases at first instance”.⁶⁹ Regarding access to the Constitutional Court and the counting of the time limit for submitting a constitutional complaint, the criticism contained in the 2003 national report referring to the ECtHR judgments (*Běleš and others v. Czech Republic*⁷⁰ and *Zvolský and Zvolská v. Czech Republic*⁷¹) is, from our point of view, incorrect. In this cases, it was a misapplication of national law in specific cases, not a systemic error in the legislation.

In addition to the Commissioner’s national reports, thematic monitoring of the Czech Republic’s commitments is also carried out periodically, especially by the individual Council of Europe committees (Committee for the Prevention of Torture, European Commission against Racism and Intolerance, European Committee of Social Rights, European Commission for the efficiency of justice...). A link to these sub-monitorings

⁶⁶ *Ibid.*

⁶⁷ The Supreme Administrative Court of the Czech Republic has already commented on the interpretation of the law in the case of missing (lost) medical records in favour of women in its judgment of 4 July 2024 No. 9 As 61/2023-65.

⁶⁸ Report by Alvaro Gil-Robles, Commissioner For Human Rights, on his visit to the Czech Republic from 24 to 26 February 2003, CommDH (2003)10, p. 9-10. These comments no longer appear in subsequent national reports.

⁶⁹ *Ibid.*

⁷⁰ *Case of Běleš and others v. Czech Republic*, App. No. 47273/99, 12 November 2002.

⁷¹ *Case of Zvolský and Zvolská v. Czech Republic*, App. No. 46129/99, 12 November 2002.

can be obtained via the website of the Permanent Representation of the Czech Republic to the Council of Europe in Strasbourg.⁷²

4. The ECHR and Czech national law

4.1. Ratification of the ECHR

Even before the ratification of the ECHR, the State had to become a member of the Council of Europe, as the Art. 59 (1) of the ECHR provides that the ECHR ‘*shall be open to the signature of the members of the Council of Europe*’ (see chap. 3.1). The Czech and Slovak Federal Republic signed the ECHR on 21 February 1991, the ratification followed 13 months after its signing, on 18 March 1992.⁷³ On the same date, the ECHR as amended by Protocols 3, 5 and 8, as well as Protocols 1, 2 and 4, became effective for the Czech and Slovak Federal Republic.⁷⁴ Czechoslovakia was the first post-communist country to ratify the ECHR.⁷⁵

Shortly before the defederalisation of Czechoslovakia (see Chapter 2.4), the Czech National Council approved a resolution that the newly formed State would consider the ECHR, including all the protocols ratified by the Czech and Slovak Federal Republic, to be effective and binding since 1 January 1993 (the date of the establishment of the independent Czech Republic).⁷⁶ However, this unilateral declaration is not legally binding on third parties.⁷⁷ As mentioned in Chapter 3.1, the Committee of Ministers of the Council of Europe decided that the two successor states of Czechoslovakia (the independent Czech Republic and the independent Slovak Republic) would have to submit to a new accession procedure and that there would be no succession of membership in the international organisation. However, together with the admission of the Czech Republic as a member of the Council of Europe on 30 June 1993, the Committee of Ministers, considering the abovementioned statement of the Czech National

⁷² Permanent Representation of the Czech Republic to the Council of Europe in Strasbourg (2024). [Online] Available at: https://mzv.gov.cz/coe.strasbourg/cz/ceska_republika_a_rada_evropy/index_1.html. (Accessed: 2 September 2024).

⁷³ Malenovský, 2013, p. 6.

⁷⁴ Kmec et al., 2012, p. 146.

⁷⁵ Smekal, 2016, p. 87; Malenovský, 2013, p. 6.

⁷⁶ Malenovský, 2013, p. 6.

⁷⁷ Hohenveldern, 2006, p. 246.

Council, decided that the ECHR would apply retroactively to the Czech Republic since 1 January 1993.

One of the most prominent Czech experts on public international law and former judge of the Court of Justice of the EU, J. Malenovský⁷⁸, criticises that the Committee of Ministers of the Council of Europe, by its retroactive resolution, effectively allowed the ECHR to also bind states which were not members of the Council of Europe, contrary to its Article 59(1) (see above). Malenovský points out that, consequently, the Czech Republic was clearly in a worse position than the other signatory states to the ECHR in the first half of 1993.⁷⁹ The Czech Republic was subject to all the obligations arising from the ECHR between 1 January 1993 and 30 June 1993, but as a result of its lack of membership of the Council of Europe it did not enjoy any rights and did not even have its own judge at the ECtHR.⁸⁰

4.2 Status of the ECHR under the Czech law

Czech constitutional law distinguishes three categories of international treaties in relation to their ratification and effects in national law. These are international treaties 1) governmental, 2) ministerial, and 3) presidential (parliamentary).⁸¹ While in the first two cases the President of the Republic has delegated their negotiation to the Prime Minister (governmental treaties) or to the minister responsible for the department (departmental treaties) by a general decision,⁸² there is no such general delegation in the case of presidential (parliamentary) international treaties; moreover, the approval of both chambers of the Parliament is required before ratification by the President of the Republic.

The presidential (parliamentary) international treaties are defined in Article 48 of the Czech Constitution, according to which

the assent of both chambers of Parliament is required for the ratification of treaties: a) affecting the rights or duties of persons; b) of alliance, peace, or other political nature; c) by which the Czech Republic becomes a member of an

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Koudelka, 2018, pp. 124-128.

⁸² Decisions of the President of the Republic No. 144/1993 Coll.

international organisation; d) of a general economic nature; e) concerning additional matters, the regulation of which is reserved to statute.

It should be emphasised that the ratification of international treaties is always carried out by the President of the Republic [Art. 63 (2) (a) of the Constitution]; the consent of Parliament is only a condition for ratification for this group of international treaties, not “ratification itself”.

The ECHR is (from the point of view of the Czech constitutional law), a presidential international treaty affecting the rights of persons. As a presidential international treaty, it holds a special status under the Constitution. According to Article 10 of the Constitution:

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

Therefore, ECHR takes precedence (“supremacy”) in application over the “ordinary” law in case of a conflict between the law and the ECHR.⁸³ Therefore, the principle of *pactum derogat legi*⁸⁴ shall apply (the so-called “direct effect” of international treaties). The factual condition for giving a “direct effect” to the relevant provision of a presidential international treaty (ECHR) is that it is *self-executing*.⁸⁵ Because the ECHR, as a presidential international treaty, is part of the legal order, the judge (of any court except the Constitutional Court) is bound by the treaty when making decisions.⁸⁶

However, in a very controversial decision from 2002,⁸⁷ the Constitutional Court of the Czech Republic went further and stated that so-called human rights treaties (which undoubtedly include the ECHR) are not only part of the national “legal order”, but even of the “constitutional order” (i.e., the body of legal norms of the highest legal force). According to Bobek and Kosař

⁸³ See also Bobek, 2010, p. 133.

⁸⁴ Mlsna and Knežinec, 2009, pp. 185-186.

⁸⁵ Rychetský et al., 2015, pp. 109-112.

⁸⁶ Art. 95(1) of the Constitution.

⁸⁷ Judgment of the Constitutional Court of the Czech Republic of 25 June 2002, Pl. ÚS 36/01 (N 80/26 SbNU 317).

*what happened in the fact was that the Constitutional Court of the Czech Republic constitutionalised the international human rights treaties, including the ECHR. Furthermore, the Czech Constitutional Court held that the ordinary courts still must refer a clash between an applicable statute and the ECHR to the Constitutional Court under the concrete review of constitutionality.*⁸⁸

We disagree with this decision of the Constitutional Court, as does most legal scholarship.⁸⁹ What is a part of the constitutional order is defined in Article 112(1) of the Constitution, while (any) international treaties are not mentioned here. The list contained in Article 112(1) is exhaustive (strictly enumerated). The Constitutional Court is not empowered to redefine the term “*constitutional order*”, because under the Constitution it is itself bound by the constitutional order.⁹⁰

Leaving aside theoretical discussions and academic considerations, in legal practice, if the provisions in the Czech Charter of Fundamental Rights and Freedoms on the one hand and the ECHR (or any human rights catalogue) on the other hand diverge, the provision that guarantees a higher standard of human rights protection is applied. Despite the fact that the ECHR, in our opinion, is not a part of the Czech constitutional order, it should be still respected that “*the Czech Republic shall observe its obligations resulting from international law*” [Art. 1 (2) of the Constitution]. However, in the vast majority of cases, the Czech Charter of Fundamental Rights and Freedoms provides the same or higher standard of protection than the ECHR.

4.3. Impact of the ECHR on national legislation

The obligations for the Czech Republic from international organisations, including the Council of Europe, are necessarily reflected in the adopted legislation. Although the influence of membership in the Council of Europe and the ECHR on legislation is not as great as in the case of the Czech

⁸⁸ Bobek, 2010, p. 135.

⁸⁹ See e. g. Mikule and Suchánek In Sládeček et al., 2016, p. 128, p. 1261; Kühn and Kysela, 2002.

⁹⁰ Art. 59(1) of the ECHR; former Art. 66(1).

Republic's membership in the EU, a high degree of emphasis is placed on compatibility with the ECHR when drafting laws in the Czech Republic.

The substantive plan of the law as well as the general part of the explanatory memorandum to the draft law, must contain an assessment of their compatibility with international treaties, in particular with the ECHR. Article 4(4) of the Legislative Rules of the Czech Government explicitly states that

the compatibility of the proposed solution with international treaties to which the Czech Republic is bound shall be demonstrated by the body which has drawn up the substantive plan. In the substantive plan, it shall indicate which international treaties apply to the area in question, what their content and purpose are, and how the proposed solution affects the fulfilment of the obligations arising from these international treaties, and shall explain in detail whether it is compatible with these obligations; in doing so, it shall also take into account the international treaties to which the Czech Republic will be bound once these treaties enter into force. In doing so, it shall always separately assess the compatibility of the proposed solution with international treaties on human rights and fundamental freedoms, in particular the ECHR and its Protocols, as well as with the case-law of the European Court of Human Rights and the legal opinions of international bodies established to monitor compliance with the obligations arising from such treaties which are relevant to the area in question; in doing so, it shall summarise the relevant case-law of the European Court of Human Rights and explain and justify in detail whether the proposed solution is compatible with those treaties.

It is probably not possible to conclude that some of the new laws in the Czech Republic have been adopted only owing to the ECHR. However, in at least a few cases, new laws have been adopted, or existing laws have been amended, *inter alia*, in accordance with the case law of the ECtHR. The following are a few examples.

First, we should mention the Anti-Discrimination Act of 2009,⁹¹ which both transposes the relevant EU directives and reflects the prohibition of discrimination under Article 14 of the ECHR and its interpretation by the ECtHR. The law defines what is considered unequal treatment and discrimination, distinguishes between a direct and indirect discrimination, and provides legal remedies against discrimination. In the area of education, Section 2(1)(a) of the Education Act⁹² is key to the prohibition of discrimination, according to which education is based on the principle of *'equal access to education for every citizen of the Czech Republic or another Member State of the European Union without any discrimination on the grounds of race, colour, sex, language, faith and religion, nationality, ethnic or social origin, property, birth and health status or any other status of a citizen'*. The amended Section 16 of the Education Act then expanded the elements of the so-called inclusive education in the Czech school system. The adoption of these laws, or their amendments, was also essential in connection with the case of D.H. and others against the Czech Republic (see below).

The influence of the case law of the ECtHR and national reports is clearly visible in the in the above mentioned (see Chapter 3.3.) law on the provision of a single amount of money to women sterilised in violation of the law.⁹³

Regarding freedom of assembly, the amendment to the Assembly Act,⁹⁴ – which, in relation to the case law of the ECtHR,⁹⁵ regulated, among other things, the issue of the conflict between two assemblies, also in relation to the new institute of “setting the conditions for the organisation of an assembly”, which represents a modest remedy than the prohibition of holding an assembly – should be mentioned.⁹⁶

⁹¹ Act No. 198/2009 Coll., on Equal Treatment and Legal Remedies against Discrimination and on Amendments to Certain Acts (Anti-Discrimination Act), as amended.

⁹² Act No. 561/2004 Coll., on pre-school, primary secondary, higher vocational and other education (Education Act), as amended.

⁹³ Act No. 297/2021 Coll., on the provision of a single amount of money to women sterilised in violation of the law and amending certain related acts.

⁹⁴ Act No. 252/2016 Coll., amending Act No. 84/1990 Coll., on the Right of Assembly, as amended.

⁹⁵ *Case of Öllinger v. Austria*, App. No. 76900/01, 29 June 2006.

⁹⁶ Grygar, 2022, pp. 162-172.

In relation to Article 6 of the ECHR, many amendments to procedural rules, particularly to the Code of Civil Procedure⁹⁷ and the Code of Criminal Procedure,⁹⁸ should be mentioned. In both of them, the legislation was adopted in the 1960s under the influence of the Marxist theory of the state and law and did not correspond at all to the requirements of a fair trial. As a result of the Velvet Revolution in 1989 (see Chapter 2.4) and the adoption of the ECHR, logically, numerous amendments to these procedural rules had to be made. Finally, let us mention the Act on Compensation for Damage Caused by Public Authority,⁹⁹ which, in contrast with the previous regulation, also explicitly enshrines the right to compensation for non-pecuniary damage caused by an unlawful decision or an incorrect official procedure.

5. Landmark cases of the Czech Republic before the ECtHR

This chapter aims to present the key judgments of the ECtHR relating to the Czech Republic. Notably, the most frequent violation against the Czech Republic is the violation of the right to a fair trial (Art. 6), particularly the violation of the right to a hearing within a reasonable time.¹⁰⁰ Although national reports have particularly pointed to the Czech Republic's violation of the prohibition of discrimination (Art. 14), and this issue is simultaneously highly "sensational" in the media, these are rare cases in the context of complaints to the ECtHR. Violations of the prohibition of discrimination have only been found in a handful of cases.

5.1. *Janáček v. Czech Republic* (2023)¹⁰¹

Violation of: Article 6 (1) of the ECHR - Fair hearing Adversarial trial.

The complainant submitted a constitutional complaint, which the Constitutional Court rejected as manifestly unfounded. In the proceedings on the constitutional complaint, the Court also requested statements (comments) on the constitutional complaint from the parties to the proceedings (the courts that decided the case before). The Constitutional

⁹⁷ Act No. 99/1963 Coll., Code of Civil Procedure, as amended.

⁹⁸ Act No. 141/1961 Coll., on Criminal Procedure (Criminal Procedure Code), as amended.

⁹⁹ Act No. 82/1998 Coll., on Compensation for Damage Caused by Public Authority, as amended.

¹⁰⁰ Kmec et al., 2012, p. 169.

¹⁰¹ *Case of Janáček v. Czech Republic*, App. No. 9634/17, 2 February 2023.

Court did not send these statements to the complainant for reply or for his attention, although they contained new reasons on which the Constitutional Court based its decision against the complainant. This procedure violates the complainant's right to a fair trial¹⁰²

The ECtHR stated that

despite the fact that the general courts' written comments were not limited to a mere reference to their respective decisions adopted in the case but went beyond the reasons adduced in those decisions ... they were not communicated to the applicant, who certainly had a legitimate interest in reacting to them. Moreover, the Constitutional Court formulated its conclusions in a manner indicating that it had actually based its decision on those comments... The principles underlying its case-law on equality of arms and fairness of proceedings must be seen as requiring the Constitutional Court, in all cases in which it decides that there is no need to communicate one party's observations to the other parties in proceedings before it, to state clearly in its decision the reasons for reaching such a conclusion. Having regard to the Court's case-law according to which it is only for the party concerned to judge whether or not a particular document calls for their comments ... very weighty reasons must be given for omitting to communicate observations that have been accepted and included in the file for consideration of the deciding court. Indeed, a decision not to communicate must be duly motivated and can only be based on the fact that the other parties in their observations did strictly nothing more than referring to their own publicly available decisions, without raising any arguments beyond those that had already been explicitly expressed in those decisions, and on the Constitutional Court's clear intention not to use those observations in reaching its decision on the dispute before it.

5.2. Grosam v. Czech Republic (2023)¹⁰³

This case concerns the disciplinary proceedings conducted against an enforcement officer, by the disciplinary chamber of the Supreme

¹⁰² Art. 6(1) ECHR.

¹⁰³ *Case of Grosam v. Czech Republic*, App. No. 19750/13, 25 June 2023.

Administrative Court of the Czech Republic acting as the disciplinary court. In addition to the professional judges, the case is also decided by presiding judges, who even form a majority. Moreover, no appeal is permitted against the decision of this disciplinary court.

In 2016, the Group of States against Corruption (GRECO) published reservations about the Czech system of disciplinary proceedings against judges, prosecutors, and enforcement officers.¹⁰⁴

In its judgment of 23. June 2022, the ECtHR first noted that the case is covered by Article 6(1) of the ECHR because

disciplinary proceedings where, as in the present case, the right to continue to practise a liberal profession is at stake, can give rise to disputes over civil rights” (§ 89). The ECtHR “cannot regard the pre-selection process (of presiding judges) as transparent and clear, giving sufficient procedural guarantees of independence. In addition, it is concerned as the manner of the appointment of lay assessors in the present case completely differed from the general arrangements for the appointment of lay assessors in the Czech legal system, as they were not elected or selected following an established procedure... Moreover, the appearance of independence was also affected by the lack of guarantees against outside pressure and the close proximity to the Minister of Justice of at least some of the lay assessors”. The Court concluded that “the legal regulation concerning the establishment of the disciplinary chamber for enforcement officers which heard and decided the applicant’s case did not offer sufficient safeguards guaranteeing the independence and impartiality of lay assessors, and, thus, of the disciplinary chamber as a whole.”¹⁰⁵

The case was subsequently referred to the Grand Chamber, which, by the judgment of 25 June 2023, declared the complaint inadmissible. Particularly, the Grand Chamber noted that the complainant had not raised the objection of the absence of independence of the Czech disciplinary court in the proceedings before the national authorities or in his complaint to the

¹⁰⁴ GRECO, 2016. Evaluation Report – Czech Republic, 72th Plenary Meeting 27 June – 1 July 2016.

¹⁰⁵ § 140.

ECtHR. He did so only in a subsequent submission after the expiry of the prescribed period of six months. It was therefore not possible to deal with that complaint. Despite the Grand Chamber's decision, there is a fundamental doubt whether the current legislation on the Czech disciplinary court in the cases of judges, prosecutors, and enforcement officers meets the requirements of Article 6 (1) of the ECHR.

5.3. *Pálka and Others v. Czech Republic (2022)*¹⁰⁶

Violation of: Article 1 of Protocol No. 1 of the ECHR (Protection of property rights).

The complainants were expropriated land for the construction of a road. Under the legislation in force in 2004, they were awarded compensation for the expropriated land in the amount of the so-called "administrative price" (this price is '*determined according to the pricing regulation without taking into account the price which can be achieved on the free market*' - § 7). According to the complainants, the compensation awarded for expropriation amounted to only 13 % of the market value of the expropriated land. In other similar cases decided after the *Pálka decision* at the national level, the Constitutional Court found that such a disproportion between the compensation awarded and the market value of the expropriated land was unconstitutional.¹⁰⁷

The ECtHR found that

domestic law that provides a rigid system of determining compensation which disregards factors other than administratively fixed prices risks upsetting the fair balance required by that provision... the domestic proceedings in the applicants' case were conducted on the basis of a flawed approach, not ensuring an overall assessment of the consequences of the expropriation. Such an approach was recognised later by the Constitutional Court to be incompatible with Article 1 of Protocol No. 1 (§ 60, § 64).

¹⁰⁶ *Case of Pálka and Others v. Czech Republic*, App. No. 30262/13, 24 March 2022.

¹⁰⁷ Frumarová, 2021, p. 89.

5.4. *Tempel v. Czech Republic* (2020)¹⁰⁸

Violation of: Article 6 (1) of the ECHR - on account of the lack of a fair trial, in respect of the length of the proceedings.

The complainant, Mr. Tempel, was arraigned for several offences, including double murder. The Regional Court in Plzeň (Court of the First Instance) acquitted the complainant of the offence of murder, finding that a key witness speaking against the complainant was untrustworthy. The acquittal was appealed by the public prosecutor, and the High Court in Prague (Court of the Second Instance) annulled the acquittal and remanded the case for a new hearing. The situation repeated itself three more times: the Regional Court acquitted the complainant each time, the High Court insisted on the complainant's guilt and reproached the first instance court for allegedly incorrect evaluation of evidence (especially witness testimony). Simultaneously, the High Court could not itself overrule Mr. Tempel; therefore, it repeatedly overruled the judgments of the Regional Court in Plzeň, once ordering the replacement of the judges on the grounds that they had repeatedly downplayed the evidence against the complainant and failed to follow the legal opinion of the higher court. However, even the change of judges at the Regional Court in Plzeň did not lead to a change, as the Regional Court acquitted the complainant of the crime of murder for the fourth time.

The High Court in Prague also cancelled the fourth acquittal of the Regional Court in Pilsen and referred the case to the Regional Court in Prague for a new hearing. In doing so, it used Section 262 of the Czech Criminal Procedure Code, which provides that '*when an appellate court remits a case back to the first-instance court for a new examination, it may order that the case be assigned to another chamber of the first-instance court. If there are important reasons to do so, it may also order that the case be assigned to another first-instance court*'. The Regional Court in Prague then found Mr. Tempel guilty of murder and sentenced him to life imprisonment. The complainant was unsuccessful in his appeals and his constitutional complaint was also rejected. The criminal proceedings lasted over 10 years.

The ECtHR found Mr. Tempel's complaint to be reasonable, emphasising that

¹⁰⁸ *Case of Janáček v. Czech Republic*, App. No. 44151/12, 1 June 2020.

repeated remittals as a result of the poor and incomplete assessment of evidence and parties' submissions, and procedural errors for which courts are responsible, may amount to a violation of the rights enshrined in Article 6 § 1 of the ECHR... In this regard, the Court points out that the repeated remittals to the court of first instance did substantially increase the overall length of the criminal proceedings in question, and that if the High Court had made use of the procedural possibility to question the witness ... itself, then this could certainly have reduced the duration of the proceedings". In addition, "the length of the proceedings is attributable mainly to the case being repeatedly remitted to the court of first instance. The applicant in no way contributed to the delays, and it was mostly the public prosecutor who lodged the appeals". In the Court's view, "the particular succession of events in the present case strongly indicates a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings.

The ECtHR also notes that other complaints (in addition to the length of the proceedings) were not manifestly ill-founded and were not inadmissible on any other grounds. On the other hand, the ECtHR stated *'that there is no need to examine separately the merits of the remaining complaints'* (§ 93). For the sake of completeness, it should be noted that the Constitutional Court of the Czech Republic itself has stated in other cases¹⁰⁹ that the *de facto* imposition of a guilty verdict (by an appeal or appellate court against a court of first instance) is contrary to the principle of free evaluation of evidence and may be unconstitutional. As a result of the ECtHR's intervention and the subsequent retrial before the Constitutional Court, Mr. Tempel was released after approximately 20 years and is currently pursuing damages against the state for his unlawful imprisonment.

5.5. D.H. and Others v. Czech Republic (2007)¹¹⁰

Violation of: Article 14 (Prohibition of Discrimination) in conjunction with Article 2 of Protocol No. 1 (Right to Education) of the ECHR.

¹⁰⁹ Judgment of the Constitutional Court of the Czech Republic of 5 February 2019, No. IV. ÚS 4091/18, § 40.

¹¹⁰ *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007.

D.H. and Others case is probably the most famous and also one the most controversial judgment of the ECtHR against the Czech Republic (see chap. 3.3 above). The applicants were 18 Roma children who argued that they were disproportionately placed in “special schools” for children with intellectual disabilities. As already mentioned above, it was one of 25 first cases in which the Grand Chamber of the ECtHR reversed a previous decision on the merits during the first eight years of the 11th Protocol to the ECHR.¹¹¹

In its judgment of 7. January 2006, the ECtHR (second section) did not share the complainants’ claims of discrimination and violation of their rights guaranteed by the ECHR. According to the Court

*the applicants’ parents had consented to and in some instances expressly requested their children’s placement in a special school. A written decision in the appropriate form was issued by the head teachers of the schools concerned and the applicants’ parents were notified of it. The decisions contained instructions on the right to appeal, a right which none of those concerned exercised”. Moreover “the Government have nevertheless succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children and that considerable efforts are made in these schools to help certain categories of pupils to acquire a basic education. The Government said that the criterion for selecting the applicants was not their race or ethnic origin but their learning disabilities as revealed in the psychological tests.*¹¹²

In its judgment of 13 November 2007, the Grand Chamber found indirect discrimination against the applicants and a violation of their right to education. According to the Grand Chamber,

there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment... The Court is not

¹¹¹ Malenovský, 2008, p. 300.

¹¹² § 48.

satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.

The judgment of the Grand Chamber was not adopted unanimously and 4 judges dissented. A number of scholarly articles have been published on the judgment with different points of view on it.¹¹³ Partly similar was the judgment of the ECtHR of 29. January 2013, Horváth and Kiss v. Hungary.

5.6. Exel v. Czech Republic (2005)¹¹⁴

Violation of: Article 6 (1) of the ECHR - on account of the lack of fair and public hearing.

The complainant's property was declared bankrupt. The case was decided by the courts of three instances, but no court ordered a public hearing in the case. In his appeal against the decision declaring him bankrupt, the complainant objected to the lack of an appeal hearing and provided his reasons for the same.

The ECtHR concluded that it found no circumstances justifying the failure to hold a public hearing. The declaration of bankruptcy over the applicant's property did not fall within the category of cases of a highly technical matter which could be decided in a purely written procedure. According to the ECtHR, a hearing should have been ordered at least in one instance of the judicial system. The declaration of bankruptcy had significant economic consequences for the applicant and, in the present case, an oral hearing would have been "important and useful".

5.7 Credit and Industrial Bank v. Czech Republic (2003)¹¹⁵

Violation of: Article 6 (1) of the ECHR - on account of the lack of a fair trial.

The applicant was a bank (a joint stock company) which was placed under receivership (compulsory administration) by the Czech National Bank (central bank), on the grounds that *'the financial situation and liquidity of*

¹¹³ See e.g. Windischer, 2010; Devroye, 2009; Goodwin, 2006.

¹¹⁴ *Case of Exel v. the Czech Republic*. App. No. 48962/99, 5 July 2005.

¹¹⁵ *Case of Credit and Industrial Bank (Kreditní a průmyslová banka) v. Czech Republic*, App. No. 29010/95, 21 October 2003.

the applicant bank had repeatedly been unsatisfactory and that the previous measures had not remedied the situation’.

The ECtHR agreed that

the proceedings relating to the compulsory administration imposed on the applicant bank and the subsequent entry in the Companies Register concerned the civil rights of the bank, in that it involved a restriction on the bank’s ability to administer its possessions and that the proceedings accordingly fell within the scope of Article 6 (§ 64).

At the time, the Banking Act did not respect the requirements of Article 6 (1) of the ECHR and the bank did not have access to effective judicial protection against the Central Bank's decision.

6. Conclusion

Hundreds of pages could undoubtedly be written on issues relating to the development of human rights in Czechoslovakia and the Czech Republic and its relationship with the Council of Europe and the ECHR. This article has presented at least basic insights into the areas defined in its introduction. As Montesquieu wrote in his book *The Spirit of Law (De l'esprit des lois)*, “it is never a good idea to exhaust the topic of a publication and leave nothing to the reader. The aim should not be to make the reader read, but to think”.¹¹⁶

The Czech Republic’s integration into the European human rights system, particularly under the ECHR, marks a significant milestone in its post-communist transformation. Czechoslovakia was the first post-communist country that ratified the ECHR. However, the process of readmission of the independent Czech Republic to the Council of Europe after the dissolution of Czechoslovakia and the subsequent retroactive binding of the ECHR on the Czech Republic has been associated with several problematic issues from the perspective of public international law doctrine. The article points out that this retroactive application of the ECHR effectively violated Art. 59 (1) of the ECHR, which provides that the ECHR shall be open to the signature of the members of the Council of Europe only. It draws attention to the problematic jurisprudence of the Czech

¹¹⁶ Montesquieu, 2010, p. 214.

Constitutional Court, according to which human rights treaties, including the ECHR, are not only part of the Czech legal order, but even of the constitutional order. This conclusion is contrary to Article 10 and Article 112(1) of the Czech Constitution. The article provided a more detailed review of some key judgments of the ECtHR against the Czech Republic, in particular: Janáček (2023), Grosam (2023), Tempel (2020) or D.H. and Others (2007). Two of them were even decided by the Grand Chamber, and partial conclusions in some of the analysed cases may be transferable to other states.

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TANJA KARAKAMISHEVA-JOVANOVSKA*

The European Convention on Human Rights – The Protection of Human Rights under the ECHR in Central and South East Europe: North Macedonia**

The culture of human rights derives its greatest strength from the informed expectations of each individual. Responsibility for the protection of human rights lies with the states. But the understanding, respect and expectation of human rights by each individual person is what gives human rights its daily texture, its day-to-day resilience.

Sergio Vieira De Mello
UN High Commissioner for Human Rights¹

ABSTRACT: Regulating human rights and their protection in North Macedonia's legal system has an important historic dimension, accounting for the historic continuum of the constitutional and legal human rights framework in the country from 1946 to date. The Socialist Republic of Macedonia, as part of the former Socialist Federal Republic of Yugoslavia (SFRY), was a signatory to the European Convention on Human Rights (ECHR) since 26 January 1965. Although the Macedonian legal system, from 1946 until the start of the democratic transition process in 1990-1991, was considered a part of the socialist systems, Macedonian citizens had constitutional, legal and institutional protection of human rights and freedoms. However, the formal existence of the legislation did not achieve the protection of human rights as a final goal. Hence, in this chapter, several key issues related to the protection of human rights in the Macedonian state will be analysed and elaborated, such as the contextual introduction of the historical development of human rights in the country, the relationship

* Full Professor of Constitutional Law and Political System at the Faculty of Law "Iustinianus Primus", University "Ss. Cyril and Methodius" in Skopje, North Macedonia and Macedonian Former Member of the Venice Commission. <https://orcid.org/0000-0001-6267-3655>, t.karakamisheva@pf.ukim.edu.mk.

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¹ Understanding Human Rights Manual on Human Rights Education, European Training and Research Centre for Human Rights and Democracy (ETC), Graz, 2003. [Online]. Available at: <https://www.etc-graz.eu/wp-content/uploads/2020/08/Manual-Eng-V1.pdf> (Accessed: 23 July 2024).

between the Macedonian state and the Council of Europe (CoE) from a human rights perspective, the CoE human rights conventions to which North Macedonia is a State Party, elaboration on the national implementation (the process and time of accession/succession /ratification) of the ECHR, how human rights protection obligations deriving from the ECHR are reflected in the constitution and/or other major acts of the country and the major law-making processes that took place in the country due to the ECHR. The chapter includes several landmark cases of North Macedonia before the European Court of Human Rights (ECtHR), elaborated in detail.

KEYWORDS: ECtHR, ECHR, human rights, freedoms, protection, ECtHR cases.

1. Contextual introduction of the historical development of human rights in North Macedonia

Human rights development in Macedonia is considered in the context of the transition to a pluralist democracy. Human rights were the flagship of this transition and have been at its core. The start of the democratic transition processes in Macedonia coincided with major efforts in the international community to strengthen the protection of human rights globally. In the early 1990s, the United Nations (UN) started promoting National Human Rights Institutions, independent national agencies designed to protect and promote human rights, to 'bridge the gulf between international law and domestic practices.'² However, these global trends did not have an immediate impact in the former Yugoslavian countries, characterised by war, violence and massive infringements of human rights. Although Macedonia managed to avoid the wars that followed the Yugoslav break-up, it did experience an inter-ethnic conflict in 2001, which had a major impact on the human rights practices in the country.

The relationship between the Macedonian state and the Council of Europe (CoE) began in 1965, when the then Socialist Federal Republic of Yugoslavia (SFRY) signed the European Convention on Human Rights

² Effectiveness of National Human Rights Institutions in the Western Balkans Montenegro, North Macedonia, Serbia Comparative Report (What is behind and) Beyond the average? Civil Rights Defenders, November 2019, [Online]. Available at: <https://epi.org.mk/wp-content/uploads/2019/12/Effectiveness-of-National-Human-Rights-Institutions-in-the-Western-Balkans.pdf> (Accessed: 23 July 2024).

(ECHR) and pledged to respect its provisions in the national legal system. A referendum on the country's independence on 8 September 1991, the adoption of the Declaration of sovereignty on 17 September 1991 and the adoption of a new constitution on 17 November 1991 marked the country's rapid transition to democratisation. In the advisory Opinion No. 11 of 16 July 1993, the Arbitration Commission of the International Conference on the Former Yugoslavia deemed Macedonia to have become one of the successor states to the SFRY from 17 November 1991. The Republic of North Macedonia, as an independent and sovereign state, became a member of the CoE on 25 June 1993. The Macedonian Assembly was granted special guest status at the Parliamentary Assembly of the CoE on 13 May 1993 after the fact-finding visit of an Assembly delegation from 26 to 30 March 1993. The Republic of North Macedonia has been participating in various CoE activities since 1993 through intergovernmental co-operation and assistance programmes, especially in the fields of legal reform and human rights, and the participation of its special guest delegation in the workings of the Parliamentary Assembly and its committees.³

Macedonia, as an independent state, signed the ECHR on 11 November 1995, while the Convention entered into force on 10 April 1997, which initiated the process of harmonising the Macedonian legislation with the European standards. After the adjustments were made, the instruments for ratification of the Convention and the Protocols no. 1, 4, 6 and 7 were transferred, while Macedonian citizens were given the right to seek protection before the European Court of Human Rights (ECtHR). The last Protocol (No. 16), that is, the instrument for its ratification, was deposited in the CoE on 25 September 2023.

Apart from the ECHR, Macedonia signed the 'European Convention for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment', the 'Framework Convention for the Protection of National Minorities', the 'General Agreement on Privileges and Immunities - with Additional Protocol', the 'European Charter of Local Self-Government', the 'European Convention on Extradition', the 'European Convention on Mutual Assistance in Criminal Matters' and the 'Convention on the Transfer of Sentenced Persons'. Furthermore, it signed and ratified the 'Criminal Law Convention on Corruption' and, with a view to ratification, signed the

³ Application by the former Yugoslav Republic of Macedonia for membership of the Council of Europe, [Online]. Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13930&lang=en> (Accessed: 20 July 2024).

‘European Charter for Regional or Minority Languages’, the ‘European Convention on Nationality and the European Social Charter and Protocols’ and the ‘European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime’. The Assembly of the Republic of North Macedonia has adopted a Code of Criminal Procedure and has included the right to a fair trial in Article 13 of the Macedonian Constitution.⁴

In accordance with the monist conception, the ECHR in the Macedonian legal system is positioned between the Constitution and the national laws. The human rights and fundamental freedoms confirmed by international law are one of the founding principles of the Macedonian constitutional order. The Macedonian Constitution classifies the human rights and freedoms as civil, political, economic, social and cultural rights. Pursuant to Article 118 of the Constitution, international agreements ratified in accordance with the Constitution are part of the national legal order and cannot be amended by law. The Macedonian Assembly, in accordance with the Constitution and the Law on the Assembly, ratifies international agreements, which become a part of the internal legal order and cannot be changed by law.

Under Article 119 of the Constitution and Article 3 of the Law on Conclusion, Ratification and Enforcement of International Agreements, the international agreements, on behalf of the Republic, are concluded by the Macedonian President. International agreements may be concluded by the Government of the Republic of North Macedonia as well, when determined by law. The procedure for the ratification of the concluded international agreements is initiated by the Ministry of Foreign Affairs by submitting a proposal for passing a law on the ratification of the concluded international agreement to the Government. The Government then submits the proposal for the adoption of the law to the Assembly.

The North Macedonia legal system ensures compliance with human rights law, including the binding decisions of the international courts. This is regulated under Article 98 of the Constitution, which states that the courts decide based on the Constitution and the laws and international agreements

⁴ Honouring of obligations and commitments by “the former Yugoslav Republic of Macedonia” Report, Committee on the honouring of obligations and commitments by Member States of the Council of Europe (Monitoring Committee), 2000, [Online]. Available at: <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8879&lang=en> (Accessed: 20 July 2024).

are ratified in accordance with the Constitution.⁵ According to the national Law on Courts, when the court considers that the application of the law in concrete cases is contrary to the provisions of an international agreement ratified in accordance with the Constitution, it shall apply the provisions of the international agreement. In concrete cases, the court could directly apply the final and enforceable decisions of the ECHR, the International Criminal Court or another court whose jurisdiction is recognised by the State, if the decision is eligible for enforcement.

Broadly speaking, the North Macedonia's constitution, regarding the protection of human rights and freedoms, contains the ECHR's spirit and idea. Hence, most of the constitutionally guaranteed rights and freedoms have identical or similar wording to the ECHR. These include the right to life (Article 10), the prohibition of torture, inhuman or degrading treatment and punishment (Article 11), the right to liberty (Article 12), the presumption of innocence (Articles 13 and 14), the respect and protection of the privacy of personal and family life, dignity and reputation (Article 25), guarantee of the freedom and secrecy of letters and all other forms of communication (Article 17), guarantee of the security and secrecy of personal data (Article 18), freedom of religion (Article 19), freedom of association (Article 20) and right to peaceful assembly and protest (Article 21). The human rights and freedoms according to Article 8, paragraph 1, point 1 of the Constitution, are the fundamental values of the Macedonian constitutional order, while the Convention is considered an act with constitutional significance.

Despite the almost 30-year application of the ECHR in the national legal system, an effective system of monitoring the alignment of the current positive legislation with international agreements has not been established, including the standards built through its interpretation of the ECHR. The Representation Office of the Republic of North Macedonia, before the ECtHR, despite its legal authority to carry out monitoring and control, does not analyse the situation within the system. The only analyses that can be found in the country are from several civil society organisations that deal with a detailed study of the rights guaranteed by the ECHR, presentation of the ECHR's jurisprudence and the compliance of the domestic legislation

⁵ The Rule of law in Macedonia Assessment based on the Rule of Law Checklists developed by the Council of Europe (The Venice Commission), Center for Research and Policy Making, November 2018, [Online]. Available at: <https://www.crpm.org.mk/wp-content/uploads/2018/12/The-Rule-of-Law-in-Macedonia.pdf> (Accessed: 22 July 2024).

with the ECHR standards. A more comprehensive analysis of the domestic jurisprudence regarding how/whether the domestic legislation complies with the ECHR is missing. However, the Macedonian regular courts have a formalistic approach to the application of the national laws. Due to these unsatisfactory conditions, many national laws call for the supremacy and direct application of the ECHR. However, despite the legal obligation to respect the ECHR, there is a trend of judgments against the Macedonian state regarding violations of the Convention.⁶

The first ECtHR judgment for the Republic of North Macedonia was delivered in 2001, almost four years after the Convention's ratification. In 2002, in the second judgment, the case was struck out of the list of cases as a friendly settlement. However, in 2005, the first two violation judgments were delivered. In the cases of *Djidrovski* and *Veselinski*, in two separate judgments, the Court decided that there had been a violation of Article 1 of Protocol No. 1 and it was not necessary to examine whether there was a

⁶ The Bureau for Representation of the Republic of North Macedonia before the ECtHR is a state administrative body within the Ministry of Justice, which carries out activities concerning the representation and proceedings of the Republic of Macedonia before the ECtHR and performs other professional activities in accordance with this Law. Its responsibilities include:

- To represent the Republic of North Macedonia in proceedings before the Court in cases where the Republic of Macedonia is a party in the dispute,
- To ensure cooperation of the bodies of the Republic of Macedonia with the Court and other bodies of the CoE, regarding issues of representation of the Republic of Macedonia,
- To prepare a defence and directly represent the Republic of Macedonia in proceedings before the Court,
- In the cases it proceeds with, to serve as a mediator for the contacts of the Court with the domestic courts and state bodies,
- In the cases it proceeds with, to communicate and undertake actions for the enforcement of the judgments of the Court, concerning the protection of human rights within the framework of the CoE,
- Has insight into judicial and administrative cases, and any other documentation of the state bodies, following the law,
- In the cases it proceeds with, to collect information and require explanations and opinions from the domestic courts and state bodies,
- On behalf of the Government, conclude agreements on friendly settlement of the cases before the Court,
- On behalf of the Government, give unilateral declaration,
- To handle classified information following the regulations on classified information, etc.

violation of Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, respectively.⁷ By the end of 2005, the Court delivered two judgments regarding the length of the proceedings. In the case of *Atanasovic and others*,⁸ the Court decided that there had been a violation concerning the excessive length of proceedings and the lack of legal remedy about the length of the proceedings. These two judgments disclose some of the most serious problems of the human rights protection system in the country. The growing number of cases concerning the length of the proceedings in 2008 initiated significant legislative and judiciary changes for strengthening the rule of law in respect to the concern.⁹ Between 2001 and mid-2025, the European Court of Human Rights delivered approximately 230 judgments involving North Macedonia. This body of case law not only reflects the country's evolving engagement with the Convention system but also illustrates the progressive strengthening of individual rights protection and the growing impact of Strasbourg jurisprudence on the domestic legal order.

A large percentage of the ECtHR's judgments refer to the violation of the right to a trial within a reasonable time and form the largest group of repetitive or cloned cases before the ECtHR.¹⁰ According to the ECtHR statistics, 159 judgements found at least one violation of the Convention: right to life—deprivation of life (2 judgements), lack of effective investigation (16 judgements), prohibition of torture (3 judgements), inhuman or degrading treatment (6 judgements), right to liberty and security (17 judgements), right to fair trial (50 judgements), length of proceedings (66 judgements), non-enforcement (5 judgements), right to respect for private and family life (10 judgements), freedom of expression (3 judgements), freedom of assembly and association (5 judgements), right to

⁷Case of *Djidrovski v. the former Yugoslav Republic of Macedonia*, App. No. 46447/99, 24 February 2005 and *Case of Veselinski v. the former Yugoslav Republic of Macedonia*, App. No. 45658/99, 24 February 2005.

⁸ *Case of Dumanovski v. the former Yugoslav Republic of Macedonia*, App. No. 13886/02, 8 December 2005 and *Case of Atanasovic and others v. the former Yugoslav Republic of Macedonia*, App. No. 13886/02, 22 December 2005.

⁹ See details in: Trajkovska and Trajkovski, 2016.

¹⁰ In 2023, the ECtHR dealt with 393 applications concerning the Republic of North Macedonia, of which 368 were declared inadmissible or struck out. It delivered 11 judgments (concerning 25 applications), 10 of which found at least one ECHR violation. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/CP_Republic_of_North_Macedonia_ENG (Accessed: 22 July 2024).

an effective remedy (11 judgements), protection of property (15 judgements) etc.

In 2023, the ECtHR delivered 11 judgments¹¹ involving North Macedonia (concerning 25 applications), 10 of which found at least one violation of the ECHR: inhuman or degrading treatment (1 judgement), right to liberty and security (4 judgements), right to fair trial (2 judgements), right to respect for private and family life (1 judgement), prohibition of discrimination (1 judgement), protection of property (3 judgements), violation of other Convention articles (2 judgements) etc.¹²

2. Relationship between the Republic of North Macedonia, the Council of Europe and the EU from a human rights perspective

The North Macedonia's legal order is defined as the European continental legal system. It is characterised by a written constitution and systematised written codes and laws enacted by governments, recognised as principal sources of law. The Republic of North Macedonia has been a CoE member state since 1995 and an EU candidate for membership state since 2005. This is relevant due to the international obligations drawn from these memberships and accompanying hard and soft laws. This part focuses on the Macedonian CoE membership due to the ratification of the ECHR and other human rights conventions¹³ and the recognition of the ECtHR's jurisdiction.

Macedonia respects the Committee of Ministers' recommendations on Ombudsperson and national institutions for the promotion and protection of human rights, the opinions of the European Centre against Racism and Intolerance (ECRI), General Policy Recommendations on specialised national bodies to combat racism, xenophobia, anti-Semitism and intolerance and General Policy Recommendations on national legislation to combat racism and racial discrimination. However, the North Macedonia-EU relationship has been the greatest catalyst for human rights and

¹¹The Republic of North Macedonia, [Online]. Available at: https://www.echr.coe.int/documents/d/echr/cp_republic_of_north_macedonia_eng?utm_source (Accessed: 25 July 2024).

¹² Statistical reports. [Online]. Available at: <https://prd-echr.coe.int/web/echr/statistical-reports> (Accessed: 22 August 2024).

¹³ Human Rights and Business Country Guide Republic of Macedonia, November 2016, [Online]. Available at: <https://globalnaps.org/wp-content/uploads/2018/04/business-and-human-rights-guide-to-macedonia-english.pdf> (Accessed: 23 July 2024).

democracy related reforms. They bring a set of implemented institutional reforms and standards, which need to be achieved. The most important EU directives include the Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, implementing the principle of equal opportunities and treatment of men and women in matters of employment and occupation.

According to the 2023 and all previous European Commission Reports,¹⁴ the legal framework for the protection of fundamental rights in the Republic of North Macedonia is partially aligned with the EU acquis and European standards. The country meets its general obligations on fundamental rights; however, the legislation needs to be implemented systematically. Significant amendments were made to the Criminal Code regulating criminal acts of gender-based violence. However, the Parliament should make appointments to independent and regulatory bodies based on merit and the functional independence of human rights bodies must be guaranteed at all times. This includes, amongst other things, allocating sufficient funds. Services for gender-based violence victims need improvement and proper budgeting is required to meet the standards laid down by the Istanbul Convention. Furthermore, persons with disabilities continue to face direct and indirect discrimination, social exclusion and barriers. The Ombudsman's Office and the Commission for the Prevention and Protection against Discrimination signed a memorandum of understanding (MoU) to formalise their coordination. However, the recommendations made by the European Committee for the Prevention of Torture for the treatment of detained and convicted persons were not addressed, which remains a serious concern. Special attention should be

¹⁴ Commission Staff Working Document North Macedonia 2023 Report, [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/north-macedonia-report-2023_en (Accessed: 24 July 2024). Commission Staff Working Document North Macedonia 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy, [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_693%20North%20Macedonia%20report.pdf (Accessed: 24 July 2024).

given to promoting non-discrimination, addressing hate crime and speech and strengthening the capacity and independence of institutions in charge of the protection of rights of persons belonging to minorities or disadvantaged communities.

The Agency for Community Rights Realization needs sufficient funding to promote the protection of minorities and the implementation of the national strategy, 'One Society for All and Interculturalism'. The external overview mechanism for the police, including prison police, remains partially functional, with three Civil Society Organization's (CSO) representatives yet to be selected by the Parliament. The enacted amendments to the Law on Civil Registry pave the way to resolving cases of statelessness and fulfilling the country's international obligations. Last year's recommendations were addressed partially and remain valid. In the coming year, the country should, particularly, address the dire conditions in prisons, step up efforts to promote alternatives to incarceration and implement relevant recommendations made by national and international institutions on detention conditions; allocate the necessary resources to the Commission for the Prevention and Protection against Discrimination, enabling it to fulfil its mandate; and ensure proper implementation of the Law on Civil Registry to end statelessness.

The Republic of North Macedonia has ratified most international human rights instruments. On 20 March 2023, the Assembly of North Macedonia ratified Protocol No. 16 to the ECHR, allowing the highest courts to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms established by the Convention. In June 2023, there were 368 applications pending before the ECtHR, which delivered judgments on 8 applications and found ECHR breaches in 6 out of 7 cases (compared with 3 in 2022). Most of these were related to the right to a fair trial, right to liberty and security and the protection of property. In the reporting period, there were 354 new applications allocated to a decision body. Currently, there are 8 cases under enhanced supervision by the Committee of Ministers.

Concerning the EU, and to fully benefit from its observer status in the EU Agency for Fundamental Rights (FRA), the country needs to develop a comprehensive monitoring and data collection system to assess the implementation level of human rights legislation, policies and strategies. The Ombudsman's Office should remain the central body for the promotion and enforcement of human rights. The Office strengthened its cooperation

with CSOs, including those dealing with the protection of rights of the children. In 2022, the Office dealt with 3482 complaints, of which 3209 had been received in 2022 and 273 had been rolled over from the previous year. Based on these, the Office initiated 2173 procedures. The Criminal Code was amended to increase the legal protection in gender-based violence cases. However, as mentioned, the services for gender-based violence victims need improvement and proper budgeting to meet the standards laid down by the Istanbul Convention, while persons with disabilities face direct and indirect discrimination, social exclusion and barriers. Nonetheless, the cooperation between the Ombudsman's Office and the Commission for the Prevention and Protection against Discrimination increased following the signature of a MoU.

The 2022 European Commission Report¹⁵ noted that, in June 2021, the Assembly of North Macedonia ratified the CoE Protocol, amending the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. In November 2021, the country became the 35th Member State of the International Holocaust Remembrance Alliance. Hence, it submitted periodic reports under the UN Convention on the Elimination of All Forms of Racial Discrimination and the answers to the questions from periodic reports under the Convention on the Rights of the Child. In June 2022, 813 applications were pending before the ECtHR. The ECtHR delivered 11 judgements and found ECHR breaches in 3 cases (against 14 in 2021), relating to the right to a fair trial and the prohibition of torture and the freedom of expression. In the reporting period, 370 new applications were allocated to a decision body. Currently, there are 11 cases under enhanced supervision by the Committee of Ministers. The Ombudsman's Office remained the central body for the promotion and enforcement of human rights. In 2021, it issued special reports on the implementation of the principle of equitable representation and gender representation in the public sector.

¹⁵ Commission Staff Working Document North Macedonia 2022 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Communication on EU Enlargement policy [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/48ba61f0-41ae-4cff-9517-29fac190f4bd_en?filename=North%20Macedonia%20Report%202022.pdf (Accessed: 23 July 2024).

The 2021 European Commission Report¹⁶ noted that the Law on the Prevention and Protection against Discrimination and the Commission for the Prevention and Protection against Discrimination were in place. The deinstitutionalisation process progressed, and most of the children were resettled to community-based care. The Ministry of Labour and Social Policy invested in community services, including supporting gender-based violence victims. An important progress was achieved with the adoption of the Law on Prevention and Protection from Violence against Women and Domestic Violence, with cross-party support. An improvement was noted in gender mainstreaming and respect for women's rights, although women were among the categories most severely affected by the pandemic. Hence, the recommendations of European and international human rights bodies, particularly regarding the treatment of detained and convicted persons, must be implemented without delay. Furthermore, it is important for the country to enhance the implementation of the legislation on hate speech and the national action plan for the implementation of the Istanbul Convention.

The civilian external oversight mechanism over the police is not fully functional and the absence of independent investigators impedes addressing police impunity and effective prosecution. The country should continue to improve the situation in prisons and increase alternatives to detention. In the coming year, it should implement all the provisions of the Law on the Prevention and Protection against Discrimination and allocate the necessary resources for the Commission for Prevention and Protection against Discrimination to become fully functional; address the recommendations of international monitoring bodies, promptly and systematically, especially regarding the rights of persons in detention/prison; promote, protect and guarantee the rights of persons in disadvantaged or marginalised situations; and improve the quality of community services to identify children at risk and provide adequate support to vulnerable categories of children, especially victims of violence, Roma children and children with disabilities.

In October 2020, the country informed the Committee on the Elimination of Discrimination against Women (CEDAW) of the measures to

¹⁶ Commission Staff Working Document North Macedonia 2021 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/724722a9-240b-4001-abce-648e0c96f88b_en?filename=North-Macedonia-Report-2021.pdf (Accessed: 24 July 2024).

implement the recommendations contained in the Sixth Periodic Country Report. In 2020, 320 applications were pending before the ECtHR. The Court found ECHR violations in 14 cases (against 9 in 2019), relating mainly to the right to a fair trial, protection of property, respect for private and family life and the prohibition of torture. According to the Council of Europe European Commission for the Efficiency of Justice (CEPEJ), 11 cases were considered closed after an ECtHR judgement and its execution (against 26 in 2019). The Ombudsman Office remained the central body for the promotion and protection of human rights. The appointment of the new Ombudsman in January 2021 raised concerns due to the political affiliation of the selected candidate. Hence, five deputy Ombudspersons need to be appointed by the Parliament. The Ombudsman's Office issued special reports and recommendations on online education, the rights of children, persons with disabilities and those in custodian-type institutions during the COVID-19 pandemic. The budget of the Office increased by 2.3% compared to 2019 and there were no additional recruitments.

Out of the 2,448 complaints received in 2020, the highest number concerned labour relations, consumer's rights, detention conditions, social protection and property rights. The institutions responded to 63% of the Ombudsman's recommendations, which was a decrease compared to previous years. The government continued to be committed to improving the prevention of torture and ill-treatment and to have a regular dialogue with the European Committee for the Prevention of Torture (CPT) regarding its recommendations. The latest CPT reports were published on 11 May and 27 July 2021.

The 2020 European Commission Report¹⁷ noted that, in January 2020, the country acceded to the 1961 UN Convention on the Reduction of Statelessness. In April 2020, following the declaration of the state of emergency due to the COVID-19 crisis, the country informed the CoE that, pursuant to Article 15 of the ECHR, it exercised its right to derogate from its obligations under the Convention, thereby suspending or restricting certain human rights and fundamental freedoms guaranteed under the

¹⁷ Commission Staff Working Document North Macedonia 2020 Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/north_macedonia_report_2020.pdf (Accessed: 24 July 2024).

Constitution. To curb the spread of the disease, the government restricted freedom of movement and assembly. Control mechanisms were activated. The Constitutional Court had a mandate to review any decree adopted by the government and actively performed its prerogatives. However, the country needs to make additional efforts to ensure the recommendations of international monitoring bodies.

In 2019, the ECHR found violations in 9 out of 12 cases, relating mainly to the right to a fair trial and property rights. New applications allocated to a decision-making committee decreased to 262, from 305 the previous year. By the end of 2019, 345 cases were pending before the Court. The country reduced the number of judgments to be executed to 36, of which 5 are under enhanced supervision.

3. Major law-making processes in North Macedonia's legal system, thanks to the ECHR

The ECHR and the case law of the ECtHR have made critical legislative, institutional and political impacts on the Macedonian legal and political system development. The specificity of these impacts is formulated as a process of conventionisation of the national system with respective European values and principles. Broadly, it is the process of Europeanisation and harmonisation of the national legal system. According to the former Macedonian judge in the ECtHR, *Mirjana Lazarova-Trajkovska*, the democratic legal and political development and the rule of law in Macedonia should be analysed through two distinctive periods – before and after the ratification – accounting for the issues and the main actors involved. The ECHR and the Court's case law on the human rights protection system influenced the development of the national political, legal, and judicial systems, with the principles of the Convention and the Court's case law standards and practices.

Before the ratification of the ECHR, legislators played the main role in transferring and interpreting the importance and the mission of the Convention and the Court. However, after the ratification, the judges at the national courts played the main role. After the ECHR ratification, the main avenue of influence was the implementation of the Court's judgments. At the time of the ratification, the ECtHR's case law was not relevant for Macedonian courts and other institutions. The Courts relied on the Constitution, laws and opinions of a general nature of the Supreme Court.

As in most post-socialist countries, the Macedonian courts 'were never required to consider the Convention as a "constitutional instrument of European public order" and to take into account the public interest of the international community'.¹⁸ One of the most visible effects of the ECHR in Macedonian society is that the Convention is perceived as a 'part of the domestic legal order and as directly applicable'.¹⁹

The ECHR's direct application in the national legal system and the application of the ECtHR case law in the national jurisprudence significantly impacted the process of enacting the national laws and by-laws in the country. All legal areas in the country, together with the legislation, were modelled according to the ECHR's and the ECtHR's standards and principles. However, the extent to which those guidelines were correctly and adequately implemented in the country remains a question. Nonetheless, the implementations had visible effects in the adoption of laws in the field of criminal law, civil legislation, media laws, non-discrimination laws, protection of freedom of thought and the right of speech. Furthermore, they impacted the adoption of the laws for the protection of the rights of persons with disabilities and other vulnerable categories of citizens, the protection of the rights of women in the area of domestic violence and the rights of children.

4. Landmark cases of North Macedonia before the ECtHR

In this part of the chapter, the most important ECtHR judgements against North Macedonia will be elaborated upon. The cases were selected according to the views and author's knowledge. For a better understanding of the impact of the ECHR and the Macedonian case law, the important judgments will be classified into four groups:

1. Cases on the procedural violation of Article 3 – the failure of the authorities to conduct an effective investigation,
2. Cases concerning the right to liberty and security,
3. Cases on the right to a fair trial – cases on length of proceeding, access to court, independent and impartial tribunal and equality of arms,

¹⁸ *Ibid.*

¹⁹ 29 June 2007, Legal Position of the Department of Criminal Offenses at the Supreme Court of the Republic of Macedonia (June 29, 2007, Legal position of the Criminal Offenses Department at the Supreme Court of the Republic of Macedonia).

4. Cases on the right to property.

4.1. Case on the procedural violation of Article 3 (the failure of the authorities to conduct an effective investigation)

4.1.1. El-Masri v. The Former Yugoslav Republic of Macedonia

The case originated in application no. 39630/09²⁰ against the former Yugoslav Republic of Macedonia, lodged with the Court under Article 34 of the ECHR, by a German national, Mr Khaled El-Masri, on 20 July 2009.

The ECtHR found that there had been a violation of Article 3 of the Convention in its procedural aspect on account of the failure of the respondent State to carry out an effective investigation into the applicant's allegations of ill-treatment. The Court held that there had been a violation on account of the inhuman and degrading treatment to which the applicant was subjected while being held in a hotel in Skopje. This treatment was classified as torture within Article 3 of the Convention.

The ECtHR found that the respondent State was responsible for the applicant's transfer to the custody of the US authorities despite a real risk that he would be subjected to further treatment contrary to Article 3. Furthermore, the applicant's detention in the hotel for 23 days was arbitrary and in breach of Article 5 of the Convention, and the respondent State was responsible under Article 5 for the applicant's subsequent captivity in Afghanistan. Hence, the respondent State failed to carry out an effective investigation into the applicant's allegations of arbitrary detention, as required under Article 5, which further violated Article 8 of the Convention. The ECtHR further held that there had been a violation of Article 13 of the Convention on account of the lack of effective remedies regarding the applicant's grievances under Articles 3, 5 and 8.

According to the applicant, on 31 December 2003, he boarded a bus in Ulm, Germany, to visit Skopje 'to take a short vacation and some time off from a stressful home environment'. At around 3 p.m., he arrived at the Serbian/Macedonian border crossing at Tabanovce. A suspicion arose regarding the validity of his recently issued German passport. A border official checked his passport and asked him about the purpose and length of his trip and the location of his intended stay. A Macedonian entry stamp,

²⁰ *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 20 July 2009.

dated 31 December 2003, was affixed to his passport. His personal belongings were searched, and he was questioned about his possible ties with several Islamic organisations and groups. The interrogation ended at 10 p.m.

Accompanied by armed men in civilian clothes, he was driven to a room on the top floor of the hotel. During his detention at the hotel, he was watched by a team of nine men, who changed shifts every six hours. Three of them were with him at all times, even when he was sleeping. He was questioned in English despite his limited proficiency in the language, and his requests to contact the German embassy were refused. On one occasion, when he stated that he intended to leave, a gun was pointed at his head, and he was threatened with being shot. After seven days of confinement, another official arrived and offered him a deal, namely that he would be sent back to Germany in return for a confession that he was a member of al-Qaeda.

On the thirteenth day of his confinement, the applicant commenced a hunger strike to protest against his unlawful detention. He did not eat for the remaining ten days of his detention in Macedonia. A week later, he was told that he would be transferred by air to Germany. On 23 January 2004, at around 8 p.m., the applicant was filmed by a video camera and instructed to say that he had been treated well, had not been harmed in any way and would shortly be flown back to Germany. Handcuffed and blindfolded, he was put in a car and taken to Skopje Airport. Upon arrival, still handcuffed and blindfolded, he was placed in a chair, where he sat for one and a half hours. He was told that he would be taken for a medical examination before being transferred to Germany.

According to the applicant, a suppository was forcibly administered. He was pulled from the floor and dragged to a corner of the room, where his feet were tied together. His blindfold was removed. A flash went off, which temporarily blinded him. When he recovered sight, he saw seven to eight men dressed in black and wearing black ski masks. One of them placed him in an adult nappy. He was dressed in a dark blue short-sleeved tracksuit. A bag was placed over his head, and a belt was put on him with chains attached to his wrists and ankles. The men put earmuffs and eye pads on him and blindfolded and hooded him. They bent him over, forcing his head down, and marched him to a waiting aircraft, with the shackles cutting into his ankles. The aircraft was surrounded by armed Macedonian security guards.

During the flight, he received two injections. An anaesthetic was further administered over his nose. He was mostly unconscious during the flight. A Macedonian exit stamp, dated 23 January 2004, was affixed to the applicant's passport. According to the applicant, his pre-flight treatment at Skopje Airport, most likely at the hands of the special CIA rendition team, was remarkably consistent with a recently disclosed CIA document describing the protocol for the so-called 'capture shock' treatment. Upon landing, the applicant disembarked. It was warmer outside than it had been in Macedonia, which was sufficient for him to conclude that he had not been returned to Germany. He deduced later that he was in Afghanistan and had been flown via Baghdad. After landing in Afghanistan, the applicant was driven for about 10 minutes, dragged from the vehicle, slammed into the walls of a room, thrown to the floor, kicked and beaten. When he adjusted his eyes to the light, he saw that the walls were covered in Arabic, Urdu and Farsi handwriting. The cell did not contain a bed. Although it was cold, he had been provided with only one dirty, military-style blanket and some old, torn clothes bundled into a thin pillow. Through a window at the top of the cell, he saw the setting sun. He understood later that he had been transferred to a CIA-run facility, which media reports identified as the 'Salt Pit', a brick factory to the north of the Kabul business district, that was used by the CIA for detention and interrogation of high-level terror suspects.

During his confinement, he was interrogated on three to four occasions, each time by the same man, who spoke Arabic with a South Lebanese accent, and each time at night. His repeated requests to meet with a representative of the German government were ignored. In March 2004, the applicant, together with several other inmates with whom he communicated through cell walls, commenced a hunger strike to protest their continued confinement without charge. As a consequence, the applicant's health deteriorated. He received no medical treatment during this time, although he had requested it on several occasions. The applicant became extremely ill and suffered very severe pain. A doctor visited his cell in the middle of the night and administered medication; however, he remained bedridden for several days. Around that time, the applicant felt what he believed to be a minor earthquake. Concerning this, the applicant submitted the 'List of significant earthquakes of the world in 2004', issued by the US Geological Survey on 6 October 2005. According to this document, there was one earthquake on 5 April 2004 in the Hindu Kush region of Afghanistan.

On 29 May 2004, the applicant arrived at Frankfurt International Airport. In his written submissions, the applicant stated that he had not undergone any medical examination apart from the isotope analysis of his hair follicles. At the public hearing, his lawyers specified that the results of some medical examinations carried out upon his return to Germany had been submitted by the German public prosecutor to the European Parliament's Fava Inquiry. However, those results had not been submitted to the Court since they had not been conclusive regarding the presence of any physical injury, given the long time that had elapsed since the incident at Skopje Airport. Furthermore, he had been subjected to sophisticated interrogation techniques and methods, specifically designed not to leave any evidence of physical ill-treatment.

The 2007 Marty Report noted that the applicant had asked for treatment at the treatment centre for torture victims in Neu-Ulm shortly after his return to Germany in 2004. However, it took until 2006 to obtain the required health-insurance funding agreement to start a course of limited treatment at the centre, which was insufficient. Furthermore, the applicant submitted a written statement of 5 January 2009 by Dr Katherine Porterfield, a senior psychologist at the Bellevue/NYU Program for Survivors of Torture, whereby she confirmed that the applicant had suffered from post-traumatic stress disorder and depression 'most likely caused by his experience of capture and extensive maltreatment and abuse'. Dr Porterfield's opinion was based on several telephone calls and two follow-up discussions with the applicant. She advised him to visit a clinician in his community with the requisite expertise to help him. However the applicant did not comply with that instruction.

According to the Macedonian Government report, the Government confirmed their version of events. They denied that the applicant had been detained and ill-treated by State agents in the hotel and was handed over to CIA agents, who ill-treated him at Skopje Airport and transferred him to a CIA-run prison in Afghanistan. In their submission, the applicant had freely entered, stayed in and left the territory of the respondent State. The only contact with State agents had occurred on 31 December 2003, on the occasion of his entry into the respondent State, when enquiries had been undertaken regarding the validity of his passport.

The enquiries by the Ministry of the Interior demonstrated that the applicant had stayed in the respondent State by his free will between 31 December 2003 and 23 January 2004, when he had freely left the State

through the Blace border crossing. In support of their argument, they submitted a copy of the following documents: extracts from the official border-crossing records for Tabanovce and Blace; extract from the hotel guest book in which the applicant had been registered as a guest occupying room number 11 between 31 December 2003 and 22 January 2004; and two letters from February 2006 in which the hotel's manager had communicated to the Ministry of the Interior the names of six persons who had been on duty in the hotel at the relevant time and had denied that any person had ever stayed in the hotel involuntarily. It was further specified that the person whose photograph was on the hotel's website was Mr Z.G., who could be found in the hotel.

They produced a letter from 3 February 2006 in which the Macedonian Ministry of Transport/Civil Aviation Administration had informed the Ministry of the Interior that, on 23 January 2004, a Boeing 737 aircraft flying from Palma de Mallorca (Spain), registered as flight no. N313P, had been permitted to land at Skopje Airport, the same aircraft had been permitted (at 10.30 p.m.) to take off on the same day for Kabul (Afghanistan), and, at 2.25 a.m., on 24 January 2004, the aircraft was permitted to fly to Baghdad (Iraq). Furthermore, the Government filed a copy of the applicant's hotel bills, which, according to them, he had paid in cash. They provided a copy of a police record of the applicant's apprehension at the Tabanovce border crossing on 31 December 2003. As specified in the record, the applicant had been held between 4.30 p.m. and 9.30 p.m. The record did not state the reasons for apprehension; however, it contained an incomplete handwritten note that he was apprehended based on 'tel. no. 9106 of 8 December 2003'.

In 2004, the Munich public prosecutor's office opened an investigation into the applicant's allegations. According to the applicant, a number of investigative steps were taken, including the examination of eyewitnesses who confirmed that the applicant had travelled to Macedonia by bus at the end of 2003 and had been detained shortly after entering that State. Furthermore, a radioactive isotope analysis of the applicant's hair was carried out. An expert report of 17 January 2005 stated, *inter alia*: '... it is very likely that the changes observed in the enclosed isotopic signatures [of the applicant's hair] indeed correspond to [the applicant's] statements ...'

According to the First Committee of Inquiry of the German *Bundestag*, the radioisotope analysis confirmed that the applicant had undergone two hunger strikes. On 31 January 2007, the Munich public

prosecutor issued arrest warrants for 13 CIA agents on account of their involvement in the applicant's alleged rendition. The names of the agents were not made public; however, their identities were allegedly given to the German prosecutor by the Spanish authorities, uncovered during the course of their investigation into the use of Spanish airports by the CIA. On 7 April 2006, the German *Bundestag* appointed the First Committee of Inquiry to review the activities of the secret services. Over an investigation period of three years, the Committee held 124 sessions, whereby 7 areas of investigation were addressed, and 141 witnesses were heard, including the applicant. The findings were made public on 18 June 2009. The report, which runs to 1430 pages, stated, *inter alia*:

... Khaled El-Masri's report on his imprisonment in Macedonia and in Afghanistan is credible as to the core facts of his detention in Macedonia and his transfer to Afghanistan, as well as his confinement there by United States forces. Doubts remain, however, about some specific aspects of his account.

The police investigations conducted by Swabian law enforcement authorities and supported by the German Federal Criminal Police reaffirmed El-Masri's account. His trip to Macedonia on 31 December 2003 was corroborated by witnesses. El-Masri's account of the transfer from Macedonia to Afghanistan by US forces was consistent with subsequent reports from other victims of the excesses of the 'war on terror' by the US government at the time. The recorded movement of an American Boeing 737 of the presumed CIA airline 'Aero-Contractors' that flew from Majorca to Skopje on 23 January 2004 and continued to Kabul matched the temporal information that El-Masri provided about the duration of his confinement at the Macedonian hotel.

On 6 December 2005, the American Civil Liberties Union (ACLU) filed a claim on behalf of the applicant in the US District Court for the Eastern District of Virginia against several defendants, including the former CIA Director George Tenet and certain unknown CIA agents. The claim alleged that the applicant had been deprived of his liberty in the absence of legal process and included a claim under the Alien Tort Statute (ATS) for violations of international legal norms prohibiting prolonged arbitrary detention and cruel, inhuman or degrading treatment. In May 2006, the District Court dismissed the applicant's claim, finding that the US

government had validly asserted the State secrets privilege. The District Court held that the State's interest in preserving State secrets outweighed the applicant's individual interest in justice. This decision was confirmed on appeal by the US Court of Appeals for the Fourth Circuit. In October 2007, the Supreme Court refused to review the case. Hence, there are valuable criticisms about this ECtHR judgement.²¹

4.2. Case concerning the right to liberty and security

4.2.1. Lazoroski v. The Former Yugoslav Republic of Macedonia

In this case,²² the ECtHR declared the complaints under Article 5 paragraphs 1 (c) and 2 and Article 6 paragraph 1 of the Convention admissible, while the remainder of the applications were inadmissible. It held that there has been a violation of Article 5 paragraphs 1 (c) and 2 and Article 6 paragraph 1 since the proceedings were not adversarial and that the respondent State was to pay the applicant 2000 euros for non-pecuniary damage, 180 euros for costs and expenses and any tax that may be

²¹ The criticism of this judgement was as follows: 'No one who reads the facts of the case will argue with the Court's conclusion that Macedonia had to bear international responsibility. The question is on what grounds one can base this conclusion. The approach chosen by the Court may surprise many international lawyers. Influenced by decades of work of the International Law Commission (ILC), their approach would be a combination of attribution of conduct on the one hand and the breach of an international obligation, on the other: Macedonia then would be responsible for handing over El-Masri to the CIA, in the face of risk (if not certainty) that he would be ill-treated and tortured. They would not normally say that the act of ill-treatment at the hands of the CIA *itself* is attributed to Macedonia, but limit Macedonia's responsibility to its *own* wrongful conduct. This distinction may seem a legal nicety, but it may have practical relevance (for questions of evidence and reparation) and also reflects that what is essentially a sovereignty-based consideration: it should not easily be presumed that a state is responsible for acts committed by another subject of international law'. André Nollkaemper, *The ECtHR Finds Macedonia Responsible in Connection with Torture by CIA. But On What Basis?*, December 24, 2012, [Online]. Available at: <https://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/> (Accessed: 28 July 2024).

Shares Research Paper 06 (2012), ACIL 2012-04, [Online]. Available at www.sharesproject.nl (Accessed: 28 July 2024), SSRN, [Online]. Available at: <http://www.sharesproject.nl/wp-content/uploads/2012/01/SHARES-RP-06-final.pdf> (Accessed 28 July 2024).

²² *Case of Lazoroski v. The Former Yugoslav Republic of Macedonia*, App. No. 4922/04, 24 January 2004.

chargeable to the applicant. The case originated in application no. 4922/04 against the former Yugoslav Republic of Macedonia, lodged with the Court under Article 34 of the Convention, by a Macedonian national, Mr Jovče Lazoroski, on 24 January 2004.

On 6 August 2003, the applicant received a telephone call from an officer of the Intelligence Service who asked him to come to a police station for a 'talk'. The applicant replied that he would attend with his lawyer, provided he received a written request. Mr J.S., a high-ranking officer in the Intelligence Service, gave a verbal order for the applicant's arrest on suspicion that he was armed and might leave the State. At 11.15 p.m. the same day, the applicant was arrested by the police near the Tabanovce border post with Serbia. He was taken to the Tabanovce police station, and a body search was carried out. A report on the search indicated that a mobile phone, passport, identity card and a licence to carry arms were found. According to the parties, a gun was found as well; however, it was not recorded in the report. The applicant was handcuffed and transferred to the Kumanovo police station by the Intelligence Service. He managed to contact his lawyer on his mobile phone.

On 7 August 2003, the applicant signed a report in which he waived his right to a lawyer. No record of questioning was made. The applicant maintained that he was questioned about the work of his superiors, about certain members of the then opposition political party and certain high-profile journalists. His personal belongings were returned, and he was released at 9 a.m. On the same day, the applicant brought his alleged unlawful arrest to the attention of the Ministry of the Interior (hereafter, the Ministry) and, on 3 November 2003, to the Sector for Internal Control at the Ministry (hereafter, the Sector). Subsequently, several letters were exchanged between the applicant and the Sector.

In a 3 March 2004 report, the Sector noted that the applicant's arrest and detention had been carried out in compliance with the law. Owing to minor errors in the minutes concerning the body search, the Sector proposed that the police officers responsible be fined and warned. The Sector repeated these findings in its reply to the applicant dated 22 March 2004. However, no explanation was given for the applicant's arrest.

Furthermore, on 7 August 2003, the applicant had requested an investigating judge at the Kumanovo Court of First Instance to review the lawfulness of the deprivation of his liberty. He claimed that he had been detained unjustifiably, had not been informed of the reasons for his arrest,

his lawyer had been prevented from attending his interview and the arrest had been carried out without a court order. However, between 15 October 2003 and 12 January 2004, the investigating judge was on sick leave. On 4 February 2004, the judge requested the Ministry to provide documents concerning the applicant's arrest. In a 20 February 2004 reply, the Ministry stated that the applicant's arrest had been ordered on account of suspicion that he had been involved in arms trafficking. However, he had been released after it was established that there was no evidence to support the allegations, and he had the requisite license. On 23 June and 21 September 2004, the judge asked for further written evidence from the Ministry, which the latter submitted on 29 September 2004.

On 26 January 2005, after five requests by the applicant for the proceedings to be expedited and relying on the information provided by the Ministry and its reports, the judge found that the applicant had been lawfully deprived of his liberty on suspicion of arms trafficking. She further found that the applicant had waived his right to a lawyer, as noted in the report of 7 August 2003, which had been duly signed by the applicant. The applicant was advised that he could appeal within two days to a three-judge panel (hereafter, the panel) of the Kumanovo Court of First Instance.

On 16 February 2005, the applicant appealed, arguing that he had been deprived of his liberty contrary to Article 5 of the Convention and the applicable legislation. He maintained that he had been arrested without a court order and the investigating judge had failed to examine the grounds for his deprivation of liberty. He further submitted that he had not been summoned by the investigating judge to present the arguments in his favour, and some witnesses could shed light on the circumstances surrounding his arrest. On 18 February 2005, the panel dismissed the applicant's appeal. Finding no reasons to question the facts, it ruled that the applicant's deprivation of liberty had been lawful and intended to identify him, verify his alibi and collect necessary information. It noted that he had been informed of his rights and the reason for his arrest, namely a reasonable suspicion that he had committed the offence of 'trafficking in arms'.

In its defence, the Government stressed that the proceedings had satisfied the procedural requirements of fairness. Hence, they maintained that the courts had reached their decisions on the basis of evidence submitted by the Ministry and the applicant, who, through written submissions, had been given sufficient opportunity to present his case. They further stated that the applicant had not been heard during the proceedings

since no such requirement was contained in the Act. The investigating judge had decided the issue on the basis of the written material submitted by the parties. However, the applicant contested these arguments, stating that the courts' failure to communicate to him the documents submitted by the Ministry was contrary to the principle of equality of arms.

The ECtHR reiterated that the right to adversarial proceedings meant, in principle, the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all the evidence adduced or observations filed, with a view to influencing the court's decision. The principle of equality of arms – one of the elements of the concept of fair trial – required each party to be given a reasonable opportunity to present their case under conditions that did not place them at a substantial disadvantage *vis-à-vis* their opponent. Furthermore, Article 6 guaranteed the right of a party to participate effectively in the proceedings, which included, *inter alia*, their right to be present and to hear and follow the proceedings. Such rights were implicit in the notion of an adversarial procedure. The Court noted that the decision of the investigating judge of 26 January 2005 was based on the written evidence submitted by the Ministry. There was nothing to show that the evidence was served to the applicant. Furthermore, the applicant had not been invited to attend the decisive hearing before the investigating judge. Hence, his complaints in this respect were left unanswered by the appeal panel. Therefore, the Court concluded that the applicant was prevented from effectively participating in the proceedings. Hence, there was a breach of Article 6 paragraph 1 of the Convention.

Regarding the length of the proceedings, the Government submitted that it had not been excessive and all-time limits, although short, had been respected by all those involved. In the latter respect, they stated that the Act had not specified any time limit for the investigating judge to reach a decision. The fact that she had been on sick leave and the unavailability of any other judge in her stead had to be taken into consideration. The applicant submitted that, given the short time limits specified in the Act, the proceedings had to be regarded as urgent and the proceedings before the investigating judge had fallen foul of the 'reasonable time' requirement. The Court noted that the proceedings in question started on 7 August 2003, when the applicant challenged the lawfulness of his arrest before the investigating judge. They ended on 18 February 2005 with the panel dismissing the applicant's appeal. Therefore, the proceedings lasted for 1 year, 6 months and 12 days for two jurisdiction levels.

The Court reiterated that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant. The Court did not find the applicant's case to be complex. It observed that no delays could be attributed to the applicant. On the contrary, his motions to expedite the proceedings were a factor in his favour.

Regarding the conduct of the authorities, the Court noted that it took a little under one and a half years for the investigating judge to issue a decision, and the panel took only two days. Although the dispute concerned the lawfulness of the applicant's detention for 10 hours, it did not require special diligence on the part of the authorities since the applicant was not in custody when he lodged the challenge. Hence, the Court considered that the length of the proceedings was not excessive and there had been no violation of Article 6 paragraph 1 regarding the length of the proceedings.

4.3. Case on the right to a fair trial (cases on length of proceeding, access to court, independent and impartial tribunal and equality of arms)

Since the State ratified the ECHR, more than 110 judgments have been given regarding Article 6 of the Convention – the right to a fair trial – with established violations in more than 100 cases. These cases mostly dealt with the length of proceedings and the lack of enforcement of the judgments. Additionally, several cases raised issues concerning the impartiality of judges, including in cases of dismissal and lustration of judges, the principle of equality of arms, particularly regarding the examination of witnesses and assessment of expert opinions, and presence at a trial. The admissibility of unlawfully obtained evidence, the use of evidence obtained by protected or anonymous witnesses, the right to defence, the right to an interpreter and the presumption of innocence were dealt with as well in several criminal cases. Furthermore, the need for judicial certainty and consistent case-law, the lack of reasoning, the right of access to a court and the right to an oral hearing were examined in several civil and administrative cases.²³

²³ Recent Case Law from the European Court of Human Rights with Respect to Albania, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia, Aire Centre, 2017. [Online]. Available at: https://rolplatform.org/wp-content/uploads/2018/09/case_law_eng-1.pdf (Accessed: 22 August 2024).

4.3.1. Ivanovski v. The Former Yugoslav Republic of Macedonia

In this case,²⁴ the Court held that there had been a violation of Article 6 paragraph 1 of the Convention regarding the overall unfairness of the lustration proceedings and of Article 8 of the Convention concerning the lustration proceedings. The case originated in application no. 29908/11 against the former Yugoslav Republic of Macedonia, lodged with the Court under Article 34 of the Convention, by a Macedonian national, Mr Trendafil Ivanovski, on 9 May 2011.

Before discussing the case details, it is important to understand the background of the application. On 22 January 2008, the Parliament of the respondent State passed the Additional Requirement for Public Office Act (hereafter, the Lustration Act), which entered into force eight days later. The Lustration Act introduced non-collaboration with the State security services between 2 August 1944 and 30 January 2008, the date of the Act's coming into force (hereafter, the screening period), as an additional requirement for the holding of public office. In other words, collaboration with the State security services during that period became an impediment to holding public office. All incumbent public officials and candidates for public office were required to submit a statement that they had not collaborated with the State security services during the screening period.

The Lustration Act was to apply for five years, starting from its entry into force. It provided for the establishment of a Facts Verification Commission, which had to be set up within 60 days of the Act's entry into force. Its task was to examine the veracity of the public officials' declarations. The members of the Commission were elected by the Parliament on 15 January 2009. The Commission became operational in late March 2009. On 22 May 2009, amendments to the Lustration Act entered into force, adding several provisions primarily regarding the functioning of the Lustration Commission and the status of its members. Moreover, the temporal scope of the Lustration Act was extended, from the 5 years initially envisaged following the Act's entry into force, to 10 years following the election of the Commission. On 27 January 2010, following petitions for abstract constitutional review, the Constitutional Court accepted the initiative and instituted proceedings to review the constitutionality of several provisions of the Lustration Act, including the

²⁴ *Case of Ivanovski v. The Former Yugoslav Republic of Macedonia*, App. No. 29908/11, 21 April 2016.

extension of the screening period beyond the date of adoption of the current Constitution of the respondent State (17 November 1991). It suspended the application of its provisions until it had decided on their compatibility with the Constitution. Fierce debate ensued, in which several politicians severely criticised the Constitutional Court's decision in the media.

Through a 24 March 2010 decision, the Constitutional Court invalidated certain provisions of the Lustration Act as unconstitutional. Particularly, the Court held that the extension of the screening period beyond 17 November 1991, the date of adoption of the present Constitution, was unconstitutional. In other words, it was incompatible with the Constitution to provide collaboration with the State security services after that date, which impeded the holding of public office. Some other provisions were held contrary to the Constitution as well, namely those providing for the publication of collaborators' names in the Official Gazette, automatic lustration in cases where no declaration had been submitted and making it possible to introduce collaboration as an impediment to membership of governing bodies of political parties, civic organisations and religious communities by internal regulations of non-State entities.

Based on this backdrop, the applicant, a judge of the Constitutional Court between 2003 and 2011, was dismissed as a result of the lustration proceedings. This was the first lustration case in the respondent State. During the lustration proceedings and at the time of his removal from office, the Applicant Was the President of the Constitutional Court. On 3 September 2009. The Applicant, as a public official, submitted to the Lustration Commission a declaration of non-collaboration with the security services. On 5 July 2010, the Commission, by a letter classified as confidential, requested the State Archive to provide it with direct access to all the data, files and documents regarding the applicant. On 12 and 22 July 2010, the State Archive informed the Commission that a personal record of the local branch of the secret police of the former Yugoslavia existed for the applicant and invited the Commission to consult the documentation.

On and around 15 September 2010, various media, despite the confidential nature of the proceedings before the Lustration Commission, reported that the Commission had allegedly identified a judge of the Constitutional Court as a collaborator with the State security services. In the following days, the media continued to speculate that the identified collaborator was the President of the Constitutional Court. During its private deliberations, held on 16 September 2010, the Lustration Commission found

that the applicant's declaration had not been in conformity with the evidence at its disposal.

The applicant was notified of the Commission's findings on 21 September 2010, with a note classified as 'strictly confidential'. He was instructed that, under the Lustration Act, he could, within five days, submit oral or written observations to the Commission's findings. The applicant replied and requested a public session on 24 September 2010. On 23 September 2010, the Commission notified the applicant that the session would be held on 27 September, it would be public 'when classified information was not being used' and he could access the entirety of the classified documentation at the Commission's disposal for one hour before the session. On 24 September 2010, in an open letter broadcast in the media, addressed to the 'opponents of the lustration', the Prime Minister of the respondent State stated, *inter alia*, that the Commission had publicly revealed that a member of the Constitutional Court had been a collaborator with the State security services and it was clear that the collaborator sitting in the Constitutional Court, nominated by the former president of the Republic, and controlled by other centres of power, had invalidated several legislative reforms of his Government. On 24 September 2010, the applicant objected to the imposed time constraints regarding his access to the classified documents. The Commission, in turn, informed him that he could consult his personal record, compiled by the secret police of the SFRY at the State Archive, and the documents at the disposal of the Commission in the coming days until the session. The applicant consulted the documents on the same day.

The record contained around 50 pages of typed reports and forms. It appeared from the record that the applicant was, on 27 and 28 March 1964, interrogated by the secret police regarding his involvement in a high-school nationalist group, and was registered as a collaborator under the pseudonym *Lambe*. The 'proposal for registration' of 19 May 1964, signed by an inspector, I.K., stated that the applicant was approached about his collaboration with the secret police and 'he gladly agreed to it, [saying] that he would do anything for the [security] service, as long as his father and the school do not find out'. A 'questionnaire' with a handwritten date of 10 February 1965, stated, *inter alia*, that the applicant was recruited on the grounds of 'compromising material' and he had not received any material benefit in exchange for his collaboration. This was noted in another

questionnaire of 10 January 1968, where, next to the pseudonym *Lambe*, there was a handwritten note '*and Lamda*'.

The record contained several reports of various dates between 1964 and 1966, composed mostly by the inspector who relied on *Lambe* as a source of information, about conversations and statements of some high-school and university students about certain political and social issues at the time. *Lambe* provided the information mostly verbally; only a few reports were based on his letters (which were not in the file). Furthermore, there were copies of two payment receipts dated May and December 1965 and a 1983 proposal for the deregistration of the collaborator *Lamda*. The deregistration referred to a person with the applicant's name, who in the 1970s was a student at the Technical Faculty and, in 1983, was working in the municipal branch of the Communist Party.

On 27 September 2010, the Commission held a public session. During the session, the applicant denied the Commission's initial findings, calling into question the veracity of his declaration. He disputed the authenticity of the documents that the Commission relied on, as he had neither composed nor signed them, and claimed that the reports had been forged or taken from others' and added to his personal record. He further denied the authenticity of the signatures on the two payment receipts. He alleged confusion regarding the two collaboration pseudonyms (*Lambe* and *Lamda*) and their real identities. He argued that the episode from the time when he was a minor and had been coerced into having contact with the secret police, due to his involvement with a high-school nationalist group, had been misused.

In a 29 September 2010 decision, the Commission held that the applicant's objection to its initial findings of 16 September 2010 was not in accordance with the information available, and he did not fulfil the additional requirement for holding public office. The decision was based on the applicant's personal record, which contained a list of 22 documents. It summarised the contents of the documents and stated that the applicant had begun collaborating in 1964 and had been deregistered in 1983. Furthermore, he had provided information on students whose activities were monitored by the security service for political reasons and, as evident from the two payment receipts, he had been paid for the collaboration in 1965. The relevant part of the Commission's decision read as follows:

... From the data available in the personal record compiled by the [secret police of the SFRY] it was established that in the rubric “collaboration relationship” it is stated that [the applicant] is a collaborator of the [secret police] recruited on the ground of compromising material. It was further established that [the applicant] started his collaboration with the [secret police] as early as 1964 as a high-school student who, when it was proposed to him that he be registered in the collaborators’ network, stated that “he gladly accepted the collaboration and would do anything for the service”, and that he was allocated a pseudonym under which he later delivered all the information to the [secret police]. In 1965 he officially became a collaborator of the [secret police]. In the documentation, in ten reports drafted by the Internal Affairs Unit in Strumica, on a number of pages, [the applicant] under his pseudonym appears as a source giving information about his schoolmates, which [information] was used by the [secret police] as operational material on the activities of high-school youth in Strumica. From four reports, it is apparent that also later on, as a student in Skopje, he gave information about students of various faculties, of which in the personal record there are five reports concerning a number of individuals whom the [secret police] monitored and had information that they were dissatisfied with the authorities in view of their weak interest in the situation of the Macedonians in the Aegean [in Greece] and Pirin [in Bulgaria] Macedonia, as well as for various wrongs committed against Macedonians in the western part of Macedonia. From the personal record it was also established that in 1965 the sums of 10,000 and 20,000 [Yugoslav] dinars had been paid to him. His collaboration officially ended in 1983 when he was employed in the Municipality of Karpoš and was deregistered from the active collaboration network.

The Commission accounted for the oral observations of the applicant, in which he expressed his disagreement with the Commission’s findings. The Commission considered all the information, files and documents contained in the applicant’s record relevant. It held that that the applicant’s

declaration of non-collaboration submitted to the Commission was not in line with the requirements; hence, the applicant did not meet the additional requirement for public office in accordance with section 2(1) and section 4(4) of the Lustration Act. The Commission's decision was served to the applicant on 30 September 2010 and classified as 'strictly confidential'.

In an exchange of correspondence, on 1 October 2010, the applicant requested that the Commission provide him with a copy of the file for seeking a judicial review of its decision. The Commission informed him that the originals were available in the State Archive and advised him to look for them there. Upon the applicant's request on the same day, the State Archive, either on the same day or on 4 October 2010, provided him with a copy of his personal record. On 5 October 2010, the applicant pointed out inconsistencies between the files provided by the State Archive, the inventory of the documents in his record and the documentation the Commission relied on in its decision.

The State Archive responded that they had received the personal record as it was and had listed the documents therein by title, without inspecting their contents, as they had not been authorised to do so. They invited the applicant to consult the contents of his personal record under their supervision. On 8 October 2010, the applicant brought an action for judicial review in the Administrative Court against the Commission's decision. He complained that the proceedings before the Commission had been unfair and had factual and legal errors. Particularly, he complained that the session before the Commission had been held without the Rules of Procedure being adopted, which the Commission should have done *ex lege* before commencing the proceedings. The public session had not been, as initially planned, followed by proceedings *in camera*; therefore, he had not had an opportunity to fully present his arguments concerning the classified information in the file.

The applicant further objected that the time limit for the appeal preparation was reduced, since he received the copies of the documents from the State Archive on 5 October 2010. However, there were obvious discrepancies between the files of the State Archive and the ones that the Commission had accessed. The applicant denied the authenticity of the documents in his personal record and suggested obtaining an opinion from a graphology expert regarding the signatures on the two payment receipts by comparing them with the letters he had allegedly sent to the inspector of the secret police; these letters were referenced in the record, yet were not

available in the file. He submitted that his identity had been confused with that of the person with the pseudonym *Lamda*, given that, in 1983, he was already a law graduate and working for the Skopje City administration. Hence, he was neither working at the municipal branch of the Communist Party nor had he ever studied at the Technical Faculty, as the record indicated. He proposed additional evidence, asked for a public hearing and requested leave to invite an expert assistant, particularly, a certain Mr I.B., a university professor of State security and intelligence and retired staff member of the SFRY secret police, to clarify the police's methods and practices concerning the opening and maintenance of records. In its reply, the Commission listed and referenced 22 documents and mentioned 'forty-seven written documents', on which it based its decision. The Commission's reply was classified as 'strictly confidential'.

On 26 October 2010, the Administrative Court held a public hearing in the presence of the applicant and the President of the Commission. The Commission objected to the Administrative Court's competence *ratione materiae* to examine the case. On 2 November 2010, the Court held another hearing, at which the Commission withdrew its objection, the expert assistant Mr I.B. gave his testimony, and the evidence was examined. The public was excluded from the parts of the hearing in which confidential material was under consideration.

In an 8 November 2010 judgement, the Administrative Court dismissed the applicant's action. It listed 27 documents and found the Commission's files identical to the originals received from the State Archive. It held that the Commission had neither been authorised nor obliged to determine the authenticity of evidence that could only be established by an expert opinion in criminal proceedings. Furthermore, it stated that the Commission did not conduct any adversarial proceedings and could admit as fact only the records compiled by the State security services. The applicant's proposal to obtain an expert opinion to check the authenticity of the signatures on the payment receipts was rejected. The Court concluded that it was immaterial to determine whether the payments had been received by the applicant, as other (non-pecuniary) benefits could suffice for someone to be deemed a collaborator under the Lustration Act. The judgment took into account the testimony of the expert assistant, Mr I.B. Parts of the judgment were classified as 'strictly confidential'.

In a 29 September 2010 decision, the Lustration Commission established that the applicant had submitted a false declaration and he did

not meet the additional requirement for public office. On 25 February 2011, the Lustration Act was amended for the second time, and certain provisions, similar to the invalidated ones, were reintroduced. The provision delimiting the screening period was reworded in a manner that left the end date undecided. The personal scope of the application was extended to cover former officials and officers in organisations performing duties of a public nature, requiring them to submit declarations of non-collaboration.

On 28 March 2012, the Constitutional Court, once again, invalidated several provisions of the Lustration Act, as amended by the 2011 Amendments. Hence, the Constitutional Court held that its earlier decision had been circumvented in view of the content of those amendments. On 17 July 2012, the previous Lustration Act was repealed, and a new Lustration Act came into force. In 2014, the Constitutional Court refused to institute proceedings for abstract constitutional review of the new legislation. While the 2008 Lustration Act was in force, the Lustration Commission established, through 11 cases, that the declarations on non-collaboration were false; therefore, the persons did not meet the additional requirement for public office. Apart from the applicant, who was the only incumbent official whose declaration was found to be false, the other cases concerned eight former officials and two journalists.

On 1 September 2015, the Act repealing the 2012 Lustration Act entered into force. According to the Act, the Lustration Commission was allowed to complete, within two years, any ongoing proceedings in which a decision had been issued; however, it could not institute new proceedings. Pending lustration proceedings, in which the Commission had not issued a decision, were discontinued. Section 3 of the Act provided that a person, regarding whom the Commission had established that he or she had collaborated with the State security services, was banned from holding public office for five years, from the time the Commission's decision became final.

4.4. Cases on the right to property

The denationalisation processes, that is, the restitution of forcefully confiscated properties from former owners, were one of the key processes in the democratic development of the Macedonian society to rectify the injustice cost by the previous governments by returning such properties to their rightful owners. The denationalisation law enabled former owners to

gain the right to property for confiscated property based on Article 30 of the Constitution.

In North Macedonia, the denationalisation process took place much later compared to the other post-socialist countries. However, unlike the other transition countries where denationalisation was carried out successfully and efficiently, this was hardly the case in North Macedonia. According to available data,²⁵ the denationalisation process in the country lasted unreasonably long. One of the reasons was the lack of political will of the authorities to execute the process swiftly and successfully.

The denationalisation process in North Macedonia faced numerous institutional barriers and bureaucratic procedures.²⁶ The Macedonian judiciary system showed several weaknesses and slowness in completing the denationalisation cases, which obstructed the citizens' legal certainty and their trust in the judiciary.²⁷ The effects of the Convention on the right to

²⁵ See: S. Mehmeti: *The Process of Denationalization in the Republic of Macedonia After Its Independence*. [Online]. Available at: https://cdn.istanbul.edu.tr/FileHandler2.ashx?f=the-process-of-denationalization-in-the-republic-of-macedonia-after-its-independence_sami-mehmeti.pdf (Accessed: 22 July 2025).

²⁶ Most of the complaints brought before the Ombudsman office in 2014, 2015 and 2016 were about property relations by the citizens, who felt manipulated in their denationalisation cases; that is, people who were harassed by the Ministry of Finance and the Administrative Court for 16 years, restricting them from any right to compensation. Some of these cases remained stuck in bureaucratic labyrinths, the denationalisation commissions established by the Ministry of Finance, administrative or higher administrative courts, or the State Commission, which decided in the second instance. The administrative judges, instead of deciding on a meritorious basis, continuously sent the cases back to the commissions.

²⁷ In its most critical report about Macedonia in the last few years, the US State Department, in the section focused on the protection of human rights, referred to the 'Gradishte' case, a major denationalisation case, with a judicial history of 25 years. Members of 36 families from Ohrid organised a protest in April 2022, claiming that the authorities had not provided them with adequate compensation for the land plots nationalised in 1957. The Ombudsman found major difficulties and procedural flaws in the denationalisation cases and pointed out the poor work of the Denationalisation Commission under the Ministry of Finance, and the inefficient cooperation with the Administrative Court and other government agencies. The 2000 denationalisation law defined the denationalisation procedure as urgent, the US State Department said in its report. 'These properties are located in the most attractive part of the Ohrid lake coast, covering an area of 100.000 m²', said Adrijana Bashovska whose family was one of those seeking justice for three decades. 'All applicants with cases related to "Gradishte" have four or five decisions in their favor issued by the Administrative Court. The decisions of the Administrative Court

property were complex because the related right was multidimensional. The case law of the country before the ECtHR, regarding property rights, noted seven judgments. Two cases were related to the right to property concerning the issue of privatisation and purchasing of apartments in the property belonging to the former federal army,²⁸ one case⁵³ involved the effective enjoyment of the right to property, two cases (*Bocvarska*²⁹ and *Arsovski*³⁰) dealt with the fair balance between the sides involved in two different rights to property cases and two cases were regarding the process of denationalisation (*Vikentijevik*³¹ and *Stojanovski and others*).³²

4.4.1. Arsovski v. the Former Yugoslav Republic of Macedonia

In this case³³ the ECtHR held that there had been a violation of Article 1 of Protocol No. 1 of the Convention. The case originated in application no. 30206/06 against the former Yugoslav Republic of Macedonia, lodged with the Court under Article 34 of the ECHR, by three Macedonian nationals, Mr Stojko Arsovski, Mr Stefan Arsovski and Mrs Verka Arsovska, on 7 July

are compulsory and executive, however the denationalisation commission under the Ministry of Finance issues decisions which are contrary with the denationalisation law and contrary to the Macedonian Constitution. These constitutes brutal violations of the applicants' human rights in the process of denationalisation', representatives of the civil organisation, Orevche, stated. 'The denationalisation process of "Gradishte" is stuck in the corruption and incapability of the institutions and the court. The state must urgently bring this process to completion', said Bashovska. Officials from Orevche accused that the denationalisation law was applied selectively. They remind the people of the scandalous decision in which the state offered compensation of 200 denars per m². A local suspicious businessman, with close links to the judges and state officials, was trying to acquire a 'Gradishte' property worth 20 million euros, officials from Orevche stated.

²⁸ *Case of Veselinski v. The Former Yugoslav Republic of Macedonia*, App. No. 45659/99, 24 February 2005 and *Case of Dzidrovski v. The Former Yugoslav Republic of Macedonia*, App. No. 46447/99, 24 February 2005; *Case of Jankulovski v. The Former Yugoslav Republic of Macedonia*, App. No. 6906/03, 3 July 2008.

²⁹ *Case of Bocvarska v. The Former Yugoslav Republic of Macedonia*, App. No. 27865/02, 17 September 2009.

³⁰ *Case of Arsovski v. The Former Yugoslav Republic of Macedonia*, App. No. 30206/06, 15 January 2013, paras. 61 and 62.

³¹ *Case of Vikentijevik v. The Former Yugoslav Republic of Macedonia*, App. No. 50179/07, 6 February 2014.

³² *Case of Stojanovski and others v. The Former Yugoslav Republic of Macedonia*, App. No. 14174/09, 23 October 2014.

³³ *Case of Arsovski v. The Former Yugoslav Republic of Macedonia*, App. No. 30206/06, 15 January 2013, paras. 61 and 62.

2006. The application was submitted on behalf of Mr Milan Arsovski, who had died on 7 October 2004. Through the submissions received on 24 January 2011, the Court was informed that Mr Stefan Arsovski had died on 26 March 2007. His widow, Mrs Dragica Arsova, and his daughters, Mrs Karolina Joseva and Mrs Kalinka Stefanovska, applied to continue the application in his name.

Since 1952, the applicants' predecessors had title to a plot of land no. 1339. Based on a gift contract of 1968, the plot was transferred to Mr Stojko Arsovski and subsequently to all the applicants. In 1973, the State was recorded in the land registry, in error, as the owner of the plot. On 1 November 1977, the City Council of Kratovo authorised company S. to use the plot for an intensive agricultural development; however, the company never engaged in any such activity. On 17 April 1996, the applicants and Mr Milan Arsovski brought a civil action against the State, seeking recognition of the title to several plots of land, including plot no. 1339. In May 1996, the then competent Ministry gave permission to the company to carry out geological research on the plot. On 19 March 2002, the Kratovo Court of First Instance upheld the applicants' claim, recognising their title to the plot. On 26 June 2002, the Skopje Court of Appeal confirmed the first-instance court's decision, establishing that the claimants had always had actual possession of the plot.

On 26 July 2002, the company requested that the State expropriate the plot for it to extract mineral water. In support, it submitted, *inter alia*, a copy of a concession contract signed by the State on 8 May 2000, under which the company had been authorised to exploit geothermal mineral water in the plot for a renewable period of 30 years. The company undertook, in return, to pay certain compensation to the State. On 9 December 2002, the Kratovo Office of the Ministry of Finance ordered the expropriation of the plot for the company to construct a pit to extract the mineral water. The expropriation order was based, *inter alia*, on the Expropriation Act. The applicants and Mr Milan Arsovski appealed against the expropriation order, arguing that the extraction of mineral water had not been specifically mentioned in any act or plan concerning the plot, and the applicable legislation had provided for partial, instead of full, expropriation in the event of research and exploitation of mineral resources, as in their case.

On 2 June 2003, the Government Appeal Commission dismissed the appeal, stating that the company had submitted the required documents and the exploitation of mineral water had been provided for in a decision of the

City Council dated 1996. The Commission stated that the expropriation in the applicants' case was in the public interest. It further stated that the company, as the beneficiary of the expropriation, would pay compensation to the applicants. The applicants and Mr Milan Arsovski lodged an appeal with the Supreme Court on points of law, arguing that they had been deprived of the peaceful enjoyment of their possessions, contrary to the Constitution and the Act. They complained that the Commission had not addressed their arguments regarding the company not being entitled to a full expropriation of the plot. They reiterated that a three-year lease contract should have applied, instead of the full expropriation, which entailed loss of the title to the plot, contrary to the principle of legal certainty.

On 16 November 2005, the Supreme Court dismissed the appeal, finding no errors in the facts or law. Noting the applicants' complaints, the court reiterated that the plot's expropriation was in the public interest, with a view to constructing objects for research and exploitation of natural resources. The company had submitted the required documents, and compensation had been determined in non-contentious proceedings. The decision was served to the applicants on 9 January 2006.

On 11 April 2006, the public prosecutor notified the applicants that there were no grounds to lodge a legality review request with the Supreme Court. According to an extract from the Land Register of 7 May 2008, the company had title to the plot. According to another extract, dated 31 December 2010, the respondent State was indicated as the owner of the plot and the company as the beneficiary. However, on 23 November 2004, the first-instance court determined, based on an expert report, the amount of compensation, which the company was required to pay to the applicants in return for the expropriated plot. The joint award was fixed at an equivalent of 880 euros. This figure corresponded to the market value of the plot, determined on the basis of its location, size, quality, suitability for construction and access to a road and different installations. The expert report contained information about the investment by the company for the exploitation of mineral water on the plot. The applicants were ordered to pay an equivalent to 475 euros for the costs incurred by the company. The decision was confirmed by the Skopje Court of Appeal on 15 September 2005.

Two individuals, one of whom was Mrs Verka Arsovska, applied to the Constitutional Court challenging the constitutionality of, *inter alia*, section 3 paragraph 1 (3) of the Act. In an *ex nunc* decision of 11 February

2009, the Court declared the provision unconstitutional, determining that although the State had a certain margin of appreciation in defining the public interest, it could not exercise it unreasonably. Hence, it was considered that the Act enumerating the objects, whose construction was regarded as public interest, was insufficient. It further stated that the construction of objects in the interest of private persons, as defined in urban plans, could not be construed as being in the public interest. Relying on Articles 8 and 30 of the Constitution, it concluded that the State could expropriate a property only after other less restrictive measures, such as a long-term lease or concession, had been exhausted. To claim otherwise would mean that the commercial interests of private persons would prevail over the public interest.

In a letter dated 3 June 2011, the Government submitted that the applicants had violated the rules of confidentiality regarding friendly-settlement negotiations. In support of this assertion, they referred to the article published in the weekly newspaper *Fokus*. According to the Government, although the article did not disclose the source of information, it was clear that the information could only have been provided by the applicants or their representatives. Although a part of that information was false and led to frivolous conclusions about the outcome of the contentious proceedings before the Court, they invited the Court to declare the application inadmissible on the ground of the abuse of the right of petition.

The applicants denied that they had disclosed any information concerning the application or the friendly-settlement proposal. They submitted that this was confirmed by the false information contained in the article. The Court noted that, according to Article 39 paragraph 2 of the Convention, friendly-settlement negotiations were confidential. Rule 62 paragraph 2 of its Rules of Court reiterated this principle and stipulated that no written or oral communication and no offer or concession made within the framework of friendly-settlement negotiations could be referred to or relied on in contentious proceedings. Noting the importance of this principle, the Court reiterated that it could not be ruled out that a breach of the rule of confidentiality may, in certain circumstances, justify that an application was inadmissible on the ground of the abuse of the right of application.

The Court considered that the direct responsibility of a party for disclosure of confidential information must always be established with sufficient certitude; a mere suspicion does not suffice to conclude that an

application amounted to an abuse of the right of individual application within the meaning of Article 35 paragraph 3 of the Convention. Hence, the Court found no evidence that the information contained in the article was disclosed by the applicants or their legal representatives. The article did not quote the applicants or their representatives, nor did it state that the relevant information had been obtained from any of them. The Government did not provide any evidence proving otherwise. Furthermore, as the Government conceded, the article contained incorrect information. The Government's assumptions that the applicants had violated the rules of confidentiality were accordingly unsubstantiated. Consequently, the objection was dismissed.

The Government did not raise any further objection about the admissibility of the application. The Court noted that the application was not manifestly ill-founded within the meaning of Article 35 paragraph 3 (a) of the Convention. It further noted that it was not inadmissible on any other grounds. Hence, it was declared admissible. The applicants submitted that the expropriation had pursued no public interest, rather the commercial interest of the company. Furthermore, there had been no relationship of proportionality between the means employed and the aim pursued, nor had a fair balance been struck between the general interest and the interests of the owners of the plot. Referring to section 4 of the Act and the Constitutional Court's decision, the applicants stated that a less restrictive measure could have been applied in their case, as they had unsuccessfully claimed in the impugned proceedings. However, their arguments remained unaddressed.

Moreover, they argued that the compensation awarded to them was below the market value of the plot. The Government submitted that the expropriation had been carried out following the Act, as in force at the time. The decision of the Constitutional Court post-dated the impugned expropriation and had no bearing on the case. The aim of the expropriation was the construction of objects for the exploitation of mineral water, an activity which the Act explicitly specified as being in the public interest. Based on the concession agreement, the company, which had been carrying out geological research in the relevant area for several years before the critical date, was granted permission to exploit the mineral water, which, as a public commodity, belonged to the State. The latter had a wide margin of appreciation in choosing the means for achieving the above-mentioned aim. Furthermore, the applicants had received compensation that corresponded to the market value of the plot, an amount determined on the basis of an expert report produced in court proceedings. Hence, the existence of mineral water

could not have any bearing on the amount of compensation, since the water was State-owned.

The Court reiterated that Article 1 of Protocol No. 1 comprised three distinct rules: first, set out in the first sentence of the first paragraph, was of a general nature and enunciated the principle of the peaceful enjoyment of property. Second, contained in the second sentence of the first paragraph, covered the deprivation of possessions and subjected it to certain conditions. Third, stated in the second paragraph, recognised that the Contracting States were entitled, amongst other things, to control the use of property following the general interest. However, the three rules were not unconnected. The second and third rules were concerned with particular instances of interference with the right to peaceful enjoyment of property and would be construed in the light of the general principle enunciated in the first rule. The Court noted that the respondent State seized the plot after the domestic courts, by a final decision of 26 June 2002, declared the applicants as the owners. It further observed that it was not disputed between the parties that the seizure amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions.

Therefore, the Court determined whether the deprivation complaint was justified under Article 1 of Protocol No.1 to the Convention, notably whether it complied with the principle of lawfulness, was in the public interest and pursued a legitimate aim through means reasonably proportionate to the aim to be realised. The Court recalled that the first and most important requirement of Article 1 of Protocol No. 1 was that any interference by a public authority with the peaceful enjoyment of possessions must be lawful: the second sentence of the first paragraph authorised a deprivation of possessions only 'subject to the conditions provided for by law'.

Turning to facts, the Court observed that the applicants were dispossessed based on the Act, under which expropriation could be ordered for the construction of objects for research and exploitation of mineral resources. The Court, posterior to the applicants' case, in its decision of 2009, declared unconstitutional the statutory provision according to which the expropriation could be ordered for the benefit of private persons, which did not affect the right of the State, as such, to seize property for research and exploitation of mineral resources. Therefore, the imposition of the seizure was considered lawful within the meaning of Article 1 of Protocol No. 1. The notion of 'public interest' was necessarily extensive.

Particularly, the decision to enact laws expropriating property would commonly involve the consideration of political, economic and social issues. The Court found it natural that the margin of appreciation available to the legislature in implementing social and economic policies would be a wide one and would respect the legislature's judgment as to what is 'in the public interest' unless that judgment was manifested without reasonable foundation.³⁴

In this case, the Court noted that the Act explicitly specified the construction of objects for the exploitation of natural resources as being in the public interest. Section 2 paragraph 1 (6) of the Act was not the subject of the review of the Constitutional Court in its 2009 decision. The public interest underlying the expropriation of the applicants' land was confirmed by the domestic authorities during the expropriation proceedings. Hence, the Court found no reason to consider otherwise. The seizure of the applicants' property was effected in pursuance of a legitimate public interest aim, namely the exploitation of mineral water, a State-owned public commodity, of which the community would have direct use and benefit. Hence, the interference with the applicants' rights under Article 1 of Protocol No. 1 was 'in the public interest'.

5. Conclusion

North Macedonia, as the 38th member country of the CoE, and the CoE have a long-standing cooperation regarding human rights, democracy and the rule of law. Starting on 9 November 1995, the country has been actively involved in all activities and work of the CoE. In 2009, the Macedonian Assembly adopted the ECtHR's Law on the Enforcement of Decisions,⁸³ which legally established two important institutions: the Bureau of the Government's agent and the Interdepartmental Committee for the execution of the Court's judgments and monitoring the enforcement of the ECtHR's judgments and decisions.

The ECHR's impact on the Macedonian society is observed through a complex social process of reception, introduced by diverse mechanisms. According to *Galigiuri and Napoletano*, the strengths of the impact of the Convention on the national legal system depend on two aspects: the position of the ECHR in the domestic hierarchy of sources of law; that is, whether it

³⁴ *Case of Urbárska Obec Trenčianske Biskupice v. Slovakia*, App. No. 74258/01, § 113, 27 November 2007.

has supra-national status or not, and the self-executing character of the ECHR rules by national laws.³⁵ In the Macedonian system, the Convention is positioned between the Constitution and the laws; hence, it is higher than the laws, yet less than the Constitution. In other words, the Constitution has the highest normative rank and every other act, including international agreements and laws, is positioned below it.

The Macedonian legal system can be identified as a variation of the monist system. According to the fundamental principles of the monistic doctrine, in case of incompatibility between a ratified international agreement and a national law, the provision of the ratified international agreement will be used. This rule, which is only one segment of the basic rules for regulating a conflict regarding the relationship between international and national law, is administered in the Macedonian constitutional system.³⁶ The Macedonian legal system is a part of the group of legal systems that are based on the continental law's traditional principles. Regarding the rules which regulate the relationship between domestic and international law, following the constitutional provisions, the adoption of international law into the Macedonian legal order is organised under the monistic doctrine. However, the monistic doctrine for accepting international agreements is not a legal model and was established in the Macedonian constitutional system for the first time with the 1991 Constitution. On the contrary, the 'sub-ordinary' position of the international agreements over the Constitution accepted this doctrine based on the established relationship between domestic and international law during socialism. This model had a relatively long tradition. The 1991 Constitution continued the normative continuity of regulating this monistic doctrine introduced in 1970.

The paper showed that the intensity of the influence of the ECtHR's jurisprudence on the Macedonian system has varied across time, with the Court's impact intensively increasing over time. The process of the ECHR's reception into Macedonian law and practice, and the relationship between the ECHR and domestic legal orders, has been an open-ended product of interactive social processes that cannot be easily summarised. The country continues to face systemic challenges in ensuring timely judicial proceedings and safeguarding the independence of institutions tasked with human rights protection. Numerous ECtHR judgments against the country

³⁵ Caligjuri and Napoletano, 2010, p. 127.

³⁶ Karakamisheva-Jovanovska and Saveski, 2022, p. 328.

underscore persistent violations of Articles 6 and 13, largely due to prolonged court proceedings and inadequate institutional independence. Hence, accelerating judicial reforms and enhancing the autonomy of human rights institutions are essential steps toward fulfilling North Macedonia's obligations under the ECHR to strengthen the rule of law, reduce human rights violations and reinforce the country's European integration path.

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BENCE ZSOLT KOVÁCS*

**Protection of Human Rights under the ECHR and Central Europe:
Romania****

ABSTRACT: In 2024, Romania commemorated 30 years since ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a crucial milestone in its human rights development. This anniversary offers an opportunity to reflect on Romania's integration into the European multilevel system of human rights protection, which fosters convergence across European states. The European Court of Human Rights' (ECtHR) view of the Convention as a "living instrument," combined with Romania's adherence to its evolving judicial practice, has helped the country align with the latest human rights standards, addressing systemic issues such as prison conditions, excessively lengthy judicial proceedings, judicial independence, and property restitution.

This chapter explores the historical evolution of human rights in Romania, focusing on the impact of ECHR ratification on the country's constitutional framework and legislation. It examines Romania's relationship with the Council of Europe and the role of landmark ECtHR cases in shaping national legal reforms. Additionally, the chapter assesses the ongoing challenges in implementing ECtHR standards and highlights the country's progress. Importantly, it discusses the creation of a legal paradigm rooted in democracy, the rule of law, and the protection of human dignity. Ultimately, by Romania's acceptance of international human rights norms, for the first time in the country's history, real content and substance were added to existing nominal or formal guarantees, transforming abstract legal provisions into practical protections.

KEYWORDS: Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights,

* PhD student, Deák Ferenc Doctoral School of Political Science and Law, Miskolc; Intern, Central European Academy, Budapest, Hungary.
kovacs.bence@centraleuropeanacademy.hu.

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human rights protection in Romania, precedence of international human rights provisions, judicial practice, legal reforms.

1. Historical Development of Human Rights Protection in Romania: A Contextual Introduction

Human rights have deep historical roots, tracing back to biblical times, ancient Greek philosophy, and Roman law, with figures such as Cicero recognising the natural equality of all humans. Over time, these ideas were reinforced through theological development by thinkers including St. Augustine and St. Thomas Aquinas, and further evolved with the establishment of key legal milestones such as the Magna Carta.¹ However, our modern understanding of human rights was shaped mostly by the Enlightenment, when, for the first time, the universal character of these rights was codified in binding legal instruments such as the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789), which affirmed rights based solely on individuals' inherent human status.² For this reason, this section discusses the development of human rights in Romania following the diffusion of Enlightenment ideas into the current territory of the country.

In a paradoxical manner, most reform ideas of the 18th century reached the Romanian Principalities of Wallachia and Moldavia from the south and east rather than from the west. The Phanariot³ hospodars were the first to adopt modern codifications, reflecting Enlightenment ideals and laying the groundwork for legal reforms.⁴ The Russo-Turkish antagonisms of the early 19th century placed the principalities under the joint suzerainty⁵ of these

¹ Varga, 2021, pp. 247–248.

² *Ibid*, pp. 248–249.

³ The Phanariots were a class of influential Greek merchants, clerics, and administrators named after the Phanar district of Constantinople, who played a significant role in the administration of the Ottoman Empire as dragomans (interpreters), particularly in the 18th and 19th centuries. They were often appointed to the thrones of Moldavia and Wallachia by the Sublime Porte.

⁴ For further information on these codifications, see Veress, 2022, pp. 174–175.

⁵ Suzerainty is a special type of international legal relationship wherein a dominant state (the suzerain) exercises authority over a subordinate state. While the latter state may retain limited internal self-governance, it cannot conduct independent foreign policy or enter into international agreements without the suzerain's involvement. The vassal is also typically bound by various obligations – constitutional, fiscal, economic, military, or otherwise – defined on a case-by-case basis. Fazakas, 2024, p. 41. Buza, 1929, p. 230.

empires.⁶ The brief Russian occupation from 1828 to 1834 introduced a new administrative framework, marking the principalities as Russian protectorates. Under General Pavel Kiselyov, the Organic Regulations (quasi-constitutional laws) were implemented separately in both principalities, bringing a relatively liberal governance structure compared to both Russian autocracy and Ottoman rule.⁷ The French-inspired reform policies of the tsarist elite prompted the emerging Romanian civil society to adopt the French model as a foundation for its future development and Westernisation.⁸ The French model continued to prevail in the subsequent legislation of Romania, formally established under this name in 1862, following the union of Wallachia and Moldavia in 1859. The country achieved independence in 1878, marking a significant transition towards modern nationhood.⁹

This historical background is crucial for understanding the development of human rights in Romania. In Western countries, foundational acts such as the Civil Code and Penal Code typically followed the establishment of modern, capitalistic economic orders, reflecting social and economic transformations that have already happened. However, in Romania, the adoption in 1865 of the Civil Code (mostly a translation of the Napoleonic Code of 1804 with some Belgian and Italian influence),¹⁰ and the Penal Code (its main sources were the Prussian Code of 1851 and the French Code of 1810),¹¹ and finally the 1866 Constitution (codified after Belgian model), preceded this economic shift based on the development of a civil society; rather, these legislations themselves served as the catalysts for these transformations. Initially perceived as alien bodies in the organisation of a mostly rural and agrarian society, they ultimately became the engine of profound societal change. In essence, these acts were revolutionary: they did not merely document social transformations that had already occurred, but rather anticipated and initiated reforms.

The rest of Romanian history regarding human rights protection can be divided into two parts: when reality approached the ideal declared by

⁶ Veress, 2024, pp. 274-275.

⁷ Djuvara, 2019, pp. 163-164.

⁸ Veress, 2024, pp. 281-282.

⁹ For more information, see Cernea and Molcuț, 1994, pp. 194-198.

¹⁰ Veress, 2022, p. 178. On the adoption and influence of this piece of legislation, see Veress, 2024.

¹¹ Cernea and Molcuț, 1994, p. 205.

law, and when the real protection was far from, or independent of, that declared by law.

Between the codification of the aforementioned major acts and the Second World War, the gap between the content of normative acts and actual practice gradually narrowed, although there were some setbacks during the wars. Institutions for the protection of human rights began to emerge. The 1866 Constitution – according to the philosophy of natural law – declared the rights and freedoms of citizens in its second chapter (On the rights of Romanians).¹² However, these prerogatives were granted only to Romanian citizens. Additionally, Article 7 of the Constitution stipulated that only Christians could become citizens, an explicit anti-Islamic and Jewish provision aimed at strengthening the nascent state. According to Hannah Arendt:

it is hardly an exaggeration to say that Rumania was the most anti-semitic country in prewar Europe [...] in 1878, the great powers had tried to intervene, through the Treaty of Berlin, and get the Rumanian government to recognize its Jewish inhabitants as Rumanian nationals – though they would have remained second-class citizens. They did not succeed, and at the end of the First World War [nearly] all Rumanian Jews [...] were still resident aliens.¹³

This situation changed only after the peace treaty that concluded the Great War. After the Great Unification that followed the First World War, Romania became a multi-ethnic country. Nevertheless, the Romanian government persisted in its efforts toward nation-building with the aim of creating a unified and homogeneous nation-state. This goal was reflected in the 1923 constitution, which declared Romania a unitary nation-state in Article 1, simultaneously failing to incorporate the minority treaty that Romania had committed itself to at the peace conference in Paris on 9

¹² *Ibid*, p. 215.

¹³ Harendt, 2022, pp. 188-189. Halász, 2022, p. 279. The restriction that excluded Jews from being naturalized was lifted following the Berlin Congress in 1878, allowing for individual naturalization under specific conditions. However, this process was cumbersome and ineffective, resulting in only a small number of Jews – just 529 – becoming naturalized citizens by 1913, while also fostering corruption within the system. Oişteanu, 2009, p. 355. For a more balanced perspective on the historical dynamic between the Jewish and Romanian communities, see Boia, 2001, pp. 171-174.

December 1919.¹⁴ Consequently, this period was characterised by the existence of factual and legal differences regarding human rights protection, particularly concerning the treatment of ethnic minorities.¹⁵ This policy led to multiple infringements on the rights of ethnic minorities, who comprised approximately 30% of the Romanian population.¹⁶ In particular, the agrarian reforms in the newly acquired territories played a significant role, as their implementation had a blatant anti-minority character. The deprivation of ethnic and religious minorities from their communal properties served the interest of Romanian nation-building.¹⁷ The Second World War era also witnessed Romania's first dictatorship, during which the persecution of the Jewish population began on ethnic grounds. Romania's policies of anti-Semitic persecution were "*always a step ahead of German developments*."¹⁸

The period following the establishment of the Soviet-type dictatorship was marked by a radical discrepancy between the content of normative acts and their systemic practice. The oppressive reality starkly contradicted the declared rule of law, despite formal guarantees in the legislation. From 1947 to 1989, civil liberties were systematically violated, and human rights infringements became widespread, including censorship, political persecution, and systemic repression. The most glaring difference between declared human rights and reality was evident in the state of general disenfranchisement. As the economic prosperity promised by the utopian ideology failed to materialise, the totalitarian system sought a new source of legitimacy. This led to an ultra-nationalist shift, moving away from the proclaimed internationalism of communism – a trend observed across Eastern Bloc countries. In Romania, this process was most pronounced, giving rise to the term "national communism", which describes the ideological changes that emerged after the late 1950s.¹⁹ This national

¹⁴ Fazakas, 2023, p. 12.

¹⁵ Securing minority rights in Eastern Europe became a key issue after the First World War, as antebellum borders in this region had fluctuated significantly over the centuries. This instability prevented the establishment of a natural ethnic majority in both the newly created countries and the older states, unlike in Western Europe. The peace treaties concluded in Paris dismantled the multi-ethnic empires, resulting in new states that, despite their diverse populations, sought to assert a distinct national character. Hungarian political thinker István Bibó, in a book written shortly after the Second World War, described this situation as an aspect of the "*misery of small Eastern European states*". Bibó, 2023.

¹⁶ Halász, 2022, p. 284.

¹⁷ Fazakas, 2023, p. 13 and 17.

¹⁸ Harendt, 2022, p. 191.

¹⁹ For more details about this process, see Zavatti, 2020, p. 44-45.; Boia, 2001, pp. 76-90.

chauvinist shift resulted in experiments involving the forced assimilation of ethnic minorities or their sale abroad (while, at the same time, Romania was the country most independent from Moscow among the satellite states,²⁰ as the Soviet army withdrew from it in 1958). The dire situation of minorities was also noted by the Parliamentary Assembly of the Council of Europe (PACE) in multiple acts adopted between 1984 and 1989.²¹ These “*vigorously condemned*” the destruction of villages (primarily minority villages) under the guise of systematisation, while stating that Romania “*blatantly disregards*” minority rights and generally “*refuses to recognize the universal nature of human rights.*”²²

The constitutions of the totalitarian era, while containing a catalogue of rights and freedoms, can be regarded as “*unenforceable pledges*”.²³ The 1952 Constitution included a chapter on Fundamental Rights and Duties, and the 1965 Constitution similarly contained a section dedicated to rights. However, the institutional mechanisms for implementing these rights and the corresponding incorporation of international standards into domestic law were weak. Although Romania was a party to the United Nations Charter, the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the Helsinki Final Act, these agreements were not treated as binding legislation.²⁴ In practice, human rights violations committed in the interest of or on behalf of the ruling elite were rarely sanctioned. The 1965 Constitution even stipulated that freedom of expression and the press could not be exercised in a manner contrary to the political establishment or the interests of workers, thus creating deliberately vague limitations that further constrained individual rights.²⁵

After the 1989 revolution and the fall of Nicolae Ceaușescu, Romania embarked on a process of democratisation, transitioning to a constitutional democracy. The 1991 Constitution, further amended in 2003, was an

²⁰ Halász, 2022, p. 271.

²¹ Resolution 830 (1984), Resolution 910 (1988) and Recommendation 1114 (1989) of the PACE.

²² Recommendation 1114 (1989).

²³ Paczolay, 2022, p. 134.

²⁴ Corlățean, 2014, p. 95. Nicolae Ceaușescu – the plenipotentiary dictator of Romania from 1965 onward – denounced the Soviet military suppression of the Prague Spring in 1968. This stance strained Romania’s relations with the Soviet Union, while simultaneously opening avenues for engagement with the West. One significant effect of this was Romania’s signing of the ICCPR on 27 June 1968.

²⁵ Veress, 2020, p. 505.

emanation of this process, laying the groundwork for international integration. During this period, reality started to gradually resemble the enshrined legal regulation.

The dismantling of the totalitarian state initiated renewed respect for human rights. This was reinforced by Romania's aspirations to integrate into the international community, which bound it to align its human rights protections with international standards. In addition to legislative reforms meant to achieve this aim, special institutions for human rights protection, such as the Advocate of the People, the National Council for Combating Discrimination, and, partially, the Constitutional Court, were established. Meeting the expectations of European integration – particularly joining the Council of Europe (CoE) – has been a significant step forward in this regard. Taken together, this process can be termed a success, as Romania managed to reverse its previous poor human rights record.

2. Romania and the Council of Europe: A Human Rights Perspective

Romania's relationship with the CoE has been pivotal in its journey toward international integration, particularly concerning human rights. Romania formally joined the CoE on 7 October 1993, only three days after the Committee of Ministers (CM) issued Resolution no. 37/1993,²⁶ inviting the country to become a member. The joining act, which included signing the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR) at the first CoE Summit in Vienna, underscored Romania's commitment to democratic values and the rule of law. This accession was essential not only for strengthening Romania's legal and institutional framework but also for fulfilling the prerequisites for membership in the European Union (EU) and NATO. This chapter further explores the historical background of Romania's accession to the CoE and the impact of CoE institutions and mechanisms on human rights development in the country.

The process of accession began earlier, with Romania obtaining "special guest" status at the PACE on 1 February 1991. This transitional status was designed for post-Soviet countries aspiring to join the Council following the fall of totalitarian dictatorships in East Central Europe,

²⁶ Resolution (93) 37 of the CM.

reflecting their intention to engage with Western democratic institutions.²⁷ By 16 December 1991, the Romanian government had submitted its official application for membership. This application was subjected to a rigorous evaluation process,²⁸ including the participation of international observers during the 1992 elections.²⁹ The CM, regarding its obligation to consult with PACE, by Resolution no. 1/1992,³⁰ invited PACE to express its opinion on the accession of Romania. The adoption of Opinion 176 by PACE on 28 September 1993,³¹ favourably recommending Romania's accession,³² was followed by the aforementioned formal invitation from the CM.

Upon joining, Romania entered a phase of formal monitoring by PACE, which scrutinised the development of its political and legal systems to ensure compliance with the CoE's core values. In April 1997, PACE acknowledged Romania's progress, concluding the formal monitoring phase

²⁷ Resolution 917 (1989) on special guest status with the Parliamentary Assembly adopted by the PACE on 11 May 1989, laid down the foundation for the representatives of these states to be able to attend the PACE's plenary sessions. It formulated certain conditions for the invitation to the session (e.g. the implementation and application of "*Helsinki Final Act and the instruments adopted at the CSCE conferences, together with the 1966 United Nations International Covenants on civil and political rights and on economic, social and cultural rights*").

²⁸ Committee opinions and reports of PACE. [Online]. Available at: <https://pace.coe.int/en/files/search?page=1&before=1993&q=Romania> (Accessed: September 18, 2024).

²⁹ The election observation reports of the time. [Online]. Available at: <https://pace.coe.int/en/files/6747> (Accessed: September 12, 2024).

³⁰ Resolution (92) 1 of the CM.

³¹ Opinion 176 (1993) of the PACE.

³² The Opinion of PACE highlights some expectations that Romania did not meet at the time. They recommended the decriminalization of homosexual acts in private between consenting adults (the abolishment of this offence happened only in 2001, by Government Emergency Ordinance no. 89/2001, when Romania prepared for joining the EU, although this can be attributed also to the successful conclusion of the post monitoring process by the CM); beginning the reprivatisation of church properties abusively taken over by the state during the Soviet-type dictatorship (this process also started as a precursor to the EU accession, with the general norms encapsulated in Law no. 501/2002; however, it remains an ongoing issue); PACE urged Romania to implement improvements in conditions of detention and emphasise the adoption of regulations protecting ethnic minorities. As can be seen from the majority of cases where Romania was condemned by the ECtHR, Romania did not conform properly to the majority of these expectations expressed by PACE at the time of accession.

through Resolution 1123³³ and Recommendation 1326. However, Romania was placed under post-monitoring, which entailed continued observation of its democratic development. This phase concluded in May 2002, recognising Romania's significant advancements in legal reforms and human rights protections.³⁴

The European Commission for Democracy through Law, commonly known as the Venice Commission, has played a significant role in guiding Romania's constitutional and legislative reforms. At the 47th plenary session of the Commission (July 2001), the Romanian authorities submitted a request for the Commission's co-operation in the revision of the Constitution, particularly with a view to facilitate Romania's accession to the EU. The Commission provided the requested opinions on the draft of the new Constitution,³⁵ which greatly improved the quality of the adopted form in 2003. Until the EU accession of Romania, the Commission also issued opinions on the law amending the functioning of the Constitutional Court of Romania and draft law on the statute of national minorities living in Romania.³⁶ After the accession, the judiciary's independence, the justice system's proper functioning, and criminal legislation's amendment were addressed. Even the Romanian Constitutional Court (RCC) references the opinions of the Venice Commission, thus making them mandatory parts of the internal legal order (the decisions of the Court are binding *erga omnes*), mostly in election-related issues.³⁷

Additionally, the engagement with the Commissioner for Human Rights (instituted with a resolution of the CM)³⁸ has been instrumental in

³³ Resolution 1123 (1997) on honouring of obligations and commitments by Romania adopted on 24 April 1997, basically reiterates the same problems as Opinion 176 (1993), stating however that "*Romania has made considerable progress towards the fulfilment of her obligations and commitments since joining the Council of Europe.*"

³⁴ For the process of accession, see the website of the Romanian Foreign Ministry: <https://coe.mae.ro/node/1252> (Accessed: 12 September 2024).

³⁵ Opinion no. 169/2001_rou of the Venice Commission.

³⁶ Even though Opinion no. 345/2005 was issued, the Law remains unadopted up to this day.

³⁷ For example, the recent Decision no. 148/2024 of the Constitutional Court of Romania, published in Official Gazette no. 408 of 30 April 2024, wherein the Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report (adopted by the Venice Commission as Opinion no. 190/2002 at its 51st and 52nd sessions on 5-6 July and 18-19 October 2002) is referred to frequently.

³⁸ Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, adopted by the CM on 7 May 1999.

addressing human rights issues within Romania. The Commissioner conducts regular visits and provides recommendations in its subsequent reports to improve the protection of human rights. Since its first visit to Romania in 2002, the Commissioner has visited four more times. In nearly every report, it has highlighted the marginalisation of the Romani community, shed light on the rampant issue of domestic violence in the country, and indicated multiple measures for the authorities regarding the rights of persons living with disabilities.³⁹

The action of the CoE in Romania when it comes to human rights protection can be seen not only in the work of the Venice Commission and Commissioner for Human Rights but also in the conclusions, recommendations, evaluations and reports of other organs, mostly the result of treaties born under the aegis of the CoE. Such organs include the European Committee for the Prevention of Torture⁴⁰; the European Commission against Racism and Intolerance (also born from a resolution of the CM)⁴¹; the European Committee of Social Rights⁴²; the Advisory Committee to the Framework Convention for the Protection of National Minorities⁴³; the Group of States against Corruption monitoring organ⁴⁴; and the Group of Experts on Action against Trafficking in Human Beings.⁴⁵

³⁹ For its letters and country reports. [Online]. Available at: https://www.coe.int/en/web/commissioner/country-work/romania?p_p_id=com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_PrMGI5az2UNt&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_PrMGI5az2UNt_redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-work%2Fromania&_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_PrMGI5az2UNt_delta=10&p_r_p_resetCur=false&_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_PrMGI5az2UNt_cur=1#p_com_liferay_asset_publisher_web_portlet_AssetPublisherPortlet_INSTANCE_PrMGI5az2UNt (Accessed: 17 September 2024).

⁴⁰ For its reports on the *ad hoc* and periodic visits in Romania. [Online]. Available at: <https://www.coe.int/en/web/cpt/romania> (Accessed: 22 September 2024).

⁴¹ For its reports and conclusions concerning Romania. [Online]. Available at: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/romania> (Accessed: 22 September 2024).

⁴² For its reports and conclusions concerning Romania. [Online]. Available at: <https://www.coe.int/en/web/european-social-charter/romania> (Accessed: 22 September 2024).

⁴³ For its reports, opinions and resolutions concerning Romania. [Online]. Available at: <https://www.coe.int/en/web/minorities/romania> (Accessed: 22 September 2024).

In 2006 and 2007, PACE played a critical role in uncovering the existence of Central Intelligence Agency (CIA)-run secret prisons on European soil, where terror suspects were illegally detained and tortured. It was revealed that several CoE member states, including Poland and Romania, had permitted CIA rendition flights and the establishment of these “black sites”. These findings were later confirmed by rulings from the ECtHR, which condemned Romania for its involvement, ruling that it had violated human rights laws by allowing secret detentions and torture.⁴⁶

Another interesting facet of the relationship between the CoE and Romania regarding human rights protection is exemplified by the practice of the RCC, which uses the practice of the ECtHR and its interpretation of the ECHR as standards when adjudicating on cases related to human rights.⁴⁷ The relationship between the two courts led to major ramifications in the Romanian legal system (*infra*, 4.3.). Furthermore, with this step, the RCC embarked on a journey of contributing to the convergence of constitutional solutions at the European level, while ensuring the alignment of national legislation with European human rights standards.

A crucial moment in Romania’s engagement with the CoE was the ECtHR’s first ruling against Romania in the *Vasilescu v. Romania*⁴⁸ case in 1998, which involved violations of the right to a fair trial and protection of property.⁴⁹ This judgment highlighted deficiencies in Romania’s judicial system and catalysed further legal reforms. Over the years, the ECHR has played a vital role in Romania’s human rights landscape, with numerous cases prompting the Romanian authorities to address issues related to judicial independence, freedom of expression, prison conditions, and property rights (mainly reprivatisation; *infra*, 5.).

Romania’s active participation in the CoE was further demonstrated during its presidency of the CM from November 2005 to May 2006. Romania set ambitious objectives to strengthen the CoE’s role in promoting democracy, human rights, and the rule of law in Europe. It emphasised the

⁴⁴ For its reports concerning Romania. [Online]. Available at: <https://www.coe.int/en/web/greco/evaluations/romania> (Accessed: 22 September 2024).

⁴⁵ For its evaluations concerning Romania. [Online]. Available at: <https://www.coe.int/en/web/anti-human-trafficking/romania1> (Accessed: 22 September 2024).

⁴⁶ *Case of Al-Nashiri v. Romania*, App. No. 33234/12, 31 May 2018.

⁴⁷ Benke and Costin, 2016, p. 103.

⁴⁸ *Case of Vasilescu v. Romania*, App. No. 53/1997/837/1043, 22 May 1998.

⁴⁹ Corlăţean, 2010, p. 118.

enhancement of human rights protection mechanisms, particularly in regions where existing systems were inadequate, and advocated for diversity and intercultural dialogue as essential components of stable societies. Romania's leadership during this period highlighted its growing influence within the CoE and its commitment to the broader European agenda of human rights promotion.

3. CoE Human Rights Conventions Ratified by Romania and the National Implementation of the ECHR

The Statute of the Council of Europe, also referred to as the Treaty of London (1949), outlines the core principles of the organisation, which are to promote human rights, democracy, and the rule of law. In order to achieve this aim, the States under the auspices of the aforementioned treaty – members of the CoE – could ratify the treaties drafted by this organisation (they are not bound by these as a result of their membership in the CoE *per se*). Since its founding, the CoE has adopted 207 such treaties, although not all of these are directly related to the protection of human rights. For example, up to this point, Romania has ratified in total 110 treaties developed by the CoE; yet, only 28 of these are related directly to the protection of human rights.⁵⁰ The most important of these regional treaties, in the author's opinion, are listed in the table below:

⁵⁰ All the data above comes from the website of the Treaty Office of the CoE. [Online]. Available at: <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=ROM&CodeSignatureEnum=&DateStatus=10-02-2024&CodeMatiere=> (Accessed: 12 September 2024).

Table 1 *The date of Romanian signatures, ratifications and means of internal implementation of the CoE human rights treaties*

Title	Signature date	Ratification date	National law
Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)	07.10.1993.	20.06.1994.	Law no. 30/1994
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the 2 additional protocols	04.11.1993.	04.10.1994.	Law no. 80/1994
European Charter of Local Self-Government	04.10.1994.	28.01.1998.	Law no. 199/1997
European Social Charter (revised)	04.10.1994	07.05.1999.	Law no. 74/1999
Framework Convention for the Protection of National Minorities	01.02.1995.	11.05.1995.	Law no. 33/1995
European Convention on the Suppression of Terrorism	30.06.1995.	02.05.1997.	Law no. 19/1997
European Charter for Regional or Minority Languages	17.07.1995.	29.01.2008.	Law no. 282/2007

European Code of Social Security	22.05.2002.	09.10.2009.	Law no. 116/2009
Council of Europe Convention on Action Against Trafficking in Human Beings	16.05.2005.	21.08.2006.	Law no. 300/2006
Council of Europe Convention on the Prevention of Terrorism	16.05.2005.	21.02.2007.	Law no. 411/2006

Source: Author's own editing.

Romania has made three reservations in total to these treaties. The first concerned the ECHR; Romania declared that Article 5 of the Convention did not preclude the application of Article 1 of Decree no. 976 of 23 October 1968, which allowed military commanders to impose disciplinary detention of up to 15 days for military discipline breaches, provided it did not exceed the limits set by current legislation. This reservation was included in the instrument of ratification deposited on 20 June 1994 and was withdrawn by a letter from the Permanent Representation of Romania dated 11 August 2004. Two other reservations were made, one each to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

Arguably, the most important role in the integration of Romania was played by the international human rights instruments related to the protection of minority rights and the ECHR. The former had to solve the minority issues inherited by the 20th century, which loomed as unsolved problems in the 90s. The ECHR, although prohibiting discrimination, seems prone to failure when it comes to the protection of ethnic minorities, as formulated by the current judge of the Court, Péter Paczolay.⁵¹ However, he

⁵¹ Paczolay, 2022, p. 154. For the differentiation in the protection allocated to different minority groups by the Court, see the enlightening article by Nagy, 2023.

also considers the Framework Convention for the Protection of National Minorities to be the “*first legally binding multilateral instrument devoted to the protection of national minorities worldwide*”⁵² and the most comprehensive treaty protecting the rights of persons belonging to national minorities in Europe, supervised by a dedicated committee: the Advisory Committee.

In the process of further European integration, the adoption of the ECHR played a crucial role. Since the drafting of the ECHR, it was seen by the Member States of the organisation as the *conditio sine qua non* of joining the CoE; however, the ECHR can be signed only by members of the CoE.⁵³ This seeming paradox was resolved in the case of Romania, as mentioned *supra*, that is the signing of the Convention happened simultaneously with the accession to the organisation (7 October 1993). At that time, eight protocols were already in force and two were open for signature. Romania signed protocols 2, 3, 5 and 8 at the time of accession; protocols 1, 4, 7, 9 and 10 a month later, and protocol 6 (on the restriction of the death penalty) in December of the same year. The Senate (upper chamber) adopted the ratification decision of the Convention on 18 April 1994, while the Chamber of Deputies (lower chamber), adopted it as Law no. 30 from 18 May 1994, on May 9 of the same year. This Law, published in the Official Gazette on 31 May 1994, made the Convention an integral part of its national legal order. The deposit of the ratification instruments of the Convention and its ten protocols happened simultaneously, on 20 June 1994, this being the official date for the ratification. Since then, Romania has signed and ratified the remaining six protocols to the ECHR.

4. Impact of the ECHR on Romania’s Constitution, Legislative Reforms and Practice of the Constitutional Court

This section will explore the influence of the ECHR on Romania’s constitutional framework, focusing on the legislative reforms introduced in

⁵² *Ibid*, p. 135

⁵³ This rule appeared *expressis verbis* in Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the CoE of PACE, adopted on 14 April 1994. It has stated that “*accession to the Council of Europe must go together with becoming a party to the European Convention on Human Rights. It therefore considers that the ratification procedure should normally be completed within one year of accession to the Statute and signature of the Convention.*”

response to ECHR standards and the evolving practice of the Constitutional Court in harmonising national law with European human rights principles.

4.1. Impact of the ECHR on Romania's Constitution

After the fall of the Soviet-type totalitarian dictatorship in Romania, a new constitution had to be adopted to facilitate the democratic transition of the country and to integrate with the larger European structures. We can be sure about the latter fact, because just eleven days after the referendum that validated the Romanian Constitution, the country applied for membership in the CoE (19 December 1991).⁵⁴ Therefore, the Constitution was drafted for the desired CoE membership; this may explain why its second title addressing the fundamental rights and freedoms shows so many similitudes with the ECHR.

An important feature of the new Constitution was that it established the monist system when it came to perceiving international law,⁵⁵ “*allowing for the direct application of international law norms in legal relations between individuals.*”⁵⁶ The monist system entails that the question of supremacy of either the international law or the domestic law must be answered. There is, of course, a polemic in Romanian jurisprudence related to this. However, we can state with certainty that when it comes to international treaties of human rights, they have a supra-legislative character.⁵⁷ This is due to how Article 20 was formulated in the 1991 constitution:

- (1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
- (2) Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.

⁵⁴ Corlăţean, 2014, p. 92.

⁵⁵ This is still a debated stance in Romanian jurisprudence.

⁵⁶ *Ibid.* Article 11 (2) of the Constitution reads as follows: “[t]reaties ratified by Parliament, according to the law, are part of national law.”

⁵⁷ Toader and Safta, 2013, pp. 95–96.

This *expressis verbis* stipulation on the precedence of international regulations is somewhat unique among the constitutions of East-Central European states.⁵⁸ However, it can be accepted that this regulation determines that such treaties are to be considered as part of the “constitutional block”, ‘with constitutional interpretative value (meaning that the constitutional provisions must be interpreted and applied in accordance with the provisions of international human rights treaties to which Romania is a party), and priority for application in the event of inconsistency.’⁵⁹ Corollary, persons can refer to these treaties directly before national courts (including the Constitutional Court).⁶⁰ Importantly, in its interpretation of Article 20, the RCC – in its first-ever decision referring to the ECHR⁶¹ – affirmed that not only the ECHR but also the practice of the ECtHR carry mandatory interpretative authority.⁶²

In 2003, the Constitution was amended and Article 20 (2) was altered in such a manner as to challenge the unconditional priority of international human rights treaties. The new solution accepted their superiority only in cases where the Constitution or national laws didn’t comprise more favourable provisions.⁶³

⁵⁸ Lukács, 2022, p. 268.

⁵⁹ Stanciu and Safta, 2021, p. 1. Marius Andreescu considers three criteria for comparing legal norms on fundamental rights: the level of legal protection provided, the extent of limits and restrictions imposed, and the degree of state interference allowed. A law is more favourable if it offers strong guarantees for the right, imposes fewer or less stringent restrictions, and limits the state’s ability to interfere with its exercise. The greater the protection and the less the state can intervene, the more robust the safeguard of the right or freedom. Andreescu, 2012, p. 213.

⁶⁰ In this sense, the RCC reiterated in multiple decisions that: “the ratification by Romania of the [...] [ECHR], made this Convention part of domestic law, a situation in which the reference to any of its provisions is subject to the same regime as that applicable to the provisions of the fundamental law.” Decision no. 146/2000 of the Constitutional Court of Romania, published in Official Gazette no. 566 of 15 November 2000. Toader and Safta, 2013, p. 96.; Stanciu and Safta, 2021, p. 2.; Andreescu, 2012, p. 214.

⁶¹ Benke and Costin, 2016, p. 88.

⁶² Decision no. 81/1994 of the Constitutional Court of Romania, published in Official Gazette no. 14 of 25 January 1995.

⁶³ From the practice of the RCC, we know of two cases when domestic protection was more favourable than the international. The first relates to the right to pension, which is enshrined in the Constitution but not in any other international treaty. Decision no. 872/2010 of the Constitutional Court of Romania, published in Official Gazette no. 433 of 28 June 2010. Stanciu and Safta, 2021, p. 13. The other case is related to the orality of criminal

The 2003 amendments to the Constitution were mostly aimed at integration with the EU. However, three modifications can be attributed to the desire to comply with the ECtHR judgements against Romania.

The first such alteration is related to the rules on arrest. In light of the condemnation in the cases *Vasilescu v. Romania*⁶⁴ and *Pantea v. Romania*,⁶⁵ the rules on “*allowing arrest measures to be adopted by a ‘magistrate’, which included a prosecutor*”⁶⁶ [Article 23 (4)] had to be changed because they were deemed contrary to Article 6 of the ECHR. Thereafter, only judges may issue a warrant for arrest measures.

The second constitutional norm which was amended was related to the nonretroactivity of legislation. Article 15 (2) stated that “[t]he law acts only for the future, with the exception of the more favourable penal law.” In relation to this article, the RCC decided that this norm must be interpreted in accordance with the practice of the ECtHR, therefore the principle of non-retroactivity should also apply in case of contravention⁶⁷ legislation.⁶⁸ The RCC made direct reference to the case *Öztürk v. Germany*,⁶⁹ wherein the ECtHR laid down this principle with reference to Article 6 of the ECHR. Building on this decision and, implicitly, the ECtHR practice, the article of the Constitution has been redrafted to enshrine the non-retroactivity of the contravention law as well.⁷⁰

The third modification can also be attributed to the practice of the RCC, which has been altered by the practice of the ECHR in the matter of free access to justice and the right to a fair trial.⁷¹ In the currently effective Constitution, this principle is enshrined in Article 21 (3), according to which: “[a]ll parties shall be entitled to a fair trial and a solution of their cases within a reasonable term.” This passage was also added during the amendment of the constitution, but earlier, the RCC made multiple

proceedings. Decision no. 641/2014 of the Constitutional Court of Romania, published in Official Gazette no. 887 of 5 September 2014.

⁶⁴ *Case of Vasilescu v. Romania*, App. No. 53/1997/837/1043, 22 May 1998.

⁶⁵ *Case of Pantea v. Romania*, App. No. 33343/96, 3 June 2003.

⁶⁶ Corlăţean, 2014, p. 102.; Stanciu and Safta, 2021, pp. 9–10.

⁶⁷ A contravention in the Romanian legal system is a form of sanction – a lesser administrative offence than one of a criminal nature.

⁶⁸ Decision no. 381/2003 of the Constitutional Court of Romania, published in Official Gazette no. 697 of 6 October 2003.

⁶⁹ *Case of Öztürk v. Germany*, App. No. 8544/79, 21 February 1984.

⁷⁰ Toader and Safta, 2013, p. 106; Stanciu and Safta, 2021, p. 11.

⁷¹ *Ibid*, p. 9.

decisions quasi-defining the notion of *reasonable term*, based on the practice of the ECtHR.⁷²

4.2. Impact of the ECHR on Romania's National Legislation

When it comes to the legislative reforms undertaken in Romania as a result of European integration, their number is impossible to assess because the legislator rarely mentions expressly in the process of drafting a law (for example, in the preamble) that the new rules are also aimed at conforming, for instance, with international standards in human rights protection. Joining the CoE and ratifying the ECHR has many more consequences than can be described in this chapter. The impact of ECtHR judgments in cases against Romania has not been limited to specific cases, yet the effect on the legal system has often been much deeper and wider. Therefore, a few major achievements will be presented, which are considered as such by the CoE.⁷³

The CoE has contributed to the decriminalisation of not only homosexual acts in private between consenting adults (*supra*, 2.) but, through the practice of the ECtHR, also to two offences inherited from totalitarian times. The offences of insult and defamation were codified in the Criminal Code of 1968. In 1999, through the case *Dalban v. Romania*,⁷⁴ the Court considered that the freedom of expression of the journalist convicted of one of these offences was violated because the matter that he addressed in his “libellous” articles was one of public interest. This judgement triggered multiple legislative reforms. First, through Government Emergency Ordinance no. 58/2002 and Law no. 160/2005, the sanction of prison sentences for these offences was abolished. One year later, by means of Law no. 278/2006, they would have been decriminalised; however, the RCC considered that this would have imperilled the constitutional right to human dignity.⁷⁵ Therefore, the two offences remained in effect until the adoption of the new criminal code in 2009, which omitted the criminalisation of these acts.

⁷² Toader and Safta, 2013, pp. 108–110.

⁷³ Impact of the ECHR with regards to Romania. [Online]. Available at: <https://www.coe.int/en/web/impact-convention-human-rights/romania> (Accessed: 17 September 2024).

⁷⁴ *Case of Dalban v. Romania*, App. No. 28114/95, 28 September 1999. For more details on how the judgement was enforced in Romania, see Corlăţean, 2010, pp. 133–136.

⁷⁵ Decision no. 62/2007 of the Constitutional Court of Romania, published in Official Gazette no. 601 of 12 July 2007.

The ECtHR contributed to the dismantling of the inheritance of the dictatorship not only by the aforementioned judgement but also by issuing multiple judgements identifying problems with the process allowing people access to their files collected by the secret police of the totalitarian system (*Securitate*).⁷⁶ The interest of the court was raised for the first time in the handling of these files in *Rotaru v. Romania* (*infra*, 5.8.).

Furthermore, the Court had a major impact on the effective reprivatisation of properties to private persons. Romania, through Law no. 247/2005, decided to pursue the principle of *restitutio in integrum* of the properties abusively coercively taken over during the Soviet-type totalitarian era – where this still could be done in nature, and where not, through compensation – but failed to achieve this aim in many instances. The Romanian national courts were flooded with applications asking for these kinds of historical reparations. The many cases which reached the ECtHR prompted Romania to reform its restitution legislation such that the whole process could be finalised. This was mainly done by one legislative act, Law no. 165/2013. Notably, this regulation is only a partial success, as restitution is still an ongoing process in Romania.

In addition, Romania had, and still has, a problem when it comes to combatting domestic violence (*supra*, 2.). In the judgement *Bălşan v. Romania*, the court noted that “*the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors [...] indicated that there was an insufficient commitment to take appropriate action to address domestic violence.*”⁷⁷ This decision, among several other cases, led Romania to embark on a journey to address the issue of domestic violence more seriously. Consequently, on 13 July 2018, the Romanian Parliament adopted Law no. 174/2018, amending and supplementing the insufficient old law on the prevention and combat of domestic violence.

The *Kövesi v. Romania*⁷⁸ case highlighted issues of judicial independence, particularly the vulnerability of prosecutors to political interference. In response to the ECtHR ruling, Romania introduced Law no. 303/2022, which allows prosecutors to challenge their dismissal in court and provides mechanisms for their reinstatement if the dismissal is found

⁷⁶ For the supervision of the execution of three such judgements, see Resolution CM/ResDH (2017)237 adopted by the CM on 6 September 2017, at the 1292nd meeting of the Ministers’ Deputies.

⁷⁷ *Case of Bălşan v. Romania*, App. No. 49645/09, 23 May 2017, point 88.

⁷⁸ *Case of Kövesi v. Romania*, App. No. 594/19, 5 May 2020.

unlawful. The law aims to protect prosecutors from undue political pressure and to reinforce the independence of the judiciary in Romania.

The case *Grosaru v. Romania*⁷⁹ emphasised the need for clear legal safeguards in minority representation. It involved the misallocation of a parliamentary seat reserved for Romania's Italian minority. Mircea Grosaru, who received the most votes nationwide, was overlooked in favour of a colleague. The ECtHR ruled that Romania's unclear electoral laws violated Grosaru's rights. Consequently, Romania adopted a new parliamentary electoral regulation, Law no. 208/2015, to clarify that parliamentary seats for minority organisations should be awarded based on national vote totals, ensuring more transparent election processes.⁸⁰

4.3. Impact of the ECtHR on the Practice of Romania's Constitutional Court

As previously mentioned, petitioners can make reference directly to the provisions of the ECHR when seeking the unconstitutionality of a legal provision under constitutional review (*supra*, 4.1.). Furthermore, the RCC incorporates the practice of the ECtHR – primarily principles deriving from these rulings – in its own decisions and accepts this as a point of reference when it comes to human rights protection. The RCC has even created certain mechanisms during its adjudication, inspired by the Strasbourg Court's practice. Titus Corlăţean expressed the idea that by these types of receptions, the RCC is in reality making a legal import of international standards to domestic law.⁸¹ Interestingly, the ECtHR also makes reference to the decisions of the RCC in cases related to Romania.⁸² In this inter-court relationship, a real dialogue emerges.

⁷⁹ *Case of Grosaru v. Romania*, App. No. 78039/01, 2 March 2010.

⁸⁰ For other ramifications of judgements in the Romanian national legal system, see the main achievements according to the Department for the Execution of Judgments of the European Court of Human Rights in 2023. [Online]. Available at: <https://rm.coe.int/ma-romania-eng/1680a186bf> (Accessed: September 18, 2024).

⁸¹ Corlăţean, 2014, p. 102.

⁸² For example, the ECtHR referred to the decisions of the RCC in *Case of Brumărescu v. Romania*, App. No. 28342/95, 28 October 1999; *Case of Pantea v. Romania*, App. No. 33343/96, 3 June 2003; *Case of Visan v. Romania*, App. No. 15741/03, 24 April 2008; *Case of Pini and Others v. Romania*, App. No. 78028/01, 22 June 2004; *Case of Cobzaru v. Romania*, App. No. 48254/99, 26 July 2007; *Case of Tudor Tudor v. Romania*, App. No. 21911/03, 24 March 2009; *Case of Maria Atanasiu and Others v. Romania*, App. Nos. 30767/05 and 33800/06, 12 October 2010.

Former justice of the RCC, Tudorel Toader, and constitutional law expert, Marieta Safta, expressed that when it comes to the role served by the national constitutional courts in the protection of fundamental rights and freedoms, ECtHR and the Court of Justice of the European Union (CJEU) can be perceived as European constitutional courts.⁸³ The control of the ECtHR, more specifically, can be seen as a safety mechanism to solve those problems that escape the control of the national constitutional court.⁸⁴ Many similarities can be observed between the practice of the ECtHR and national constitutional courts. The legal literature summarises these similarities as follows: both apply similar standards regarding the restriction of fundamental rights, use the proportionality test with comparable legal concepts (such as the rule of law and democracy), and rely heavily on their own earlier judicial practice. Furthermore, both courts emphasise consistency, predictability, and equality in their interpretations of human rights.⁸⁵

The RCC holds the ECtHR's practice in high regard, so much so that in a recent decision, it was referred to as part of the European constitutional heritage.⁸⁶ There was a growing tendency in the Constitutional Court's practice to reference the judicial practice of the ECtHR, particularly after the amendment of the Constitution in 2003. This was reflected in the increasing number of decisions that cited ECtHR rulings, the wider range of fundamental rights addressed, and the broader array of referenced judgments. Another trend was the inclusion of ECtHR practice in *a priori* petitions, where laws were reviewed before enactment. In such cases, the Court made more substantial references to ECtHR practice, particularly when discussing legislative techniques that had important consequences for ensuring legal certainty.⁸⁷

Between 1994 and 2003, around 380 decisions of the Constitutional Court were based on the ECHR and ECtHR practice. However, this number was reached within a single year in more recent times. For instance, in 2012,

⁸³ Toader and Safta, 2013, p. 94.

⁸⁴ *Ibid*, p. 95.

⁸⁵ Tóth, 2021, pp. 87–89.

⁸⁶ Decision no. 2 of 5 October 2024, of the Constitutional Court of Romania, unpublished yet. This is the first decision where the Court mentions expressly European constitutionalism and its heritage.

⁸⁷ Toader and Safta, 2013, p. 100.

the Court issued 1,098 decisions, reflecting a significant increase in the use of ECtHR references.⁸⁸

An analysis of the Constitutional Court's practice reveals that, in petitions assessing potential infringements of fundamental human rights, it also tends to evaluate the compatibility of national legislation with the principles articulated by the ECtHR and, by extension, with the provisions of the ECHR. On the one hand, referencing this judicial practice promotes a uniform interpretation of fundamental human rights and freedoms, thereby enhancing legal certainty. On the other hand, this reliance on the ECtHR's practice may marginalise national specificity, potentially overlooking unique local contexts and legal traditions.⁸⁹

Toader and Safta consider that there are certain domains wherein the practice of the ECtHR has influenced decisively the practice of the RCC.⁹⁰ Among these, the mechanism determining the quality of legislation (to ensure legal certainty), namely, laying down the necessary requirements of legislature, is of an utmost importance. The RCC, referring to *Rotaru v. Romania*⁹¹ and *The Sunday Times v. United Kingdom*,⁹² identified four such requirements: “clarity, precision, foreseeability and predictability in order to enable the subject of the law concerned to conduct himself in such a way as to avoid the consequences of non-compliance with them.”⁹³ Since this decision, this has been a constant mechanism (test) employed by the RCC when adjudicating on *a priori* or *a posteriori* petitions.

The RCC often makes reference to the case *Marckx v. Belgium*⁹⁴ when adjudicating in cases related to principle of equal rights.⁹⁵ In some instances, the RCC reconsidered its settled practice in light of the ECtHR judgements. For example, with regards to the right to defence, the criminal procedural provisions prohibiting the representation of the defendant in court in the case of offences for which the penalty prescribed by law is imprisonment

⁸⁸ *Ibid.*

⁸⁹ Tóth, 2021, p. 91.

⁹⁰ Toader and Safta, 2013, pp. 101–116.; Corlăţean, 2014, pp. 102–105.

⁹¹ *Case of Rotaru v. Romania*, App. No. 28341/95, 4 May 2000.

⁹² *Case of The Sunday Times v. United Kingdom*, App. No. 6538/74, 26 April 1979.

⁹³ Decision no. 61/2007 of the Constitutional Court of Romania, published in Official Gazette no. 116 of 15 February 2007.

⁹⁴ *Case of Marckx v. Belgium*, App. No. 6833/74, 13 June 1979.

⁹⁵ Toader and Safta, 2013, pp. 106–108.

for more than one year were found unconstitutional.⁹⁶ These are only a few examples of how the “invisible constitution” (i.e. the practice of the RCC) was influenced by the ECtHR and its interpretation of the ECHR.

5. ECtHR’s Practice Regarding Romania and Landmark Cases

Since the accession of states from the former Eastern Bloc to the CoE and, therefore, to the ECHR, the caseload of ECtHR expanded swiftly. A report that examined the statistics from the setting up of the Court in 1959 to 2020, found 1,578 judgements pronounced in cases against Romania. Here, it should be reiterated that the ECHR entered into force in 1994 in Romania, so the number is given by 26 years of practice. However, this number places the country after Turkey (3,742 judgements; ECHR in effect since 1954), Russia⁹⁷ (2,884 judgements; ECHR in effect between 1998–2022) and Italy (2,427 judgements; ECHR in effect since 1955), but before Ukraine (1,499 judgements; ECHR in effect since 1997), Poland (1,197 judgements; ECHR in effect since 1993), France (1,048 judgements; ECHR in effect since 1974) and Greece (1,047 judgements; ECHR in effect since 1974).⁹⁸ This overrepresentation in the statistics compared to the population of Romania is likely to remain the same, as the most recent Annual Report of the ECtHR mentions the fact that in 2023, “75% of pending applications concern the same five States as those listed in 2022, namely Türkiye (23,400 applications), the Russian Federation (12,450), Ukraine (8,750), Romania (4,150) and Italy (2,750).”⁹⁹ However, the number of pending cases involving Romania shows a faster decreasing trend in the period 2020–2024 than the CoE average.¹⁰⁰

⁹⁶ Decision no. 145/2000 of the Constitutional Court of Romania, published in Official Gazette no. 116 of 15 February 2007. It cited the cases *Case of Poitrimol v. France*, App. No. 14032/88, 23 November 1993; *Case of Lala v. the Netherlands*, App. No. 14861/89, 22 September 1994, and *Case of Pelladoah v. the Netherlands*, App. No. 16737/90, 22 September 1994.

⁹⁷ After its expulsion from the CoE on 16 March 2022, the Russian Federation ceased to be a party to the ECHR on 16 September 2022. The ECtHR retained jurisdiction to handle applications against Russia for actions or omissions that took place prior to the latter date.

⁹⁸ *ECHR Overview 1959–2020*, 2021, pp. 8–9.

⁹⁹ *Annual Report 2023 of the European Court of Human Rights, Council of Europe*, 2024, p. 6.

¹⁰⁰ For the current number of pending applications per country and their annual evolution. [Online]. Available at:

Of the 1,578 judgements relating to Romania up until 2020, the Court found at least one violation of a fundamental freedom or right in 1393, no violation in 77, 38 cases ended in a friendly settlement or striking-out, and other judgements were pronounced in 70 cases. In 2023, the Court processed 3,441 applications related to Romania, with 3,041 being declared inadmissible or struck out. It issued 74 judgments (concerning 400 applications), with 58 judgments identifying at least one violation of the ECHR.¹⁰¹

Notably, the judgements that found violations in the last 30 years can be integrated into a pattern. The multitude of cases do not translate to multiple forms of violations, as most violations of human rights are repetitive. In the practice of the Court, besides repetitive cases, leading judgements,¹⁰² which are more challenging to implement than regular cases, are also distinguishable as they typically necessitate changes to laws or practices to prevent the recurrence of similar violations. Until 2020, Romania has mostly violated Articles 3 (prohibition of torture) and 6 (right to a fair trial) of the ECHR, and Article 1 (right to property) of Protocol 1 according to the judgements of the Court.¹⁰³ This cannot be considered exceptional, as it fits the constant practice of the Court, wherein nearly 40% of violations have involved Article 6, addressing the fairness (16.79%) or length (20.86%) of proceedings, and over 16% have concerned serious breaches of Articles 2 and 3, relating to the right to life and the prohibition of torture and inhuman or degrading treatment. A 2018 study addressing the Court's practice between 2007 and 2017 also confirms that the main leading cases are all related to these violations. The most frequent human rights

https://public.tableau.com/app/profile/echr/viz/Analysis_statistics/Overview (Accessed: September 25, 2024).

¹⁰¹ *Press Country Profile: Romania*, 2024, p. 1.

¹⁰² The Glossary of the ECtHR defines a repetitive case as “relating to a structural and / or general problem already raised before the Committee in the context of one or several leading cases” and leading cases as that “which has been identified as disclosing a problem, in law and/or practice, at national level, often requiring the adoption by the respondent State of new or additional general measures to prevent recurrence of similar violations. If this new problem proves to be of an isolated nature, the adoption of general measures, in addition to the publication and dissemination of the judgment, is not in principle required. A leading case may also reveal structural/systemic problems, identified by the Court in its judgment or by the Committee of Ministers in the course of its supervision of execution, requiring the adoption by the respondent State of new general measures to prevent recurrence of similar violations.” *Glossary of the ECtHR*.

¹⁰³ *ECHR Overview 1959–2020*, 2021, p. 9.

violations in Romania include inadequate detention conditions, particularly due to overcrowding and lack of access to sanitary facilities (Article 3); non-enforcement of judgments (Article 6); excessive length of proceedings, both in criminal and civil cases (Article 6); and the failure to protect private property (Article 1 of Protocol 1).¹⁰⁴

As of January 2024, nearly half (49%) of the leading judgments issued by the Court in the past decade remain unimplemented, totalling 1,326 pending judgments overall. The average pending time for the implementation of these leading judgments is six years and eight months. Specific to Romania, there are 115 leading judgments awaiting implementation, with an average pending time of five years and five months, representing 59% of leading cases from the last ten years that still await proper implementation.¹⁰⁵ When it comes to the philosophy – the *raison d'être* – behind the ECHR, another aspect should be mentioned. According to Péter Metzinger, external judicial control has arisen because of a certain evolution of the rule of law, to address serious injustices that may not have been remedied, or may even have been caused, by a final judgment within a national legal system. The ECtHR is one of the organs serving this purpose, therefore, it:

is not empowered to directly remedy (annul) the act of the State (judgment, law) breaching the human right of the party, but it may order pecuniary compensation. Legal certainty and justice are so reconciled in a way that the public act causing the harm remains valid and enforceable, while the individual harm gets material compensation.¹⁰⁶

Furthermore, if such a judgement happens to be *ultra vires*, in an exaggeration of the rule of law principle to the detriment of the principle of democracy (entailing pluralism as a value), that would amount to legal imperialism.¹⁰⁷ However, the ECtHR has shown with its practice so far that it is not prone to judicial activism, and tries to adjudicate on the basis of the values universally accepted by the states under the auspices of the ECHR.

¹⁰⁴ Reichel and Grimheden, 2018, pp. 277–279; Corlăţean, 2010, p. 115.

¹⁰⁵ European Implementation Network, Countries. [Online]. Available at: <https://www.einnetwork.org/countries-overview> (Accessed: 12 September 2024).

¹⁰⁶ Metzinger, 2022, p. 19.

¹⁰⁷ *Ibid*, pp. 20–21.

Protocol 14 of the ECHR (entered into force in 2010) opened the possibility of issuing pilot judgements¹⁰⁸ to address systemic or structural dysfunctions in human rights protection in a more efficient manner. Till date, the ECHR has delivered two pilot judgements regarding Romania and multiple semi-pilot judgments.¹⁰⁹ In both pilot judgements, the issues from the aforementioned repetitive and leading cases were addressed. The first one from 2010,¹¹⁰ refers to the “*systemic problem with the inefficient restitution or compensation mechanism*”¹¹¹ of properties abusively nationalised or confiscated by the state prior to the fall of the Soviet-type dictatorship in 1989 (aka. the right to property). The second pilot judgement is from 2017,¹¹² and deals with the overcrowding and precarious conditions in prisons (aka. the prohibition of torture).¹¹³

The following pages explore several landmark cases concerning Romania, carefully selected for their influence on national courts and their relevance to key legal topics. In the author’s view, the significance of the *Spasov v. Romania* case is profound, as it opened a novel channel between the application of EU law and the protection of fundamental rights under the ECHR, particularly through the right to a fair trial (in a way, it further developed the Bosphorus doctrine).

¹⁰⁸ According to the Glossary of the ECtHR, “[w]hen the Court identifies a violation which originates in a structural and / or systemic problem which has given rise or may give rise to similar applications against the respondent State, the Court may decide to use the pilot judgment procedure. In a pilot judgment, the Court will identify the nature of the structural or systemic problem established and provide guidance as to the remedial measures which the respondent State should take. In contrast to a judgment with mere indications of relevance for the execution under Article 46, the operative provisions of a pilot judgment can fix a deadline for the adoption of the remedial measures needed and indicate specific measures to be taken (frequently the setting up of effective domestic remedies). Under the principle of subsidiarity, the respondent State remains free to determine the appropriate means and measures to put an end to the violation found and prevent similar violations.” *Glossary of the ECtHR*.

¹⁰⁹ For the enumeration of these until 2020, see Verga, 2020, pp. 41–42.

¹¹⁰ *Maria Atanasiu and Others v. Romania*, App. Nos. 30767/05 and 33800/06, 12 October 2010.

¹¹¹ Verga, 2020, p. 42.

¹¹² *Rezmiveş and Others v. Romania*, App. Nos. 61467/12, 39516/13, 48231/13 et al., 25 April 2017.

¹¹³ For the short description of these two judgements, see Verga, 2020, pp. 41–42. or *Press Country Profile: Romania*, 2024, pp. 21–22.

5.1. *Spasov v. Romania*¹¹⁴

The *Spasov v. Romania* case revolves around a Bulgarian fisherman, Mr. Spasov, who was charged by Romanian authorities with illegal turbot fishing in Romania's exclusive economic zone. Despite his claim that EU law allowed him to fish under a Bulgarian license and that his nets complied with EU regulations, Romanian courts initially applied national law, which imposed stricter requirements. The case became more complex when the Romanian Court of Appeal overturned a lower court's decision, asserting that Romanian law, not EU law, governed fishing in the zone, leading to Spasov's conviction and subsequent appeals.

Mr. Spasov appealed to the ECtHR, claiming that his right to a fair trial under Article 6(1) of the ECHR had been violated because the Romanian courts had misapplied EU law and refused to refer the matter to the CJEU for a preliminary ruling. The ECtHR found in his favour, concluding that the Romanian courts had committed a “*manifest error of law*” by disregarding EU law, which had been clarified by the European Commission. The court ruled that this misapplication constituted a denial of justice, thereby violating Spasov's right to a fair trial.

The Spasov case is significant because it establishes a new connection between the application of EU law and the right to a fair trial under the ECHR. The ECtHR's ruling opens the door for individuals to challenge the misapplication of EU law in national courts through human rights claims, framing such errors as violations of fundamental rights. This case introduces the concept that the improper handling of EU law by domestic courts can lead to recourse in the ECtHR, raising important implications for the relationship between the two legal systems and their coaction in protecting human rights across Europe.¹¹⁵

5.2. *Rezmiveş and Others v. Romania*¹¹⁶

In the pilot judgment *Rezmiveş and Others v. Romania*, the ECtHR examined the precarious conditions of detention in Romanian prisons and police detention facilities. The applicants reported severe issues such as

¹¹⁴ *Spasov v. Romania*, App. No. 27122/14, 6 December 2022.

¹¹⁵ For more information on the case, see Nagy, 2024. For a detailed discussion on the issue of the European Union's accession to the European Convention on Human Rights, see Voiculescu and Berna, 2023, pp. 195–200.

¹¹⁶ *Rezmiveş and Others v. Romania*, App. Nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017.

overcrowding, inadequate sanitary facilities, lack of hygiene, substandard food, dilapidated equipment, and the presence of rats and insects in their cells. Under Article 3 of the ECHR, the Court concluded that the conditions of the applicants' detention subjected them to hardships beyond the unavoidable level of suffering inherent in imprisonment. Recognising that these issues were not isolated incidents but part of a broader, systemic problem affecting the Romanian prison system, the Court decided to apply the pilot-judgment procedure.

Romania had to implement general measures – including both preventive and compensatory measures for affected individuals – to address the structural dysfunction within its prison system. The examination of similar applications not yet communicated to the Romanian Government was adjourned, while those already communicated would continue. Romania was required to submit a detailed implementation timetable for these measures, in cooperation with the CM, within six months of the judgment becoming final.

5.3. *Creangă v. Romania*¹¹⁷

The noteworthy case of *Creangă v. Romania* dealt with a Romanian police officer, Mr. Creangă, who was deprived of his liberty during a large-scale criminal investigation to dismantle a petroleum trafficking network. The ECtHR examined his detention under Article 5 of the ECHR, which guarantees the right to liberty and security. On the one hand, the Court found that Mr. Creangă's deprivation of liberty on 16 July 2003, between 12 noon and 10 p.m., violated Article 5(1). During this time, he was deprived of his liberty without a legal basis. On the other hand, the Court held that there was no violation regarding his deprivation of liberty from 10 p.m. on 16 July 2003, to 10 p.m. on 18 July 2003, as this detention period was considered lawful in light of the circumstances and applicable legal framework at the time.

5.4. *Maria Atanasiu and Other v. Romania*¹¹⁸

In the pilot judgment *Maria Atanasiu and Others v. Romania*, the ECtHR identified a systemic issue with Romania's inefficient mechanism for restitution or compensation for properties nationalised during the

¹¹⁷ *Case of Creangă v. Romania*, App. No. 29226/03, 23 February 2012.

¹¹⁸ *Case of Maria Atanasiu and Others v. Romania*, App. Nos. 30767/05 and 33800/06, 12 October 2010.

communist regime. The applicants, whose properties had been confiscated, faced lengthy delays and significant obstacles in the Romanian restitution process. The Court found violations of Article 6(1), right to a fair hearing, for Mrs. Atanasiu and Mrs. Poenaru due to the prolonged legal proceedings, and violations of Article 1 of Protocol No. 1, protection of property, concerning all three applicants because of the ineffective restitution system. As this was a pilot judgment, the Court temporarily suspended similar cases to allow Romania time to implement general measures and address the shortcomings in the restitution process. Romania was granted an extension for the implementation to ensure compliance with the ECHR.

5.5. Lupeni Greek Catholic Parish and Others v. Romania¹¹⁹

The *Lupeni Greek Catholic Parish and Others v. Romania* case is of particular interest, and centred on a request for the restitution of a place of worship that originally belonged to the Greek Catholic Church but was transferred to the Orthodox Church during the totalitarian regime. The applicants sought to reclaim the property, arguing that they were treated unfairly in the restitution process. The ECtHR found no violation of Article 6(1) regarding the right of access to a court. However, it identified violations of Article 6(1) due to breaches of the principle of legal certainty and the excessive length of the proceedings. The Court determined that the applicants experienced delays that undermined their right to a fair hearing and legal certainty in the restitution process. Additionally, the Court ruled no violation of Article 14, prohibition of discrimination, in conjunction with Article 6(1) regarding the applicants' access to a court compared to the Orthodox parish. It determined that it was unnecessary to separately examine the complaint about alleged discrimination concerning other Greek Catholic parishes, as the relevant issues had already been addressed.

5.6. Radovici and Stănescu v Romania¹²⁰

Radovici and Stănescu v. Romania concerned the applicants' prolonged inability to use property that had been confiscated by the state and later legally returned to them. Despite this legal restitution, the applicants were unable to evict a tenant occupying the flat, preventing them from fully

¹¹⁹ *Case of Lupeni Greek Catholic Parish and Others v. Romania*, App. No. 76943/11, 29 November 2016.

¹²⁰ *Case of Radovici and Stănescu v Romania*, App. Nos. 68479/01, 71351/01 and 71352/01 joined, 2 November 2006.

enjoying their property rights. The ECtHR ruled that there was no violation of Article 1 of Protocol No. 1, protection of property.

5.7. *Tătar v. Romania*¹²¹

In *Tătar v. Romania*, the case involved pollution from a company's cyanide-based gold mining process in Baia Mare. The applicants claimed that the pollution—particularly the use of cyanide—posed serious risks to their health and the environment. The ECtHR found a violation of Article 8 of the ECHR, the right to respect for private and family life, ruling that Romanian authorities failed to adequately protect the applicants from the environmental risks posed by the mining operations.

5.8. *Rotaru v. Romania*¹²²

In *Rotaru v. Romania*, the applicant claimed an inability to refute what he alleged to be false information contained in a file archived by the Romanian Intelligence Service (SRI). He had been sentenced to one year in prison in 1948 for criticising the communist regime. The ECtHR found a violation of Article 8 of the Convention, stating that the SRI's retention and use of information about the applicant's private life were not legally justified. The Court noted that public information could be considered part of private life when collected and stored by authorities, especially if it pertained to an individual's distant past. Furthermore, the Court identified gaps in Romanian law regarding the types of information that could be archived and the conditions under which it could be retained. It concluded that the lack of clear guidelines on the exercise of discretion by public authorities led to a violation of Article 13, the right to an effective remedy, as the applicant was unable to contest the information or its validity.

5.9. *Bragadireanu v Romania*¹²³

The case of *Bragadireanu v. Romania* was found to be “*the most central and most interconnected case, which concerned conditions of detention (Article 3) and length of the procedure (Article 6).*”¹²⁴ The case concerned the conditions of the applicant's detention and the treatment he received while incarcerated. Mr. Bragadireanu claimed that he had been subjected to

¹²¹ *Case of Tătar v. Romania*, App. No. 67021/01, 27 January 2009.

¹²² *Case of Rotaru v. Romania*, App. No. 28341/95, 4 May 2000.

¹²³ *Case of Bragadireanu v. Romania*, App. No. 22088/04, 6 December 2007.

¹²⁴ Reichel and Grimheden, 2018, p. 277.

overcrowded and unsanitary conditions, poor ventilation, inadequate food, and poor medical care, violating his rights under Article 3 of the ECHR, which prohibits inhuman or degrading treatment.

The court examined the conditions of Mr. Bragadireanu's detention and found that they did indeed violate Article 3 of the Convention. The judgment stressed that the cumulative effects of overcrowding, lack of basic facilities, and the poor health care system in Romanian prisons were sufficient to meet the threshold for inhuman or degrading treatment. Consequently, the court ruled in favour of Mr. Bragadireanu, leading to a judgment requiring Romania to address these conditions and potentially compensate the applicant.

6. Concluding Thoughts

Historically, Romania has a very bad human rights record. The regulation sometimes moved away, and sometimes moved closer, to the reality. From the time human rights first appeared in law, until the First World War, a positive process of modernisation took place. In spite of anti-Semitism, reality was approaching regulation. After the Great Unification, Romania became a multi-ethnic country, which in turn wanted to continue on the path of nation-building to create a united and homogeneous nation-state. This kind of policy led to multiple violations of the rights of ethnic minorities, who made up around one-third of the country's population. However, real advances in human rights were often hampered by political instability and authoritarianism. The period of the Second World War also saw the first dictatorship. The persecution of the Jewish population on ethical grounds in Romania is a well-known fact.

Under the post-war Soviet-style totalitarian dictatorship, there were glaring differences from the human rights declared in law. A state of general disenfranchisement was the everyday reality. The regime's policies shifted from internationalist socialism to national chauvinism, particularly in the 1960s and 1970s, resulting in efforts to forcibly assimilate ethnic minorities. After the fall of the dictatorship, the dismantling of the totalitarian state began in various ways. Respect for human rights came to the fore, and reality once again began to approach the law. Among other things, meeting the expectations of European integration has been a major step forward in the protection of human rights. One of the cornerstones of this was the accession to the CoE and the signing of the ECHR in 1993.

Romania's relationship with the CoE has been crucial for its integration into European institutions, particularly in the realm of human rights and democratic governance. After a rigorous evaluation process that included monitoring its elections and legal framework, Romania's accession to the CoE marked a commitment to democratic values, helping it meet the prerequisites for joining the EU and NATO. The Venice Commission and other CoE bodies provided guidance on constitutional and legal reforms, while the ECtHR played a significant role in addressing deficiencies in Romania's judicial system. Romania's active role within the CoE, including its presidency of the CM in 2005–2006, underscores its commitment to aligning with European standards in human rights, the rule of law, and democracy.

Romania has ratified 110 CoE treaties, 28 of which focus on human rights, with the ECHR being particularly significant. The ECHR was signed and ratified simultaneously with Romania's CoE membership, marking a crucial step in Romania's European integration. Other key human rights treaties include the European Social Charter,¹²⁵ the Convention on Action Against Trafficking in Human Beings, and the Framework Convention for the Protection of National Minorities. Romania has made three reservations to CoE treaties, including one related to military detention under the ECHR. While the ECHR plays a central role in Romania's legal system, particularly in addressing discrimination, its impact on protecting ethnic minorities has been questioned, although other instruments such as the Framework Convention for National Minorities are seen as more effective.

The ECHR significantly influenced Romania's post-communist Constitution and its legislative reforms, especially in the protection of fundamental rights. Romania adopted a monist system, allowing international human rights treaties to take precedence over national laws in cases of conflict, as articulated in Article 20 of the 1991 Constitution. This principle – unusual for Eastern Europe – was reinforced by the RCC, which affirmed the binding nature of both the ECHR and the practice of the ECtHR. Constitutional amendments in 2003, largely motivated by European integration, brought further alignment with ECHR standards. These changes addressed issues such as arrest procedures and the non-retroactivity of contravention law, incorporating ECtHR rulings into Romanian law, and

¹²⁵ For a detailed discussion on the Charter and its general characteristics, see Voiculescu and Berna, 2023, pp. 541–551.

significantly shaping constitutional norms to ensure compliance with international human rights obligations.

The ECHR has also impacted Romania's national legislation and the practice of its Constitutional Court. Numerous legislative reforms were driven by ECtHR judgments, such as the decriminalisation of defamation, improving property restitution processes, and strengthening judicial independence. The RCC has integrated ECtHR principles into its rulings, frequently referencing its judicial practice to ensure legal consistency, predictability, and alignment with European human rights standards. This close relationship between the RCC and the ECtHR fosters uniformity in the interpretation of rights; however, it can also marginalise local legal specificities. Over time, the RCC has used ECtHR practice to review legislation prior to its enactment, ensuring greater legal certainty and improving the quality of laws, while adopting proportionality tests and legal concepts similar to those applied by the Strasbourg court. In this way, it contributes to a culture of human rights and to the convergence of human rights at the international level.

Romania has the highest number of human rights violations in the EU according to court judgement. While the downward trend in the number of applications in recent years is encouraging, the proliferation of repetitive and leading cases raises structural problems, particularly with respect to Articles 3 and 6 of the ECHR and Article 1 of the First Protocol. These were also highlighted by the Court in its two pilot decisions. The implementation of leading cases is lower than average; however, as there are more leading cases (more structural changes would be needed), the number of leading cases implemented is also higher. Implementing key reforms, Romania has made significant progress in aligning its domestic laws with European human rights standards. Nevertheless, challenges remain, particularly in areas such as judicial independence, prison conditions, fairness and length of judicial proceedings, and property restitution. Landmark cases at the ECtHR have played a pivotal role in shaping the country's approach to human rights, reflecting both achievements and ongoing struggles in fully implementing the ECHR's protections.

Romania's engagement with the ECtHR and the broader CoE human rights framework has been instrumental in its post-totalitarian transformation. By ratifying the ECHR, it strengthened fundamental rights that protect citizens from state interference, which are the basis of any democratic system, as they limit the power that, if unchecked, leads to

abuse. The ECtHR's real role in Romania's legal development was that it helped give substance (real content) to the preexisting forms (the domestic human rights provisions) for the first time in the country's history.

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BORIS KREŠIĆ*

Protection of Human Rights under the European Convention on Human Rights in Central Europe: Bosnia and Herzegovina**

ABSTRACT: According to the Constitution of Bosnia and Herzegovina (BiH; Annex 4 to the General Framework Agreement for Peace in BiH), the state of BiH is defined as a democratic and legal state with free and democratic elections. By signing the Dayton Peace Agreement and accepting the Constitution, BiH undertook to ensure the highest level of internationally recognised human rights and fundamental freedoms. Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European Convention on Human Rights – ECHR) received a special status in the Constitution of BiH. Similar to other modern democratic and legal states, BiH has signed all the other international and regional instruments for the protection of human rights. Therefore, by insisting on the protection of human rights, it was necessary for all people in BiH, as well as in other democratic and legal states, to have an equal status towards the state and the government, which would ensure measures to overcome antagonisms created on the basis of religious, ethnic, racial, and national diversity in BiH.

Political participation in BiH needs to be viewed as a broader phenomenon that includes not only elections as the basis of democracy and a prerequisite for effective and legitimate decision-making, but also the participation of citizens in everyday political events and life. Furthermore, political participation in a state is limited by ethnicity and territorial origin. This means that only constituent peoples, as guaranteed by the Constitution and numerous laws, are allowed to run for the three-member Presidency of the State or the House of Peoples of BiH. National minorities are excluded from these branches of government, and their political participation is limited solely to local levels of legislative power. Although BiH, according to the Constitution, is considered a democratic state, it is unable to protect the rights of all its citizens and fulfil their basic human rights guaranteed by

* PhD., associate professor, Faculty of Law, University of Tuzla, Bosnia and Herzegovina. b_kresic@yahoo.com.

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numerous internationally recognised conventions, but primarily by the ECHR.

Keywords: The Constitution of Bosnia and Herzegovina, The Convention for the Protection of Human Rights and Fundamental Freedoms, human rights, discrimination, constituency.

1. The Convention versus the Constitution of Bosnia and Herzegovina

On 14 December 1995, the General Framework Agreement for Peace in Bosnia and Herzegovina (BiH; the Dayton Agreement) was signed in Paris, with the intention of stopping the aggression against BiH and establishing frameworks that will lead to the stabilisation of conditions, both in BiH and the former Yugoslavia.¹ The Dayton Peace Agreement is the result of intensive negotiations conducted in November 1995 at the US Air Force base in the city of Dayton (state of Ohio). On 21 November 1995, the agreement was drawn up and initialled, while its signing ceremony took place on 14 December 1995 in Paris. The signatories to the Peace Agreement included representatives of BiH, Croatia, and the Federal Republic (FR) of Yugoslavia, as well as representatives of the Contact Group, that is, the "godfathers" (France, Germany, Russia, the USA, and Great Britain). The Dayton Agreement, BiH, which now consists of two entities, the Republika Srpska (the RS) and the Federation of BiH,² and the Brčko District (established by subsequent arbitration), guaranteed territorial integrity (within internationally recognised borders), state sovereignty, and international subjectivity. Along with it, the Constitution of BiH was also adopted,³ which, in fact, created the current constitutional and legal order.

Unlike all other European countries that incorporated the human rights and fundamental freedoms of the European Convention into their own constitutional and legal system through ratification by the national parliament, BiH accepted the rights and freedoms of the European Convention by signing the General Framework Agreement for Peace in

¹ The Dayton Agreement consists of the General Framework Agreement for Peace in BiH and 11 annexes to this agreement. [Online]. Available at: <https://www.ohr.int/dayton-peace-agreement/?lang=en> (Accessed: 02 July 2024).

² The name of one of the entities of BiH is: the Federation of BiH and not the "Bosniac-Croatian FBiH", as Nenad Kecmanović repeatedly points out. For more details see: Kecmanović, 2007, p. 63.

³ For more on the legal aspect of Annex 4, see: Begić, 2021, pp. 103-104.

BiH. Hence, BiH accepted the human rights and freedoms contained in the European Convention on Human Rights (ECHR) and its protocols not through ratification after becoming a member of the Council of Europe – as is the case with all European countries – but through an international treaty, the General Framework Agreement for Peace in BiH, in which the Constitution represents only one (Annex 4) out of a total of 11 annexes to that treaty. The legal basis for this exception is contained in the Recommendation of the Council of Ministers of the Parliamentary Assembly of the Council of Europe on the establishment of a mechanism for the protection of human rights in European countries that are not members of the Council of Europe.⁴ This is precisely why BiH is a country distinct not only because it accepted the ECHR through the Dayton Peace Agreement, but also because it gave the convention a supra-constitutional character.⁵

Considering that the versions of the Constitution of BiH in the official languages – Bosnian, Serbian, and Croatian – have never been published in the official gazettes, only the English version of the text must be accepted as authentic. In the English version, therefore the only authentic one, Article II/2 of the Constitution of BiH reads as follows:

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Using a simple grammatical interpretation, it is very easy to conclude that the term "*over all other law*" entails that in the legal order of BiH, the ECHR is above the entire law in BiH, and consequently above the Constitution of BiH as one part of the totality of the legal order of a state.⁶

⁴ Haller, 2006, p. 105.

⁵ Begić, 2015.

⁶ A different opinion is given by the judge of the Constitutional Court of FBiH, Mirko Bošković, 'if Article II/2 of the Constitution of BiH regulates that the European Convention on the Protection of Human Rights and Fundamental Freedoms "has priority over any other law", then it could be concluded, starting from the aforementioned provision of the Constitution of BiH, that the European Convention on the Protection of Human Rights and Fundamental Freedoms has the priority only over the law but not over the Constitution. Or, if the Annex to the Constitution of FBiH contains "Instruments for the protection of human rights that have the legal force of constitutional provisions", among which the European

For example, this interpretation is supported by the fact that Article 3, item 3/b of the Constitution of BiH, states '*the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities*'. Article I/2 of the Constitution of BiH also states 'Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections'.

An additional argument is given by the text of Article X of the Constitution of BiH, which establishes the procedure for amending the Constitution of BiH; however, Article X/2 establishes that no amendment to the Constitution of BiH can eliminate or reduce any of the rights and freedoms from Article II of the Constitution of BiH or amend this provision.⁷ Thus, Article II of the Constitution of BiH became the only article of the Constitution of BiH by which the human rights it protects cannot in any way be changed or reduced. Furthermore, the position of the principle of protection of human rights is further strengthened in Art. II/6 and II/8 of the Constitution of BiH, which establishes the obligation of all courts, institutions, and authorities, be they state, entity, or intra-entity authorities, to apply human rights and fundamental freedoms from the European Convention.⁸ In addition, the obligation of local authorities to

Convention on the Protection of Human Rights and Fundamental Freedoms is listed, then it could be concluded that this Convention, according to the Constitution of FBiH, has only the force of constitutional provisions, that is, the force equal to that of the rank of the Constitution, but not the force above the Constitution of BiH'. Round table discussion on the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in Bosnia and Herzegovina, case-law of the Constitutional Court of BiH and the courts of the Entities and Brčko District, Sarajevo, 15 and 16 November 2001, p. 52.

⁷ Article X: Amendment

1. Amendment Procedure. This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.
2. Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

⁸ Article II: Human Rights and Fundamental Freedoms

6. Implementation. Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.
8. Cooperation. All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring

cooperate with international mechanisms for the protection of human rights has been established. Regarding the formulation of the direct applicability of the ECHR in BiH, it is the provision that allows the immediate application of the rights contained in it, by the courts in BiH, without the adoption of subsequent acts for their implementation. At the same time, the essence of the concept of direct applicability lies in prohibiting state bodies from preventing the application of these rights in any way or transforming these rights into national law, thus concealing their true source and meaning. Such would be the case with the Constitution of BiH, as Article II/3 states the rights that are almost identical to the rights from the European Convention, but the constitution maker still, despite this fact, gave the European Convention a special place in the Constitution of BiH. As stated earlier, the Court of Justice defined the concept of direct applicability in relation to the law of the European Union and found that it represents a complete and uniform application of regulations (community law) in all member states from the moment of its entry into force until as long as they are in force. Such provisions represent a direct source of rights and obligations for all addressees – the subjects of community law, be they member states or individuals.⁹

The obligation to harmonise the Constitution of BiH with the ECHR, specified in the provision that the priority of the ECHR over every other right must be established, represents the only known case where the constitution itself mandates the obligation to be changed from the very moment of signing and declaration on 14 December 1995 in Paris. The obligation imposed on the state of BiH to protect human rights is also its obligation to be able to execute the function of human rights protection. In BiH, unlike all other countries in Europe, it is precisely the primary obligation to strengthen the state in a democratic way so that it can protect human rights, which is executed by emphasising the need to consistently establish itself on the principles of a representative system and the separation of powers.

mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

⁹ Vehabovic, 2006, p. 93.

The obligation to implement the ECHR is therefore a way to eliminate the obvious shortcomings of the state of BiH and build it as a modern democratic and legal state, capable of protecting human rights. Accordingly, the ECHR, which pursuant to the decision of the European Court of Human Rights is a "constitutional instrument of the European legal order", also became a constitutional instrument of the constitutional and legal order of BiH. The direct application of human rights contained in the ECHR and their priority in relation to any other right should, according to Annex 6 to the General Framework Agreement for Peace in BiH, be ensured by the Office of the Ombudsman and the Human Rights Chamber,¹⁰ which was not the best solution for post-war BiH. The situation regarding the protection of human rights changed after the admission of BiH to the Council of Europe and the ratification of the ECHR, when the protection mechanisms changed, such that the European Court of Human Rights in Strasbourg took over the protection of human rights instead of the House for Human Rights.¹¹

Insisting on the priority of the ECHR human rights over any other right is an obvious signal of the legislator's intention to, among other things, eliminate all forms of discrimination against individuals, including primarily those based on nationality, religion, and race. This is precisely why the state's obligation to protect the human rights of all individuals under its jurisdiction came into conflict with the "*vital national interests*" of Bosniacs, Serbs, and Croats as "*constituent peoples*", and why, under such circumstances, the state of BiH could not resolve this contradiction.¹² Namely, the decision-making process at the Parliamentary Assembly of BiH foresees the protection of "*vital national interest*", as the Constitution actually specifies the particular interests of individual national groups – such that the interest of society as a whole is actually the sum of the interests of individual national groups. The emphasised role of ethnic groups coincides with the discrimination of individuals who are outside these groups. Such an attitude is indicated by the very division of the peoples who lived in BiH according to the 1991 population census into a "constituent", which are Bosniacs, Croats, and Serbs, and "Others", which include

¹⁰ Articles 2(1) and 2(2) of Annex 6 to the General Framework Agreement for Peace in BiH.

¹¹ Article 19 of the ECHR.

¹² On the issues of constituent peoples, see more in Begić, 2021, pp. 115-134.

seventeen remaining peoples that make up the population of BiH.¹³ However, the term “Others” should not be understood as referring exclusively to national minorities. Rather, it encompasses all citizens of BiH who choose not to identify as members of the constituent peoples or as members of any specific national minority. This broader interpretation reflects the inclusive nature of the constitutional framework, which recognises the right of individuals to refrain from ethnic self-identification and affirms the principle of equality irrespective of ethnic affiliation. Such an understanding is essential for accurately conceptualising the category of “Others” within the legal and political discourse of BiH, particularly in light of the country’s commitment to pluralism, non-discrimination, and the protection of individual rights under both domestic and international legal standards.¹⁴

The legal nature of contemporary Bosnian-Herzegovinian multicultural society is defined by the existence of “constituent peoples” and their primacy over the individual. This framework results in the marginalisation of the primary decision-making subject the Bosnian-Herzegovinian citizen – and restricts the enjoyment of guaranteed human rights and freedoms.

Given the specificity of the term “constituent peoples”, its legal significance must be understood in light of the following considerations:¹⁵

- It constitutes a collective national right of the Peoples explicitly enumerated in the Constitution;
- It represents a right narrower than sovereignty yet broader than individual rights to national identity and equality. As such, it cannot be exercised in isolation or independently of the rights of other constituent peoples, nor can it serve as a basis for the territorialisation of constituent peoples;

¹³ In 2003, the Parliamentary Assembly of BiH adopted the *Law on the Protection of the Rights of National Minorities*. This legislative act affirms the commitment of BiH to safeguard the status, equality, and rights of seventeen national minorities officially recognised within its territory. These minorities include Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Rusyns, Slovaks, Slovenes, Turks, and Ukrainians.

¹⁴ Omerdić, 2021, pp. 323-350.

¹⁵ *Ibid.*

- It entails a system of institutional and procedural guarantees aimed at protecting the equality of all constituent peoples, regardless of their proportional representation within the population structure;
- It is a right significantly broader than that afforded to non-constituent peoples, and is therefore inherently discriminatory in relation to national minorities (and Others);
- Its application is justified only insofar as the economic, social, political, cultural, and other conditions necessary for the realisation of international standards of human rights and freedoms have not yet been established.

This jeopardises the principle of equality of individuals before the law and the obligation of the state to ensure human rights and freedoms specified in the ECHR and its protocol for all individuals under its jurisdiction, regardless of which people they belong to, which constitutes the violation of Article 14 of the ECHR, which specifically prohibits discrimination based on nationality, religion, and race.¹⁶

The incorporation of the ECHR into the constitutional system of BiH was supposed to be an incentive to build BiH as a modern state. In this sense, it was necessary to strengthen the principle of political representation as the foundation of a modern democratic state by introducing the right to free elections instead of the segregation and discrimination provisions of the Constitution.¹⁷ This right meant ensuring modern democratic elections, which in the process of electing legislative bodies, ensure the free expression of the opinion of the people – not only the three constituent peoples, as stated in the remaining part of the Constitution of BiH, but the people of BiH as a whole.¹⁸

The Constitution that prioritises the three “*constituent peoples*” instead of the people as a whole and “vital national interests” instead of general interests is certainly anachronistic and at odds not only with the principles of constitutional law but also with modern civilisation. This persistent insistence on the special interests of the three peoples is particularly expressed in the decision-making process at the Parliamentary Assembly of BiH¹⁹ and the Presidency of BiH.²⁰ The completely

¹⁶ Article 14 of the ECHR.

¹⁷ On the issues of constituent peoples see more in Trnka, 2000, pp. 86-91.

¹⁸ Article 3. Protocol 1 of the ECHR.

¹⁹ Article 4(3) of the Constitution of BiH.

²⁰ Article 5(2) of the Constitution of BiH.

unnecessary and inexplicable insistence on the protection of “*vital national interests*” necessarily leads to the slowing down and blocking of political decision-making, and often the absolute impossibility of making some decisions that are of vital importance for the state, people, and individuals in BiH, including those belonging to the so-called constituent peoples. The desire to protect the “*vital national interests*” of the three “*constituent peoples*” at all costs had to lead not only to the discrimination of individuals belonging to all the remaining peoples regarding their possibility to compete for membership in the Presidency of BiH and the House of Peoples of BiH of the Parliamentary Assembly of BiH, the president and two vice-presidents of each house of the Parliamentary Assembly of BiH, etc. This insistence also led to the paralysis of passing laws and other political decisions in the Parliamentary Assembly of BiH and the Presidency of BiH, returning like a boomerang to the “*constituent peoples*” themselves in the form of general economic, democratic, and other lags in relation to other European nations.

2. Conflict between the Constitution of BiH and the ECHR

The best illustration of the method of application of the ECHR and the de facto reshaping of the Constitution of BiH, in the event of a conflict between the Constitution of BiH and the ECHR, with regard to its material content, is expressed in the decision of the Constitutional Court in case number U 26/01, which decided on the constitutionality of the Law on the Court of BiH.²¹

The applicants²² believed that the Law on the Court of BiH grossly violates the provisions of Article III of the Constitution of BiH, which regulate the competences and relations between the institutions of BiH and the entities. They highlighted that point 3(a) 1 of the article does not foresee the judiciary to be under the authority of BiH and stated that it is apparent from point 3(a) of the same article that the organisation of the judicial system is under the authority of the entities, and that there is no constitutional basis for the adoption of the Law on the Court of BiH,

²¹ The decision by the Constitutional Court number U 26/01, dated 28 September 2001 was published in the “Official Gazette of BiH” number 4/02 dated 04 March 2002. [Online]. Available at: https://www.ustavisud.ba/uploads/odluke/_bs/U-26-01-51291.pdf (Accessed: 2 July 2024).

²² 25 representatives of the National Assembly of the RS.

because apart from the Constitutional Court, the Constitution does not specify any other judicial instance at the state level. They also stated that the implementation of the Law on the Court of BiH implies the adoption of a set of laws of a material and procedural character, which also has no basis in the Constitution of BiH. Thus, in this case, there was a conflict between the text of the Constitution of BiH and the ECHR. In explaining its decision, the Constitutional Court stated:²³

This issue needs to be considered, first of all, in the context of Article I/2. of the Constitution, which reads: ‘Bosnia and Herzegovina is a democratic state that functions in accordance with the law on the basis of free and democratic elections.’ Based on this fundamental principle of a democratic state as well as on its internal structure modified pursuant to point 3 of the same article, the Constitution assigns BiH responsibilities and competences that ensure: the preservation of its sovereignty, territorial integrity, political independence and international subjectivity (see, among others, Articles I/1, II/7, III/1.(a), III/5.(a), IV/3.(a)); the highest level of internationally recognized human rights and fundamental freedoms (see, among other things, Article II/1 of the Constitution, Annexes 5–8 of the General Framework Agreement for Peace in Bosnia and Herzegovina); and free and democratic elections (see Articles IV/2 and V/1 of the Constitution). In Article III/1., the Constitution establishes that the exclusive responsibilities of the institutions of BiH are: foreign policy, foreign trade policy, customs policy, monetary policy as provided for in Article VII, finances of the institutions and for the international obligations of BiH, immigration, refugee and asylum policy and regulation, international and inter-entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-entity transportation, and air traffic control. In addition, the jurisdiction of BiH includes the citizenship of BiH which, pursuant to Article I/7. of the Constitution, is regulated by the Parliamentary Assembly of BiH; ensurance of the highest level of internationally recognized human rights and fundamental

²³ Decision of the Constitutional Court in case number U 26/01.

freedoms, as provided for in Article II of the Constitution; and adoption of the election law, as provided for in Article IV/2. and Article V/1. of the Constitution. Pursuant to Article III/5.(a) of the Constitution, BiH shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of BiH, in accordance with the division of responsibilities between the institutions of BiH. Additional institutions may be established as necessary to exercise these powers.

The Constitutional Court especially points out that pursuant to Article II/1. of the Constitution, BiH and both entities shall ensure the highest level of human rights and fundamental freedoms and that, pursuant to Article II.2, the rights and freedoms set forth in the ECHR and its Protocols shall apply directly in BiH. These shall have priority over all other law. In the specific case, the Constitutional Court shall specifically consider the general principle of the rule of law inherent in the ECHR, and more specifically, the principles of fair trial and effective legal remedy, which are protected by Articles 6 and 13 of the ECHR.

The establishment of the Court of BiH is expected to be an important element in ensuring that the institutions of BiH act in accordance with the rule of law and meet the requirements of the ECHR regarding fair trials before courts and effective legal remedies. The Constitutional Court observes that, until the Court of BiH began to function, in the legal system of BiH there was no possibility of contesting the decisions of the institutions of BiH before a body that fulfills the prerequisites of an 'independent and impartial tribunal'.

In this regard, the Constitutional Court refers to Article IV/4.(a) of the Constitution, which stipulates that the Parliamentary Assembly of BiH passes the laws required to implement the decisions of the Presidency of BiH or to perform the functions of the Assembly under this Constitution. Although it is not the task of the Constitutional Court to determine the appropriateness of laws, the Court nevertheless notes that, in the context of BiH, the

establishment of the Court of BiH can be expected to contribute to strengthening the rule of law, which is one of the fundamental principles for the functioning of a democratic state. Such a clear position of the Constitutional Court leaves no room for speculation about the priority in the application of the ECHR in the event of a conflict between the Constitution of BiH and its provisions. Instead of the conclusion about the supremacy of the ECHR over the Constitution of BiH, which seems not to be questionable after this position of the Constitutional Court, the following position of the Constitutional Court from the aforementioned decision may be used:

... Apart from those stipulated by the Constitution, Bosnia and Herzegovina, functioning as a democratic state, is authorized to establish other mechanisms and additional institutions required for the execution of its competencies, including the establishment of a court to strengthen the legal protection of its citizens and ensure respecting the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. Constituency of the People Pursuant to the Provisions of the Constitution of BiH

Bearing in mind the explicit constitutional provisions and the concept of constitutional solutions, it can be concluded that the constituency of Bosniacs, Croats, and Serbs at the state level is manifested through the parity representation of the constituent peoples in the House of Peoples of the Parliamentary Assembly of BiH (House of Peoples) and the Presidency of BiH, and the specified decision-making procedures of these bodies.

Exercising the right to constitutivity through equal representation in government institutions is based, first of all, on Article IV paragraph 1, which prescribes the structure of the House of Peoples of the state parliament. Pursuant to the provisions of this article, the House of Peoples shall comprise 15 delegates, two thirds from the Federation of BiH (including five Croats and five Bosniacs) and one third from the RS (five Serbs). (a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation of BiH. Delegates from the RS shall be

selected by the National Assembly of the RS (Article IV paragraph 1. a)). Each of the Houses of the Parliamentary Assembly of BiH has a chairperson and two deputies, elected from the delegates belonging to constituent peoples, with the mandatory rotating chair.²⁴

The European Commission for Democracy through Law (the so-called Venice Commission) also commented on the method of elections and the structure of the House of Peoples of the Parliamentary Assembly of BiH. In its Opinion on the constitutional situation in BiH and the powers of the High Representative dated 11 March 2005,²⁵ point 79, the Commission states that, in accordance with constitutional solutions,

... No Serb from the Federation and no Croat or Bosniac from the RS may sit in the House of Peoples... A significant part of the population of BiH therefore does not have the right to stand for elections to the House of Peoples.

In this regard, the Commission concludes in point 80 of this Opinion that the structure and method of electing the delegates to the House of Peoples of the Parliamentary Assembly of BiH are not in accordance with the provisions of the ECHR from 1951 and its Protocols. Article 14 of the ECHR prohibits discrimination '*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*'. In accordance with Article V of the Constitution of BiH, the Presidency of BiH is tripartite and only representatives of the three constituent peoples can be the members. However, it should be emphasised that exercising the right to constituency of Bosniacs, Croats, and Serbs, as well as Others, is significantly limited by the provisions of the electoral law, as Serbs from the Federation of BiH and Bosniacs and Croats from the RS cannot run for this office.

In connection with the structure and method of election of the members of the Presidency of BiH, the Venice Commission, in point 69 of the Opinion, took the following position:

²⁴ The Constitution of BiH, Article IV Paragraph 3.b.

²⁵ Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative. [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e) (Accessed: 2 July 2024).

If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests.²⁶

In point 70 of the aforementioned Opinion, the following is emphasised:

Furthermore, members of the three constituent peoples can be elected to the Presidency, but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. Moreover, the Election Law (based on the corresponding provisions of the Constitution) clearly excludes Others, i.e., citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and to stand for election under Article 25 of the ICCPR or with the equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention for the Protection of National Minorities to formally exclude members of minorities from a public office.

In this regard, in point 71 of the Opinion, the Venice Commission referred to Article 14 of the ECHR, stating, however, that a violation of this article can be assumed,

if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature.” The Commission warned about Protocol No. 12 of the ECHR and its entry into force on April 1, 2005, in BiH, which guarantees the enjoyment of any right set forth, not by the Convention, but by the laws of the member state. The

²⁶ *Ibid.*

commission pointed out that "... the prohibition of discrimination will thereby be extended to cover the right to elect a President or stand for election as President.

The right to constituency is also exercised through the prescribed decision-making procedures of the Presidency of BiH. Thus, Article V paragraph 2. c) of the Constitution of BiH prescribes that the Presidency whose members are the representatives of the constituent peoples '*...shall try to adopt all decisions... ...through consensus*'. Decisions of the Presidency, pursuant to the same article, '*... can... ... be adopted by two members if all attempts to reach a consensus fail*'. In such cases, as stipulated in paragraph 2.d of the same article, '*a member of the Presidency who does not agree with the decision, may declare the decision of the Presidency destructive to the vital interest of the entity from which he was elected, provided that they do so within three days of its adoption. Such a statement shall be sent immediately to the National Assembly of the RS, if the statement was made by a member from that entity; to Bosniac delegates in the House of Peoples of the Federation of BiH, if such a statement was made by a Bosniac member; or to the Croatian delegates in the same body, if that statement was made by a Croatian member*'. *The disputed decision of the Presidency, made by overvoting, shall have no effect 'if such a proclamation is confirmed by a two-thirds majority of votes within ten days after its sending...*' In this way, the decision-making procedures in the Presidency of BiH are fully "placed" in the function of protecting national interests. Regardless of the fact that the constitutional norm in this case introduces the term "*vital interest of the entity*", it is clear that in the Federation of BiH, the representatives of the constituent peoples Bosniacs and Croats decide on the merits, while the procedure itself is also initiated by the representatives of these constituent peoples. In the RS, the situation is significantly different. It is true that the entire procedure is initiated by the representative of the Serbs as the constituent people in the Presidency of BiH, but the final decision is made by the National Assembly of the RS, whose members are elected by all citizens of this entity, rather than the delegates to the House of Peoples as exclusive representatives of the interests of the Serbs as the constituent people in this entity. Thus, in the case of the RS, in this context, one can speak of the institute as the Constitution of BiH itself names it – "*vital interest of the entity*" – rather than in the case of the Federation of BiH where, with regard to decision-

making bodies, this institute is entirely in the function of protecting national interests.

From this, as well as from the entire Constitution of BiH, it follows that the constituency of the people is a collective right narrower than sovereignty, but broader than the individual right to national identity. Constituency does not entail the right to self-determination or the right to secede. No nation achieves its constituency independently of other nations that have the same rights.²⁷

This is the principle by which the citizens of BiH, as members of the constituent peoples, should achieve national equality within the state of BiH.²⁸

4. Conflict of the Constitution of BiH with the ECHR

One small but not the only example of the inconsistency between the Constitution of BiH and the ECHR concerns Articles IV/1 and V/1 of the Constitution of BiH, which determine the method of electing the members of the Presidency and delegates to the House of Peoples of the Parliamentary Assembly of BiH. The reasons are also given for their non-compliance based on the practice of the European Court of Human Rights.

4.1. The Presidency and the House of Peoples of BiH

Under the terms of Article V/1 of the Constitution, 'The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska'.

This provision leads to the conclusion that to be elected member of the Presidency, a citizen has to belong to one of the constituent peoples; that the choice of the voters is limited to Bosniac and Croat candidates in the Federation of BiH and Serb candidates in the RS; and that Bosniacs and Croats can be elected only from the territory of the Federation of BiH and not from the RS, while Serbs can be elected only from the RS and not from the Federation of BiH. In principle, in a multi-ethnic state such as BiH, it

²⁷ Trnka, 2006, p. 178.

²⁸ Mirašćić and Begić, 2009.

appears also legitimate to ensure that a state organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined.²⁹

The Constitutional Court of BiH referred to this problem in the following terms in its decision number U 5/98,³⁰ concerning constituent peoples in the Entity constitutions:

A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph, The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation of BiH, and one Serb directly elected from the territory of RS. One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of the RS with or without a specific ethnic affiliation. He/She thus represents neither the RS as an entity nor the Serb people only, but all the citizens of the electoral unit of the RS. And the same is true for the Bosniac and Croat Members to be elected from the Federation of BiH.

If the members of the Presidency elected from an entity represent all citizens residing in this entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the entity from which they were elected. It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation of BiH. The identity of interests in this ethnically dominated manner impedes the development of a wider sense of nationhood.

²⁹ Begić and Delić, 2013, p. 455.

³⁰ The decision of the Constitutional Court U 5/98. – “Official Gazette of BiH” number 36/00.

Furthermore, members of the three constituent peoples can be elected to the presidency but they may be prevented from standing as candidates in the entity in which they reside if they live as Serbs in the Federation of BiH or as Bosniacs or Croats in the RS. Moreover, the Election Law (based on the corresponding provisions of the Constitution of BiH) clearly excludes Others, that is, citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the presidency. This seems clearly incompatible with the equal right to vote and stand for election under Article 25 of the ICCPR or with the equality under the law guaranteed to members of minorities under Article 4 of the Framework Convention for the Protection of National Minorities as it formally excludes members of minorities from a public office.³¹

Article 14 of the ECHR provides that,

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

A violation of this article can therefore only be assumed if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature. However, it must also be taken into account that BiH has ratified Protocol No. 12 to the ECHR, which guarantees the enjoyment of any right set forth by law without discrimination. This Protocol entered into force on 1 April 2005, and the prohibition of discrimination has been thereby extended to cover the right to elect a President or stand for election as President.

However, one might still wonder whether such an apparent discrimination may be justified under the specific, fairly exceptional conditions of BiH. The European Court of Human Rights in its decisions *Mathieu-Mohin and Clerfayt v. Belgium* and *Melnichenko v. Ukraine*³²

³¹ Begić, 2024, p. 170.

³² Judgments of the European Court of Human Rights in the *Case of Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 02 March 1987; *Case of Melnichenko v. Ukraine*, App. No. 17707/02, 19 October 1994.

seemed willing to leave to states a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

In the present case, the distribution of posts in the state organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny the legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and avoid further loss of human lives. The inclusion of such rules in the text of the Constitution of BiH at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution of BiH aimed at preventing discrimination. This justification has to be considered, however, in the light of development in BiH since the Constitution of BiH entered into force. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has ratified the ECHR and its Protocol No. 12. However, circumstances remain that require a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups, as a transitional solution until a civil state principle is achieved.

This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such that raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of certain groups of citizens, be they constituent peoples or Others. The need for the amendments to the constitutional provisions on the presidency seems completely clear so as to make these provisions compatible with international standards for human rights protection.

5. Cases of the European Court of Human Rights

The following section of the article presents three very significant decisions made by the European Court of Human Rights that support discrimination set forth in the Constitution of BiH. The decisions refer to the election of a member of the Presidency of BiH as an active voting right as well as the possibility to elect the members of the Presidency of BiH in terms of a

passive voting right. The abbreviated versions of the cases are taken from the website of the European Court of Human Rights and include descriptions of the cases and the Court meritum with no additional changes made.

5.1. Case of *Sejdić and Finci v. Bosnia and Herzegovina*³³

The case originated in two applications against Bosnia and Herzegovina lodged with the Court under Article 34 of the ECHR (“the Convention”) by two citizens of BiH, Mr. Dervo Sejdić and Mr. Jakob Finci (“the applicants”), on 3 July and 18 August 2006, respectively.

The applicants were born in 1956 and 1943, respectively. They have held and still hold prominent public positions. Mr. Sejdić is now the Roma Monitor of the Organisation on Security and Cooperation in Europe (OSCE) Mission to BiH, having previously served as a member of the Roma Council of BiH (the highest representative body of the local Roma community) and a member of the Advisory Committee for Roma (a joint body comprising representatives of the local Roma community and of the relevant ministries). Mr. Finci is now serving as the Ambassador of BiH to Switzerland, having previously held positions such as the President of the Inter-Religious Council of BiH and the Head of the State Civil Service Agency.

The applicants describe themselves to be of Roma and Jewish origin, respectively. As they do not declare affiliation with any of the “constituent peoples”, they are ineligible to stand for election to the House of Peoples of BiH (the second chamber of the State Parliament) and the Presidency (the collective Head of State). Mr. Finci obtained official confirmation in this regard on 3 January 2007.

The Constitution of BiH (hereinafter referred to as “the Constitution” or “the State Constitution” when it is necessary to distinguish it from the Entity Constitutions) is an annex to the 1995 General Framework Agreement for Peace in BiH (“the Dayton Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. As it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures that could have provided democratic legitimacy. It constitutes the unique case of a constitution that was never officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. The Constitution confirmed

³³ *Case of Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06 and 34836/06, 22 December 2009.

the continuation of the legal existence of BiH as a State, while modifying its internal structure. In accordance with the Constitution, BiH consists of two Entities: the Federation of BiH and the RS. The Dayton Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard (Article V of Annex 2 to the Dayton Agreement). Pursuant to an arbitral award of 5 March 1999, the Brčko District has been created under the exclusive sovereignty of the State.

In the Preamble to the Constitution, Bosniacs, Croats, and Serbs are described as “constituent peoples”. At the State level, power-sharing arrangements were introduced, making it impossible to adopt decisions against the will of the representatives of any “constituent people”, including a vital interest veto, an Entity veto, a bicameral system (with a House of Peoples composed of five Bosniacs and the same number of Croats from the Federation of BiH and five Serbs from the RS), as well as a collective Presidency of three members with a Bosniac and a Croat from the Federation of BiH and a Serb from the RS.

The applicants took issue with their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. They relied on Article 14 of the Convention, Article 3 of Protocol No. 1, and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

The enjoyment of the rights and freedoms set forth in [the] 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 3 of Protocol No. 1 provides:

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.

Article 1 of Protocol No. 12 to the Convention provides:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

he Court's assessment

(a) As Regards the House of Peoples of BiH

The applicants relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court considers that this complaint should first be examined under the first-mentioned provisions.

(i) The applicability of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

It is noted that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence as it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall “within the ambit” of one or more of the latter.³⁴ The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms that the Convention and the Protocols require each State to guarantee. It applies also to those additional rights falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court’s case-law.³⁵

³⁴ See, among many other authorities: *Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, App. Nos. 9214/80; 9473/81; 9474/81, 28 May 1985, § 71; *Case of Petrovic v. Austria*, App. No. 20458/92, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II; *Case of Sahin v. Germany*, App. No. 30943/96, 8 July 2003, § 85.

³⁵ See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (merits)*, 23 July 1968, § 9, Series A no. 6; *Case of Stec and Others v.*

The Court must decide, therefore, whether elections to the House of Peoples of BiH fall within the “ambit” or “scope” of Article 3 of Protocol No. 1. In this connection, it is reiterated that this provision applies only to elections of a “legislature”, or at least of one of its chambers if it has two or more. However, the word “legislature” has to be interpreted in the light of each State’s constitutional structure and, in particular, its constitutional traditions and the scope of the legislative powers of the chamber in question. Furthermore, the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50, and 52) that the Contracting Parties took into account the particular position of certain parliaments that included non-elective chambers. Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms that could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system.³⁶ At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament’s chambers to be filled through direct elections.

As regards the House of Peoples of BiH, the Court notes that its composition is the result of indirect elections, its members being appointed by the Entities’ legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of BiH and approves a budget of the State institutions.³⁷ Lastly, its consent is necessary before a treaty can be ratified.³⁸ Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1. Accordingly, Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

the United Kingdom, App. Nos. 65731/01 and 65900/01, § 40, *Case of E.B. v. France*. App. No. 43546/02, 22 January 2008.

³⁶ *Case of Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2 March 1987, § 53.

³⁷ See Article IV § 4 (b)-(c) of the Constitution.

³⁸ See Articles IV § 4 (d) and V § 3 (d) of the Constitution.

(ii) Compliance with Article 14 taken in conjunction with Article 3 of Protocol No. 1

The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.³⁹ The scope of a Contracting Party’s margin of appreciation in this sphere will vary according to the circumstances, the subject matter, and the background (*ibid.*, § 82).

Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person’s ethnic origin is a form of racial discrimination (see the definition adopted by the International Convention on the Elimination of All Forms of Racial Discrimination in paragraph 19 above and that adopted by the European Commission against Racism and Intolerance in paragraph 23 above). Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.

In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. The Court has also held that no difference in treatment that is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*ibid.*, § 176). That said, Article 14 does not prohibit Contracting Parties from treating groups differently to correct “factual inequalities” between them. Indeed, in certain circumstances, a failure to

³⁹ *Case of Andrejeva v. Latvia*, App. No. 55707/00, 18 February 2009.

attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article.⁴⁰

Turning to the present case, the Court observes that to be eligible to stand for election to the House of Peoples of BiH, one has to declare affiliation with a “constituent people”. The applicants, who describe themselves to be of Roma and Jewish origin respectively and who do not wish to declare affiliation with a “constituent people”, are, consequently, excluded (see paragraph 11 above). The Court notes that this exclusion rule pursued at least one aim that is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place, a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and “ethnic cleansing”. The nature of the conflict was such that the approval of the “constituent peoples” (namely, the Bosniacs, Croats, and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants’ preoccupation with effective equality between the “constituent peoples” in the post-conflict society.

It is nevertheless the case that the Court is only competent *ratione temporis* to examine the period after the ratification of the Convention and Protocol No. 1 thereto by BiH. The Court does not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a “legitimate aim”, as for the reasons set out below, the maintenance of the system in any event does not satisfy the requirement of proportionality.

To begin with, the Court observes significant positive developments in BiH since the Dayton Agreement. It is true that progress might not always have been consistent and challenges remain.⁴¹ It is nevertheless the case that in 2005, the former parties to the conflict surrendered their control over the armed forces and transformed them into a small, professional force; in 2006,

⁴⁰ See *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, cited above, § 10; *Case of Thlimmenos v. Greece*, App. No. 34369/97, 6 April 2000, § 44; *Case of D.H. and Others*, cited above, § 175;

⁴¹ E.g. see the latest progress report on BiH as a potential candidate for European Union membership prepared by the European Commission and published on 14 October 2009, SEC (2009)1338.

BiH joined the North Atlantic Treaty Organization's Partnership for Peace; in 2008, it signed and ratified a Stabilisation and Association Agreement with the European Union; in March 2009, it successfully amended the State Constitution for the first time; and it has recently been elected a member of the United Nations Security Council for a two-year term beginning on 1 January 2010. Furthermore, whereas the maintenance of an international administration as an enforcement measure under Chapter VII of the United Nations Charter implies that the situation in the region still constitutes a "threat to international peace and security", it appears that preparations for the closure of that administration are under way.⁴²

In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to BiH and that the time may still not be ripe for a political system that would be a simple reflection of majority rule, the Opinions of the Venice Commission⁴³ clearly demonstrate that there exist mechanisms of power-sharing that do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere.⁴⁴

Lastly, by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto without reservations, the respondent State has voluntarily agreed to meet the relevant standards. It has specifically undertaken to 'review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary'. Likewise, by ratifying a Stabilisation and Association Agreement with the European Union in 2008, the respondent State committed itself to 'amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention

⁴² See a joint report by Mr. Javier Solana, the European Union's High Representative for Common Foreign and Security Policy, and Mr. Olli Rehn, European Union Commissioner for Enlargement, on "EU's Policy in Bosnia and Herzegovina: The Way Ahead" of 10 November 2008, and a report by the International Crisis Group on "Bosnia's Incomplete Transition: Between Dayton and Europe" of 9 March 2009.

⁴³ See paragraph 22 above.

⁴⁴ *Case of Glor v. Switzerland*, App. No. 13444/04, 30 April 2009, § 94.

on Human Rights and the Council of Europe post-accession commitments' within one to two years.⁴⁵

Thus, the Court concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of BiH lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.

(iii) The complaints under Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12

Having regard to its finding in the preceding paragraph, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12 as regards the House of Peoples.

(b) As Regards the Presidency of BiH

The applicants relied on Article 1 of Protocol No. 12 only.

(i) The applicability of Article 1 of Protocol No. 12

The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination.

The applicants contested constitutional provisions rendering them ineligible to stand for election to the Presidency of BiH. Therefore, whether or not elections to the Presidency fall within the scope of Article 3 of Protocol No. 1,⁴⁶ this complaint concerns a "right set forth by law"⁴⁷, which makes Article 1 of Protocol No. 12 applicable. This has not been contested before the Court.

(ii) Compliance with Article 1 of Protocol No. 12

The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that "discrimination" means treating differently, without an objective and reasonable justification, persons in

⁴⁵ See paragraph 25 above.

⁴⁶ *Case of Boškoski v. the former Yugoslav Republic of Macedonia*, App. No. 11676/04, 2 September 2004.

⁴⁷ See sections 1.4 and 4.19 of the Election Act 2001 – see paragraph 18 above.

similar situations. The authors used the same term, “discrimination”, in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14.⁴⁸ The Court does not therefore see any reason to depart from the settled interpretation of “discrimination”, noted above, in applying the same term under Article 1 of Protocol No. 12.⁴⁹

The lack of a declaration of affiliation by the present applicants with a “constituent people” also rendered them ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples; moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner. It follows that the constitutional provisions that render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol No. 12, the Court not considering that there is any pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of BiH.

Accordingly, and for the detailed reasons outlined in paragraphs 47-49 above in the context of Article 14, the Court finds that the impugned precondition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12.

5.2. Case of Zornić v. Bosnia and Herzegovina⁵⁰

The case originated in an application against BiH lodged with the Court under Article 34 of the ECHR (the Convention) by a citizen of BiH, Ms. Azra Zornić (the applicant), on 19 December 2005.

The applicant was born in 1957 and lives in Sarajevo. She actively participates in the political life of the country. Among other things, in 2002, she stood as a candidate of the Social Democratic Party of BiH for election to the parliament of one of the Entities. As the applicant does not declare

⁴⁸ See paragraph 18 of the Explanatory Report to Protocol No. 12.

⁴⁹ As regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see, *Case of N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634.

⁵⁰ *Case of Zornić v. Bosnia and Herzegovina*, App. No. 3681/06, 15 December 2014.

affiliation with any of the “constituent people” (namely, Bosniacs, Croats, and Serbs), but simply as a citizen of BiH, she is ineligible to stand for election to the second chamber of the State parliament (the House of Peoples) and to the collective Head of State (the Presidency).⁵¹

(a) As Regards the House of Peoples of BiH

The applicant relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court will first examine this complaint under the first-mentioned provisions. Furthermore, the test for Article 14 and Article 1 of Protocol No. 12 being the same⁵², the Court finds it appropriate to look at this complaint under Article 1 of Protocol No. 12 at the same time.

The Court has already held in *Sejdić and Finci* that elections to the House of Peoples of BiH fall within the scope of Article 3 of Protocol No. 1.⁵³ Accordingly, Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.

The Court observes that in accordance with the Constitution, only persons declaring affiliation with a “constituent people” (Bosniacs, Croats, and Serbs) are entitled to run for the House of Peoples of BiH. The applicant, who does not declare affiliation with a “constituent people”, but declares herself as a citizen of BiH, is, consequently, excluded.⁵⁴ The Court considers, therefore, that the present case is identical to *Sejdić and Finci*. Although, unlike the applicants in that case, who were of Roma and Jewish origin, respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.

As regards the Government’s argument that the applicant could at any time choose to affiliate with one of the “constituent people”, the Court observes that the same could be said for members of minority groups, such as the applicants in *Sejdić and Finci*, or citizens without any ethnic affiliation. As noted above, there are no objective criteria for one’s ethnic affiliation (see paragraph 8 above). It depends solely on one’s own self-classification. There may be different reasons for not declaring affiliation

⁵¹ Ribičičm, Begić and Pavlović, 2016.

⁵² See paragraph 27 above.

⁵³ *Ibid.*, §§ 40 and 41.

⁵⁴ See, *mutatis mutandis*, *Sejdić and Finci*, cited above, § 45.

with any particular group, such as, for example, intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of BiH. While it is unclear what the present applicant's reasons are, the Court considers them in any case irrelevant. The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification.

The Court reiterates that identical constitutional provisions have already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 in *Sejdić and Finci*.⁵⁵ Accordingly, and for the detailed reasons elaborated in *Sejdić and Finci*⁵⁶, the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and a violation of Article 1 of Protocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of BiH.

Having regard to its finding in the preceding paragraphs, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone as regards the House of Peoples.

(b) As Regards the Presidency of BiH

The applicant relied on Article 1 of Protocol No. 12 only. The Court has already found this Article to be applicable to elections to the Presidency of BiH in *Sejdić and Finci*⁵⁷.

The lack of a declaration of affiliation by the present applicant with a "constituent people" also renders her ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 as regards the House of Peoples (see paragraph 32 above); moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 27 above). In *Sejdić and Finci* (ibid., § 56), the Court has already found that the constitutional provisions that rendered the applicants ineligible for election to the Presidency were discriminatory and in breach

⁵⁵ *Ibid.*, § 50.

⁵⁶ §§ 47-49.

⁵⁷ *Ibid.*, § 54.

of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jurisprudence in the present case.

There has accordingly been a violation of Article 1 of Protocol No. 12 as regards the present applicant's ineligibility to stand for election to the Presidency.

(i) Application of article 46 of the Convention

The Court finds it appropriate to consider the present case under Article 46 of the Convention, which provides, in so far as relevant:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant that the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings.⁵⁸

The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions that rendered the applicant's ineligible to stand for elections to the House of Peoples and to the Presidency of BiH amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the

⁵⁸ See: *Case of Scozzari and Giunta v. Italy*, App. Nos. 39221/98 and 41963/98, 13 July 2000, § 249; *Case of Karanović v. Bosnia and Herzegovina*, App. No. 39462/03, 20 November 2007; *Case of Čolić and Others v. Bosnia and Herzegovina*, App. No. 1218/07, 10 November 2009; *Case of Burdov v. Russia*, App. No. 33509/04, § 125; *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010, § 106.

Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1, and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.⁵⁹

Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that several amendments to the Constitution of BiH and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions urging the authorities of BiH to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of BiH and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further.⁶⁰ In its third resolution in particular, the Committee of Ministers called upon the respondent State, to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the 'constituent peoples'.⁶¹

In light of the lengthy delay that has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner that complies with the Convention's guarantees.⁶²

In *Sejdić and Finci*, the Court observed that when the impugned constitutional provisions were put in place, a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" was

⁵⁹ *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010.

⁶⁰ See paragraph 12 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation No. 2025(2013) of the Parliamentary Assembly of the Council of Europe.

⁶¹ See paragraph 12 above.

⁶² *Case of Greens and M.T. v. the United Kingdom*, App. Nos. 60041/08 and 60054/08, 23 November 2010, § 112.

necessary to ensure peace (ibid.). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system that will provide every citizen of BiH with the right to stand for elections to the Presidency and the House of Peoples of BiH without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of BiH.

5.3. Case of *Pilav v. Bosnia and Herzegovina*⁶³

The applicant, Ilijaz Pilav, is a citizen of BiH who was born in 1964 and lives in Srebrenica, in the RS (one of the two constituent entities of BiH). Mr. Pilav declares himself as Bosniac, one of the country's "constituent peoples". He is a member of the Party for BiH and has held several elected and appointed political positions in the RS. In 2006, Mr. Pilav submitted his candidacy for the elections to the Presidency of BiH. The Central Election Commission rejected it on the grounds that he declared his affiliation with Bosniacs, whereas, pursuant to the Constitution and the Election Act, the presidential candidate from the RS had to be a Serb. Mr. Pilav's appeal against that decision was rejected and, in September 2006, the Constitutional Court of BiH rejected his constitutional appeal. In 2010, Mr. Pilav again submitted his candidacy, which was again rejected.

The Court observed that in accordance with the Constitution of BiH, only persons declaring affiliation with a "constituent people" were entitled to stand for election to the Presidency, which consisted of three members: one Bosniac and one Croat, each directly elected from the Federation of BiH, and one Serb directly elected from the RS. Mr. Pilav, a Bosniac living in the RS was as a result excluded. The Court had already found a similar constitutional precondition to amount to a discriminatory difference in treatment, in breach of Article 1 of Protocol No. 12, in the case of *Sejdić and Finci*, which concerned the inability of the applicants, of Roma and Jewish origin, respectively, to stand for election to the Presidency. While Mr. Pilav, as being affiliated with one of the "constituent people", had a constitutional right – unlike the applicants in *Sejdić and Finci* – to participate in elections to the Presidency, he would be required to leave his

⁶³ *Case of Pilav v. Bosnia and Herzegovina*, App. No. 41939/07, 9 September 2016.

home and move to the Federation of BiH to effectively exercise this right. In other cases, the Court had found that a residence requirement was not disproportionate or irreconcilable with the underlying purpose of the right to free elections under Article 3 of Protocol No. 1 to the Convention. However, unlike the applicants in those cases, who did not have permanent residence in the State where they wished to stand for elections and therefore did not satisfy the residence requirement, Mr. Pilav lived in BiH. The Court noted that the Presidency of BiH was a political body of the State and not of one of the two constituent entities. Its policy and decisions affected all citizens of BiH, whether they lived in the Federation, the RS, or Brčko District. Therefore, although Mr. Pilav was involved in political life in the RS, he was also clearly concerned with the political activity of the collective Head of State. The Court took account of an objection of the Government of BiH to the effect that Mr. Pilav could not claim to be a victim of discrimination as the residence requirement concerned in his case applied equally to all the “constituent peoples”. However, Mr. Pilav complained that he was treated differently from Serbs living in the RS. As regards the Government’s argument that that difference in treatment was justified by the need to maintain peace and facilitate a dialogue between different ethnic groups, the Court recalled that it had already addressed that justification in the case of *Sejdić and Finci*. It had held in particular that, while it was not necessary to abandon the power-sharing mechanisms peculiar to BiH, there existed power-sharing mechanisms that did not automatically lead to the total exclusion of representatives of the other communities. Notwithstanding the differences with the case of *Sejdić and Finci*, the Court considered that Mr. Pilav’s exclusion from election to the Presidency as a result of the residence requirement in question was based on a combination of ethnic origin and place of residence, both grounds of distinction falling within the scope of Article 1 of Protocol No. 12. That exclusion as such amounted to a discriminatory treatment in breach of Article 1 of Protocol No. 12. In view of that conclusion, the Court considered that it was not necessary to examine separately whether there had also been a violation of Article 1 of Protocol No. 12 as regards Mr. Pilav’s complaint that he was unable to vote for a member of his own ethnic community to the Presidency.

5.4. *Case of Kovačević v. Bosnia and Herzegovina*⁶⁴

The applicant was born in 1972 and lives in Sarajevo. On 7 March 2023, he was granted leave to present his own case in the proceedings before the Court under Rule 36 § 2 *in fine* of the Rules of Court. The Constitution of BiH (“the Constitution”) is an annex to the 1995 General Framework Agreement for Peace in BiH (“the Dayton Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. In accordance with the Constitution, BiH consists of two Entities – the Federation of BiH (“the Federation”) and the RS (see Article I § 3 of the Constitution) – and the Brčko District in the joint ownership (condominium) of the two Entities.⁶⁵ The Constitution makes a distinction between “constituent peoples” (Bosniacs, Croats, and Serbs) and “Others and citizens of BiH” (members of ethnic minorities and those who do not declare affiliation with any particular ethnic group because of intermarriage, mixed parenthood, or other reasons). At the State level, power-sharing arrangements were introduced, such as a vital interest veto, an Entity veto, a bicameral system (with a House of Peoples – the second chamber of the State Parliament – composed of five Bosniacs and the same number of Croats from the Federation and five Serbs from the RS) and a collective Head of State – the Presidency – comprising three members: a Bosniac and a Croat from the Federation and a Serb from the RS.⁶⁶ Those arrangements make it impossible to adopt decisions against the will of the representatives of any “constituent people”.⁶⁷

Only persons declaring affiliation with a “constituent people” are thus entitled to run for the House of Peoples and the Presidency. Moreover, only the voters residing in the RS may participate in the election of Serb members of the House of Peoples (through indirect elections) and the Presidency (through direct elections), whereas only the voters residing in the Federation may participate in the election of Bosniac and Croat members of those institutions. By contrast, no ethnic requirements apply in elections to the House of Representatives (the first chamber of the State Parliament).

The constitutional provisions pertaining to the ethnic privileges for the “constituent peoples” were not included in the Agreed Basic Principles that constituted the basic outline for what the future Dayton Agreement would

⁶⁴ *Case of Kovačević v. Bosnia and Herzegovina*, App. No. 43651/22, 29 August 2023.

⁶⁵ See Article VI § 4 of the Constitution, as amended in 2009.

⁶⁶ See Articles IV and V of the Constitution, quoted in paragraphs 12 and 13 below.

⁶⁷ For more information, see paragraph 25 below.

contain.⁶⁸ Reportedly, the international mediators reluctantly accepted these arrangements at a later stage because of strong demands to this effect from some of the parties to the conflict.⁶⁹ Fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out. Article II § 2 of the Constitution, providing that the rights and freedoms set forth in the Convention and its Protocols had “priority over all other law” (for the full text, see paragraph 10 below), was therefore inserted.⁷⁰

The applicant is a political scientist and a political adviser to a member of the Presidency of BiH. It would appear that he does not declare affiliation with any “constituent people” or with any other ethnic group. Sarajevo, where he lives, is situated in the Federation. The latest legislative and presidential elections at the State level took place in 2022. The applicant complained that because of the combination of the territorial and ethnic requirements mentioned above, he had been unable to vote for the candidates of his choice in those elections. He alleged that the candidates best representing his political views were not from the “right” Entity and/or of the “right” ethnic origin. The applicant did not indicate whether he had nevertheless voted for other candidates.

5.4.2. The Court’s assessment

(a) General Principles

The Court reiterates that despite the difference in scope between those provisions, the meaning of “discrimination” in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 of the Convention.⁷¹ It therefore sees no reason to depart from the settled interpretation of “discrimination”, as developed in the case-law concerning Article 14, in applying the same term under Article 1 of Protocol No. 12.

In order for an issue to arise under Article 14 of the Convention, there must be a difference in the treatment of persons in analogous, or relevantly

⁶⁸ See paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of 26 September 1995.

⁶⁹ See: Nystuen, 2005, p. 192 and pp. 240-41; O’Brien, 2005, p. 105.

⁷⁰ Nystuen, 2005, p. 100.

⁷¹ Sejdić and Finci, cited above, § 55.

similar, situations.⁷² However, only differences in treatment based on a personal characteristic (or “status”) by which persons or groups of persons are distinguishable from each other are capable of triggering the application of this provision. The words “other status” in the text of Article 14 have generally been given a wide meaning,⁷³ and their interpretation has not been limited to characteristics that are personal in the sense that they are innate or.⁷⁴ The Court has previously recognised that the “place of residence constitutes an aspect of personal status for the purposes of Article 14” and can trigger the protection of that Article.⁷⁵

A difference in the treatment of persons in analogous or relevantly similar situations will be deemed discriminatory only if it has no objective and reasonable justification – in other words, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”⁷⁶. The scope of a Contracting Party’s margin of appreciation in this sphere will vary according to the circumstances, the subject matter, and the background.

Discrimination on account of a person’s ethnic origin is a form of racial discrimination. Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authority’s special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.⁷⁷

In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.⁷⁸ The Court has also held that no difference in treatment that is based exclusively or to a decisive extent on a

⁷² See, for instance, *Case of Molla Sali v. Greece*, App. No. 20452/14, 19 December 2018, § 133.

⁷³ See *Case of Khamtokhu and Aksenchik v. Russia*, App. Nos. 60367/08 and 961/11, 24 January 2017; *Case of Carson and Others v. the United Kingdom*, App. No. 42184/05, 4 November 2008, § 70.

⁷⁴ See *Case of Clift v. the United Kingdom*, App. No. 7205/07, 13 July 2010, §§ 56-59.

⁷⁵ See *Case of Carson and Others*, cited above, §§ 70-71.

⁷⁶ See, among many authorities, *Molla Sali*, cited above, § 135.

⁷⁷ See *Case of Sejdić and Finci*, cited above, § 43, with further references.

⁷⁸ See *Case of D.H. and Others v. the Czech Republic*, App. No. 57325/00, 13 November 2007, § 196.

person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.⁷⁹ That said, Article 14 does not prohibit Contracting Parties from treating groups differently to correct "factual inequalities" between them. Indeed, in certain circumstances, a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article.⁸⁰

(b) Application of the Above Principles in the Present Case

The Court notes that the House of Peoples (the second chamber of the State Parliament) comprises fifteen delegates: five Bosniacs and five Croats from the Federation and five Serbs from the RS.⁸¹

First, to indirectly participate in the election of Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of BiH, the applicant must vote for persons who declare affiliation with Bosniacs and Croats in elections for his cantonal assembly (the Assembly of the Sarajevo Canton) because only the Bosniac and Croat caucuses of that Assembly elect Bosniac and Croat delegates to the House of Peoples of the Parliament of the Federation, who, in turn, elect Bosniac and Croat delegates to the House of Peoples of the Parliamentary Assembly of BiH.⁸² Second, it follows from the combination of the relevant territorial and ethnic requirements that the applicant, as a resident of the Federation, cannot participate in the election of Serb delegates to the House of Peoples of the Parliamentary Assembly of BiH. The Government's argument that the applicant could always change his permanent residence is not convincing because a false declaration of permanent residence is an offence, subject to a fine of up to 300 convertible marks.⁸³ Moreover, social benefits are strictly linked to place of residence and are not the same in different parts of the country.⁸⁴ Accordingly, the applicant is treated differently than persons from

⁷⁹ *Ibid.* § 176.

⁸⁰ See *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 10, Series A no. 6; *Case of Thlimmenos v. Greece*, App. No. 34369/97, 6 April 2000, § 44; *Case of D.H. and Others*, cited above, § 175; and *Case of Sejdić and Finci*, cited above, § 44.

⁸¹ See Article IV § 1 of the Constitution, quoted in paragraph 12 above.

⁸² See Article IV § 1 (a) of the Constitution, quoted in paragraph 12 above.

⁸³ See paragraph 20 above.

⁸⁴ See, *mutatis mutandis*, *Case of Pilav v. Bosnia and Herzegovina*, App. No. 41939/07, 9 June 2016, §§ 34, 43, 45, in which the Court rejected a similar argument, and, for

the Federation who declare affiliation with Bosniacs and Croats and persons from the RS who declare affiliation with Serbs.

The Court is aware of the historical context, notably that the above-mentioned arrangements were designed to end a brutal conflict marked by genocide and “ethnic cleansing”. The nature of the conflict was such that the approval of the “constituent peoples” was necessary to ensure peace. It is therefore conceivable that the existence of a second chamber, composed of representatives of the “constituent peoples” only, would have been acceptable in the special case of BiH, had the powers of the House of Peoples been limited to the precisely, narrowly, and strictly defined vital national interests veto of the “constituent peoples”.⁸⁵ However, the House of Peoples is currently a chamber with full legislative powers. Article IV § 3 (c) of the Constitution specifically provides that all legislation requires the approval of both chambers. That being the case, it is of utmost importance that all segments of society should be represented in the House of Peoples.

It must be emphasised in this connection that in addition to excluding certain citizens from the House of Peoples on the grounds of their ethnicity, the current arrangements render ethnic considerations and/or representation more relevant than political, economic, social, philosophical, and other considerations and/or representation and thus amplify ethnic divisions in the country and undermine the democratic character of elections.⁸⁶

The Government asserted that the time was still not ripe for a political system that would be a simple reflection of majority rule.⁸⁷ The Court has already examined and dismissed that argument in, *inter alia*, *Sejdić and Finci*,⁸⁸ in which it held in particular:⁸⁹

illustrative purposes; *Case of Pudarić v. Bosnia and Herzegovina*, App. No. 55799/18, 8 December 2020, § 26.

⁸⁵ See, for instance, the Venice Commission’s analysis and proposals in paragraphs 25 and 27 above.

⁸⁶ See, *mutatis mutandis*, *Case of Bakirdzi and E.C. v. Hungary*, App. Nos. 49636/14 and 65678/14, 10 November 2022 § 63 in which the Court held under Article 3 of Protocol No. 1 taken in conjunction with Article 14 of the Convention that the right to vote encompassed the opportunity for voters to choose candidates or party lists that best reflected their political views, and that election regulations should not require voters to espouse political positions that they did not support; see also the submission of the Commissioner for Human Rights, quoted in paragraph 23 above.

⁸⁷ See paragraph 46 above.

⁸⁸ Cited above, §§ 47-49.

⁸⁹ *Ibid.*, § 48.

... while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission ... clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere.⁹⁰

Moreover, in *Zornić*, the Court noted:

In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The nature of the conflict was such that the approval of the 'constituent peoples' was necessary to ensure peace. However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.

⁹⁰ See *Case of Glor v. Switzerland*, App. No. 13444/04, 06 November 2009, § 94.

The Court sees no reason to depart from that case-law.⁹¹ Indeed, a reform of the electoral system is an outstanding post-accession obligation of BiH.

The Court notes that the Government referred to *Mathieu-Mohin and Clerfayt v. Belgium*, in which the Court found no breach of Article 3 of Protocol No. 1 taken either alone or in conjunction with Article 14 of the Convention. However, the Constitutional Court held that the situation examined in that case was significantly different from the domestic electoral system based on the concept of the “constituent peoples”.⁹² The Court sees no reason to disagree with the finding of that court.

Lastly, although the Convention does not prohibit Contracting Parties from treating groups differently to correct “factual inequalities” between them⁹³, none of the “constituent peoples” is in the factual position of an endangered minority that must preserve its existence. On the contrary, the “constituent peoples” clearly enjoy a privileged position in the current political system.

There has accordingly been a breach of Article 1 of Protocol No. 12. In view of this conclusion, it is not necessary to examine separately either the admissibility or the merits of this same complaint under Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

At the time of writing the paper, the judgment of the Grand Chamber had not been made publicly available. On 25 June 2025, the European Court of Human Rights delivered the operative provisions (conclusions) of its judgment in the case *Kovačević v. Bosnia and Herzegovina*.⁹⁴ The case concerned the applicant's allegation that the requirements applicable to elections for the House of Peoples of the Parliamentary Assembly and for the Presidency of BiH are discriminatory against him and prevented him from voting for candidates of his choice in those elections in 2022. The Court upheld the Government's objection to the admissibility of the application on the grounds that the applicant had abused the right of application within the meaning of Article 35 § 3 (a) of the ECHR, and that he lacked victim status under Article 14 of the Convention, in conjunction

⁹¹ See also the decision of the Committee of Ministers of the Council of Europe, quoted in paragraph 22 above, and the submission of the Commissioner for Human Rights, quoted in paragraph 23 above, according to which the current system, based on ethnic discrimination, impedes social cohesion, reconciliation, and progress.

⁹² See paragraph 15 above.

⁹³ See the case-law quoted in paragraph 52 above.

⁹⁴ *Case of Kovačević v. Bosnia and Herzegovina*, App. No. 43651/22, 29 August 2023.

with Article 3 of Protocol No. 1 to the Convention, and Article 1 of Protocol No. 12.

6. Conclusion

By introducing the principle of the ECHR having priority over every right, Annex 4 – the Constitution of BiH – should have been fundamentally transformed, such that instead of the three “constituent peoples” and their “vital national interests”, an individual – a citizen, is introduced as the basis and goal of the state in accordance with the old maxim that every right is created for the benefit of human beings (*Hominum causa omne ius constitutum est*).

The Constitution of BiH, or Annex 4 of the Dayton Agreement, if viewed beyond the provision on the mandatory application of the ECHR, cannot in any way belong to the positive democratic constitutional tradition of Europe. Rather, it would fall into the category of extremely undemocratic, possibly totalitarian systems, such as those Europe has known throughout its history, precisely because the three “constituent peoples” rather than a human being are the purpose of the constitution and the state founded by that constitution. If the three constituent peoples are everything, and the citizen and the democratic state are nothing, then in a certain sense, it is still a constitution that does not follow the tradition of the democratic countries of Europe, which is given in the ECHR Preamble.

Harmonisation of the Constitution of BiH with the ECHR certainly implies the need for the urgent addressal of several discriminatory constitutional provisions, which has already been discussed. However, the Constitution of BiH includes numerous other inconsistencies, gaps, and contradictions in the text of the Constitution itself, which also need to be overcome in the process of harmonising the Constitution of BiH with the ECHR. It is especially important to respond to the numerous positive obligations the state of BiH accepted by ratifying the ECHR with the aim of ensuring the protection of human rights and fundamental freedoms of individuals under its jurisdiction. The realisation of this type of obligation requires more than the abrogation action of the state, as is the case with discrimination provisions. It requires a certain creative engagement so as to equip the state for the consistent and full application of the ECHR, as well as all the obligations arising from it. In this regard, it would be particularly important to structure the organisation of judicial bodies in a modern way to

ensure the individual's right to an effective legal remedy. This would also mean completing the principle of separation of powers that serve as the basis for the functioning of the modern state. What is particularly striking here is the need to integrate the judiciary in a modern way and re-introduce a supreme court that will ensure the equal position of all individuals according to the law, justice, and the state.

However, the fact that the rights of constituent peoples lead to discrimination against citizens of BiH who do not belong to this category cannot be ignored. In addition, it should be emphasised that the exercise of the right to constituency at the state level is significantly limited. Thus, Serbs from the federation of BiH and Bosniacs and Croats from the RS cannot be elected or vote for their national representative in the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH. Thus, according to some estimates, almost one third of the citizens of BiH are excluded from the electoral process for the aforementioned state authorities, which directly violates international democratic standards on the active and passive voting rights of citizens, which also, in accordance with the General Framework Agreement for Peace in BiH, represent an integral part of the constitutional system of BiH. The key issue is to find a constitutional model in which the civil concept shall not be threatened by collective national rights and vice versa. In this regard, the realisation of the sovereignty of the citizens of BiH, as well as the constituency of Bosniacs, Serbs, and Croats, must be ensured by the consistent realisation of their political rights, primarily through active and passive voting rights. The negation of the importance of the citizen of BiH, regardless of their "collective belonging", cannot lead to the construction and preservation of a stable and prosperous BiH society.

In conclusion, it can be stated that the actual application of the ECHR as a document with a supra-constitutional character in BiH would be a big step forward in the creation of a democratic state of BiH, capable of fulfilling all the functions of a modern state. At the same time, it would also mark considerable progress towards the increased security of BiH, which is a necessary condition for fulfilling its role in the protection of human rights as well as all other obligations in the creation of a modern economy and promotion of technology, democracy, and human rights.

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DEYANA MARCHEVA *

Protection of Human Rights under the European Convention on Human Rights: Bulgaria **

ABSTRACT: Bulgaria's accession to the Council of Europe in 1992 was a pivotal moment in the reaffirmation of constitutional democracy, the rule of law, and the protection of human rights in the country, following the collapse of the communist regime. The 1991 Constitution established a comprehensive framework of fundamental rights for citizens, aligning with the European Convention on Human Rights. However, it was the ECHR's framework and the progressive jurisprudence of the Strasbourg Court – renowned for its broad interpretation – that significantly bolstered human rights protections and advanced the Bulgarian legal system.

Despite facing challenges related to contentious issues and the prolonged non-implementation of various European Court of Human Rights rulings against Bulgaria for over a decade, the Convention has profoundly influenced the nation's legal landscape. Over time, the rights enshrined in the Convention have prompted nuanced changes in legal and policy outcomes, fostering a more rights-oriented approach in legislation and judicial decisions. This shift has contributed to a culture of governmental accountability and respect for individual rights. Nevertheless, progress has been hindered by societal attitudes, political resistance, and gaps in legal scholarship and education.

Today, the ECtHR serves as a crucial and independent authority on fundamental rights in Bulgaria, establishing standards for rights protection, adjudicating individual cases, and highlighting systemic deficiencies in Bulgarian legislation and practices. The country continues to struggle with implementation issues concerning contentious human rights matters, including privacy rights related to secret surveillance, voting rights for prisoners, LGBTQI rights, the rights of incapacitated persons, and the rights of the Macedonian minority. Tensions have also emerged between the ECtHR's jurisprudence and the rulings of the Constitutional Court,

* Ph.D., Associate Professor, Department of Law, New Bulgarian University, Sofia, Bulgaria. <https://orcid.org/0009-0000-1806-8028>, deyana.marcheva@gmail.com.

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particularly regarding the unconstitutionality of the Istanbul Convention. This discord has led to a growing disconnection between Bulgarian jurisprudence and supranational legal standards.

KEYWORDS: Bulgaria, implementation of the ECHR, systemic deficiencies, tensions between national courts and ECtHR.

1. Introduction

After World War II, Bulgaria aligned with the Soviet Union, adopting a totalitarian regime that claimed to champion superior human rights while suppressing genuine freedoms. During the Cold War, both the Eastern and Western blocs used human rights for propaganda, with Bulgaria promoting a narrative that socialist states provided true rights, contrasting with the alleged superficial liberties of the West. The socialist doctrine regarded international and domestic law as two independent legal orders without primacy for either system,¹ leading to ambiguities in the application of international law, especially concerning human rights. The position of the individual was determined by domestic law, not by international law,² and international human rights norms did not provide direct rights to individuals.³

After the collapse of the communist regime and adoption of the new democratic Constitution of the Republic of Bulgaria in 1991, human rights assumed renewed importance as a cornerstone for establishing the rule of law. A new principle regarding the relationship between international and domestic law was introduced in Article 5, paragraph 4, of the Constitution, stipulating that all ratified, promulgated, and enforced international instruments were incorporated into domestic law, taking precedence over parliamentary legislation. Furthermore, the Constitution emphasised the significance of international human rights treaties by empowering the Constitutional Court to evaluate the compatibility of national laws with generally recognised international norms and treaties to which Bulgaria is a party.

Integrating self-executing international norms into the domestic legal framework represented a significant paradigm shift in Bulgaria's approach

¹ Радойнов, [Radoynov] 1971, p. 72.

² Przetacznik, 1971, p. 269.

³ Векилов [Vekilov] et al., 1982, p. 266.

to human rights, marking a new era in their protection, especially following the country's ratification of the European Convention on Human Rights (ECHR).

2. Council of Europe Human Rights Treaties Signed and Ratified by Bulgaria

Bulgaria became a member of the Council of Europe on 7 May 1992, and has since signed and/or ratified several Council of Europe human rights treaties, as outlined in the table below.

Table 1 Council of Europe Human Rights Treaties signed and ratified by Bulgaria

Council of Europe Human Rights Treaties	Bulgaria's Signature	Bulgaria's Ratification	Entry Into Force for Bulgaria
1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocol Nos.1, 2, 3, 5, and 8	7 May 1992	7 Sept 1992	7 Sept 1992
• Protocol No. 4 (free movement, expulsion, etc.)	3 Nov 1993	4 Nov 2000	4 Nov 2000
• Protocol No. 6 (restriction of death penalty)	7 May 1999	29 Sept 1999	1 Oct 1999
• Protocol No. 7 (free movement, expulsion, etc.)	3 Nov 1993	4 Nov 2000	1 Feb 2001
• Protocol No. 11 (restructuring the control machinery) ⁴	3 Nov 1993	3 Nov 1994	1 Nov 1998
	11 May 1994	13 Feb 2003	1 July 2003
	21 Nov 2002	17 Nov 2005	1 June 2010
	23 Sept 2005	11 Jan 2016	1 Aug 2021
	5 Nov 2013		

⁴ Protocol No. 11 introduced significant modifications to enhance the efficiency of the control system, thereby improving access to the ECtHR. Prior to this protocol, states had

• Protocol No. 13 (complete abolition of death penalty) • Protocol No. 14 (amending the control system) • Protocol No. 15 (amending the convention, including reference to the principle of subsidiarity and the doctrine of margin of appreciation in the preamble, shortening the time limits of the application to the ECtHR, etc.)			
1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data	2 June 1998 2 June 2010 10 Oct 2018	18 Sept 2002 8 July 2010 10 Dec 2019	1 Jan 2003 1 Nov 2010

the option to ratify the Convention without acknowledging the jurisdiction of the Court. Complaints were initially reviewed by the Commission, which determined their admissibility and sought amicable resolutions. If no settlement was reached, the Commission would compile a report and could refer the case to the European Court of Human Rights. Protocol No. 11 allowed for direct applications to the Court and made its jurisdiction compulsory. Furthermore, this protocol restructured the Court into a full-time institution. By the time Bulgaria joined the Council of Europe, it was evident that there was no necessity for the country to sign or ratify Protocol Nos. 9 and 10, as these protocols had become obsolete following the implementation of Protocol No. 11 on 1 November 1998.

• 2001 Additional Protocol (regarding supervisory authorities and transborder data flows) • 2018 Protocol amending the Convention			
1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	30 Sep 1993	3 May 1994	1 Sept 1994
1992 European Convention on the Protection of the Archaeological Heritage	16 Jan 1992	2 June 1993	25 May 1995
1995 Framework Convention for the Protection of National Minorities	9 Oct 1997	7 May 1999	1 Sept 1999
1996 European Social Charter (revised)	21 Sep 1998	7 June 2000	1 Aug 2000
1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine)	31 May 2001	23 Apr 2003	1 Aug 2003
• 2002 Additional	23 Sept 2005	30 Oct 2006	1 Feb 2007
	23 Sept 2005	30 Oct 2006	1 Sept 2007

Protocol (concerning Transplantation of Organs and Tissues of Human Origin) • 2005 Additional Protocol (concerning Biomedical Research)			
2003 Convention on Contact Concerning Children	15 May 2003		
2005 Council of Europe Convention on Action against Trafficking in Human Beings	22 Nov 2006	17 Apr 2007	1 Feb 2008
2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	25 Oct 2007	15 Dec 2011	1 Apr 2012
2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)	21 Apr 2016		

Source: Author's own edition.

Bulgaria has yet to sign and ratify the following Council of Europe instruments: 1992 European Charter for Regional or Minority Languages, 1992 Convention on the Participation of Foreigners in Public Life at the Local Level, Protocol Nos. 12 and 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Additional Protocol to the

Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes, 2006 European Convention on the Exercise of Children's Rights, and 2008 European Convention on the Adoption of Children (revised).

The Istanbul Convention became a highly divisive political issue in Bulgaria in the process of its ratification, with the ultra-nationalist party "United Patriots" and the Bulgarian Socialist Party framing it as a gateway to recognising a "third gender" and legalising same-sex marriages.⁵ Consequently, 75 Members of Parliament submitted the Convention for preliminary constitutional review, leading the Constitutional Court to rule it unconstitutional, citing the terms "gender" and "gender identity" as ambiguous and unacceptable.⁶ In its decision, the Constitutional Court departed from its prior practice of cautiously interpreting rights by strictly adhering to the text of the Constitution, instead adopting an ideologically driven activist stance in defence of "traditional values".⁷ Political and academic debates surrounding the Istanbul Convention persist across various humanitarian fields, including linguistics, media, and more.⁸ However, legal scholars in Bulgaria seldom engage⁹ with this highly controversial topic, as it would require them to critique the rulings of the Constitutional Court.

3. Bulgaria's Accession to the Council of Europe

In August 1949, during the inaugural session of the Consultative Assembly of the Council of Europe,¹⁰ parliamentarians from the founding Member States¹¹ debated on how to reconstruct Europe. Amid these discussions, they decided to reserve several empty seats as a symbolic gesture to those

⁵ Марчева and Стайкова, [Marcheva and Staykova] 2024.

⁶ Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

⁷ Smilova, 2020.

⁸ Slavova, 2022; Kovacheva, 2023.

⁹ Марчева, [Marcheva] 2021; Тодорова, [Todorova] 2023.

¹⁰ The previous name of the Parliamentary Assembly of the Council of Europe was used until 1974.

¹¹ Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom, with Turkey and Greece.

European nations that could not be represented at that time.¹² This gesture uniquely addressed the growing East–West divide, marking one of the early political responses to the emerging tensions of the Cold War. It was an act of inclusion and hope for the reunification of the divided European family that carried significant weight, particularly from the perspective of Central and Eastern countries under Soviet influence. In retrospect, the reserved seats were interpreted in Bulgaria as a signal that the path to democracy and membership in the Council of Europe was open to any nation struggling with a totalitarian regime and striving to embrace the principles of democracy, the rule of law, and human rights.¹³

In September 1989, the Council of Europe established special guest status with the Parliamentary Assembly (PACE) to support and encourage democratisation in Central and Eastern European countries. Bulgaria promptly took advantage of this opportunity, submitting its application on 4 December 1989, to establish a framework for cooperation as soon as possible.¹⁴

The Bulgarian Communist Party relinquished its monopoly on power, initiating the country's transition to a multi-party democracy through the Round Table negotiations (3 January–14 May 1990).¹⁵

In June 1990, Bulgaria held its first free elections in over four decades, leading to the establishment of the Seventh Grand National Assembly, which adopted the new democratic Constitution in 1991. The PACE observer mission concluded that 'in the circumstances, the conduct of the elections was reasonably free and fair'.¹⁶

On 3 July 1990, PACE granted Bulgaria special guest status at both

¹² Consultative Assembly, Council of Europe, Motion for a resolution, Doc. 7, 21 August 1949.

¹³ Тошев, [Toshev] 2022.

¹⁴ See point 1.3. in PACE Doc. 6598/16 April 1992. Opinion on the application of the Republic of Bulgaria for membership of the Council of Europe (Rapporteur: Mr. Columberg, Switzerland, Christian Democrat), [Online]. Available at: <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6925&lang=EN> (Accessed: 7 August 2024).

¹⁵ Bulgaria's Round Table provided a framework for political negotiations between the Communist government and the emerging democratic opposition following the fall of the communist regime. It was inspired by similar models in other Central and Eastern European countries, including Poland (February–April 1989), Hungary (March–October 1989), Czechoslovakia (November–December 1989), and East Germany (December 1989–February 1990).

¹⁶ See point 3.1 in PACE Doc. 6598/16 April 1992.

parliamentary and intergovernmental levels. The first democratically elected parliament, the Grand National Assembly, sent a Bulgarian delegation to the Parliamentary Assembly of the Council of Europe.¹⁷

On 31 January 1991, Bulgarian President Zhelyu Zhelev delivered a speech to the PACE, outlining Bulgaria's significant strides towards democracy and the enhancement of human rights. He emphasised the country's willingness and readiness to collaborate closely with the institutions of the Council of Europe.¹⁸ Bulgarian institutions began preparing for the country's accession to the Council of Europe, holding numerous productive meetings, which resulted in Bulgaria signing several European Conventions in 1991.¹⁹

PACE delegations observed the parliamentary and local elections held in October 1991, as well as the presidential elections in January 1992. They reported no significant instances of fraud or malpractice favouring any political party, confirming that Bulgaria had met one of the conditions for its accession to the Council of Europe.

The Parliamentary Assembly of the Council of Europe evaluated Bulgaria's application, monitoring its progress in judicial independence and human rights protections. In its Opinion dated 16 April 1992, the Committee on Legal Affairs and Human Rights emphasised that Article 5, paragraph 4, of the 1991 Constitution provided the means to enforce the rule of law by prioritising international law over conflicting provisions of domestic legislation. Acknowledging the challenges of transitioning from a totalitarian state to a democratic system, the Committee confirmed that Bulgaria fulfilled all the conditions required for membership in the Council of Europe.²⁰

In another Opinion dated 4 May 1992, the Political Affairs Committee recognised Bulgaria's significant economic problems and lagging economic

¹⁷ Тошев, [Toshev] 2022, pp. 20-21.

¹⁸ Zhelyu Zhelev's Speech made to the Assembly, 31 January 1991, [Online]. Available at: <https://assembly.coe.int/nw/xml/Speeches/Speech-XML2HTML-EN.asp?SpeechID=255> (Accessed: 7 August 2024).

¹⁹ On 31 January 1991, Bulgaria signed the European Convention on Information on Foreign Law, the European Convention on the Protection of the Archaeological Heritage, the Additional Protocol to the European Convention on Information on Foreign Law, the Convention on the Conservation of European Wildlife and Natural Habitats, and the Convention for the Protection of the Architectural Heritage of Europe, and on 2 September 1991, the European Cultural Convention.

²⁰ See Conclusion in PACE Doc. 6598/16 April 1992.

reform.²¹ However, it highlighted the positive aspects of Bulgaria's pluralist democracy, including the depoliticisation of the army, police, courts, and civil service; the establishment of a free press; and new freedoms of movement and choice of religion. The Committee concluded that as encouragement for further political and economic improvement, and as a crucial step towards joining the community of European nations, PACE should endorse Bulgaria's acceptance as a full member of the Council of Europe at the earliest opportunity.

As a result of demonstrating sufficient progress, Bulgaria was invited to join the Council of Europe and officially became a member on 7 May 1992. On that day, the country signed the ECHR and Stefan Savov, the President of the Bulgarian National Assembly, addressed the Parliamentary Assembly, expressing his confidence that Bulgaria's membership would significantly bolster the country's future democratic development and the protection of human rights.

On 31 July 1992, the National Assembly ratified the ECHR, with the act published in State Gazette No. 66 on 14 August 1992. During parliamentary debates on the ratification, a proposal was made to postpone the ECHR's entry into force by six months to allow institutions time to prepare for their new roles in upholding the Convention's rights and obligations. However, the debate quickly evolved into a political contest, with parties vying to demonstrate greater support for the swift implementation of the ECHR in Bulgaria.²² This shift redirected the focus from practical preparations to a symbolic commitment to human rights. Consequently, the proponents of the standstill period withdrew their proposal, leading to the ratification law taking immediate effect upon promulgation. Nonetheless, a technicality delayed the entry into force of the ECHR until 7 September 1992, because the initial publication of the ratification act in the State Gazette did not include an official translation into Bulgarian.

Bulgaria's entry into the Council of Europe marked a significant milestone in its overall integration into European and transatlantic frameworks, which subsequently encompassed its accession to the North

²¹ PACE Doc. 6597/4 May 1992. Opinion on the application of the Republic of Bulgaria for membership of the Council of Europe (Rapporteur: Mr. Rathbone, United Kingdom, Conservative), [Online]. Available at: <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6924&lang=EN> (Accessed: 7 August 2024).

²² Михайлова, [Mihaylova], 2022, p. 103.

Atlantic Treaty Organization (NATO) in 2004 and the European Union in 2007. Following its accession, the Council of Europe continued to oversee Bulgaria's commitment to upholding democratic principles and the rule of law. The European Court of Human Rights (ECtHR) has been instrumental in shaping Bulgaria's legal framework and judicial decisions regarding human rights protection.

4. Implementation of the ECHR in Bulgaria

The Constitution of the Republic of Bulgaria was adopted on 12 July 1991, a year before the country ratified the ECHR. In a documentary interview, Emilia Drumeva, a professor of constitutional law and an expert involved in drafting the Constitution – particularly the second chapter, “Fundamental Rights and Duties of Citizens” – noted that these constitutional provisions were closely aligned with the ECHR.²³

However, the human rights catalogue in the new democratic Constitution was not substantially different from those in the socialist Constitutions of 1947 and 1971. What truly advanced the protection of human rights and propelled the Bulgarian legal system forward was the framework of the ECHR and the sophisticated jurisprudence of the Strasbourg Court, renowned for its broad scope and progressive approach.²⁴ Today, the ECtHR functions as a vital and independent authority on fundamental rights in Bulgaria, setting standards for rights protection, delivering justice in individual cases, and exposing systemic deficiencies in Bulgarian legislation and practices.

From the outset of parliamentary debates on ratifying the ECHR, it was evident that effective implementation would require substantial reforms in domestic legislation, as well as restructuring and training within the justice system and public administration.²⁵ In 2003, the National Assembly amended the constitution and adopted new legislation to establish the Ombudsman institution, aligning its human rights protection framework with earlier recommendations from the Committee of Ministers of the Council of Europe.²⁶ In 2012, this legislation was further strengthened by

²³ Марчева, [Marcheva], 2024, p. 108.

²⁴ Keller and Stone, 2008, p. 3; Christoffersen and Madsen, 2011.

²⁵ Михайлова, [Mihaylova] 2022, p. 102.

²⁶ CM/Rec (85)13 on the Institution of the Ombudsman, [Online]. Available at: <https://rm.coe.int/0900001680506bee> (Accessed: 10 August 2024).

designating the Ombudsman as the National Preventive Mechanism, thereby enhancing the legal safeguards for prisoners and detainees against torture and inhumane or degrading treatment.

Over time, the rights enshrined in the Convention have driven numerous subtle changes in legal and policy outcomes. The jurisprudence of the ECtHR has significantly shaped Bulgaria's legislative, executive, and judicial branches, with varying degrees of impact across different legal domains. Its effects continue to deepen and evolve, sometimes resulting in tensions between Bulgarian authorities and the Council of Europe institutions. In the last decade, legal education and scholarship have also progressed in ways that will help consolidate the domestic presence and legitimacy of the ECHR regime. Building on the concept of "mechanisms of reception" coined by Keller and Stone,²⁷ I outline the key aspects of the complex social process through which the ECHR has influenced Bulgaria's national legal system and examine the progress and setbacks in its reception within the country.

4.1. Impact of the ECHR on Legislation

4.1.1. Supra-Legislative Rank of the ECHR in Bulgarian Law

Following the establishment of a new constitutional framework that integrated international agreements into national law and prioritised them over parliamentary legislation, the ECHR has been conferred supra-legislative status within the national legal system. This new paradigm enabled public administration and judges to enforce it directly. Furthermore, the Constitutional Court was empowered to ensure that national laws align with ratified international treaties, underscoring the importance of human rights in the newly established democratic system. This integration of self-executing international norms marked a major shift in Bulgaria's approach to human rights.

Consequently, the 1991 Constitution allowed for "a more monist approach"²⁸ to the ECHR, paving the way for more robust mechanisms to integrate the Convention into the national legal order. However, more than two and a half decades after the ratification of the ECHR, the country still had not reformed its legislative process to ensure full compliance with

²⁷ Keller and Stone, 2008, p. 4.

²⁸ Ibid, p. 20.

human rights standards. During this time, the ECtHR issued numerous judgments against Bulgaria.

In late 2016, the legislative process in Parliament underwent reform. The Council of Ministers was mandated to include an ECHR compliance review, prepared by the Ministry of Justice when submitting draft laws. Consequently, all draft laws from Government Ministries are now systematically evaluated for conformity with the ECHR and the case law of the ECtHR. However, this safeguard does not extend to draft laws introduced by Members of Parliament, creating a significant loophole. This gap has been exploited on several occasions, particularly with controversial legislation. The most recent instance occurred on 7 August 2024, when amendments to the Pre-School and School Education Act were adopted. These amendments imposed a ban on ‘propaganda, popularization, and incitement, in any form, directly or indirectly, of ideas and views related to non-traditional homosexual orientation or gender identity determination other than biological’.²⁹

In recent years, ECHR compliance reviews of government-proposed draft laws have not generated significant public debates in Parliament. Consequently, important discussions regarding the alignment of the proposals with human rights standards have largely taken place within the executive branch during the drafting phase, before being made public. It is noteworthy that public administration seldom references ratified international instruments in its legislative and law enforcement practices.

After ratifying the ECHR in 1992, Bulgaria initiated major legislative reforms in the mid-1990s to enhance judicial independence and ensure the right to an independent and impartial court. Despite several constitutional reforms³⁰ and numerous legislative amendments, this area has continued to be the Achilles’ heel of Bulgaria’s constitutional and legal system.

²⁹ Article 11, paragraph 2, point 3 in conjunction with § 1, point 16 of the Additional Provisions of the Pre-School and School Education Act (Prom, SG 69/16.08.2024).

³⁰ Five of the six amendments to the Bulgarian Constitution pertain to the judiciary. The amendments in 2003 and 2015 focused exclusively on the status of judges, prosecutors, and the Supreme Judicial Council. The amendments in 2006, 2007, and 2023, while primarily centred on judicial reform, also addressed broader issues such as the status of the members of parliament and the powers of the parliament (2006, 2007), local authorities (2007), and the caretaker government (2023), among others.

4.1.2. Death Penalty Abolishment

The ECHR was crucial in Bulgaria's decision to abolish the death penalty. The last executions of individuals sentenced to capital punishment took place in November 1989. Following a *de facto* moratorium on executions, the Grand National Assembly formally decided on 20 July 1990 to suspend the execution of death sentences. On 10 January 1991, a group of parliament members introduced a bill proposing an amendment to the constitution to abolish the death penalty.³¹ However, the bill was not adopted, and capital punishment remained in the legislation. Courts continued to impose death sentences and uphold existing ones on appeal, although the execution of these sentences was suspended.

Although Bulgaria did not formally pledge to eliminate the death penalty when it became a member of the Council of Europe, such a commitment was implied in the broader obligation to adhere to Article 3 of the Statute of the Council of Europe.

On 10 December 1998, the Parliament officially abolished the death penalty, replacing it with life imprisonment without the possibility of parole. Subsequently, on 29 September 1999, Bulgaria ratified Protocol No. 6 to the Convention.

4.1.3. Minority Rights Reforms

In 1998, Bulgaria implemented reforms in educational laws aimed at ensuring that minority children could receive instruction in their mother tongue, thereby facilitating the integration of minority groups into the Bulgarian education system. Additionally, a new Radio and Television Act was enacted that year, allowing media operators to broadcast programs specifically tailored for Bulgarian citizens whose first language was not Bulgarian.

In 1999, Bulgaria ratified the Council of Europe's Framework Convention for the Protection of National Minorities, thus committing to uphold the rights of national minorities. This ratification sparked significant political controversies, the effects of which continue to resonate in judicial practices, policy developments, and societal attitudes. Despite these challenges, the convention is regarded as a vital instrument for promoting and protecting minority rights.

³¹ Гръев, [Gruev], 1998, p. 178.

In 2002, the Bulgarian Parliament adopted the Religion Act, which replaced the 1949 Religious Denominations Act. This new legislation established a legal framework for religious freedom, ensuring individuals the right to practice their religion freely – a provision that was particularly significant for the Muslim minority.

In 2003, Bulgaria made a notable advancement in aligning with European human rights standards by enacting the Protection Against Discrimination Act. This law expanded the definition of discrimination to include indirect discrimination, and established the Commission for Protection Against Discrimination, a dedicated state body responsible for enforcing the law. This legislation underscored Bulgaria's commitment to the principles of equality and non-discrimination as outlined in the ECHR.

4.1.4. Reforms in Proceedings to Reflect ECtHR Judgments

Bulgaria reformed its legislative frameworks for civil, criminal, and administrative proceedings to align with the ECtHR judgments against the country. In 1997, the Civil Procedure Code was amended to include a provision allowing for the revocation of a final civil court judgment if the ECtHR found a violation of the ECHR.³² The following year, the Criminal Procedure Code was revised to permit the reopening of closed criminal cases in response to “critically significant” violations identified by the ECtHR.³³ These provisions were reaffirmed in the revised Criminal Procedure Code of 2005 and the Civil Procedure Code of 2007, ensuring the ongoing ability to revive closed cases based on ECtHR decisions.³⁴ Additionally, the first Bulgarian Administrative Procedure Code of 2006 established that an ECtHR judgment confirming a violation of the Convention served as grounds for reopening closed administrative cases involving final administrative acts or court judgments.³⁵

³² Article 231, letter “h” [in Cyrillic “з”] of Civil Procedure Code (Prom. OG. 12/8.02.1952, repealed).

Article 303, paragraph 1, point 7 of the Civil Procedure Code (Prom. SG. 59/20.07.2007).

³³ Article 362, paragraph 1, point 4 of Criminal Procedure Code (Prom. SG. 89/15.11.1974, repealed).

³⁴ See Article 422, paragraph 1, point 5 of Criminal Procedure Code (Prom. SG. 86/28.10.2005) and Article 303, paragraph 1, point 7 of Civil Procedure Code (Prom. SG. 59/20.07.2007).

³⁵ See Article 99, point 7 of Administrative Procedure Code (Prom. SG. 30/11.04.2006).

4.1.5. Revision in the Criminal Procedure to Align with ECtHR Rulings

Bulgaria has undertaken several reforms to align its criminal proceedings with the standards set by the ECtHR. The Criminal Procedure Code has undergone several revisions since the 1990s, demonstrating a dedication to improving the fairness and integrity of the criminal justice system.

In 1993, reforms were initiated to strengthen the position of the defence, ensuring fairer trials. The following year, 1994, clearer regulations regarding pre-trial detention were established, aimed at safeguarding individual rights. By 1997, the rights of the accused were further enhanced, notably through the introduction of plea bargaining, which allowed for expedited trials and reduced sentences in exchange for guilty pleas. These changes were largely influenced by early ECtHR cases involving Bulgaria, particularly the landmark case *Lukanov v. Bulgaria*,³⁶ where the court found that the detention of a former Prime Minister lacked a sufficient legal basis, rendering it arbitrary and devoid of necessary safeguards.

In response to the ECtHR ruling in *Assenov and Others v. Bulgaria*,³⁷ the Bulgarian Parliament enacted reforms to rectify identified violations. The 1999 amendments to the Code of Criminal Procedure instituted judicial oversight for pre-trial detention, ensuring that only a court could authorise such measures, thereby addressing the issues that contributed to previous violations.

Following the judgment in *Velikova v. Bulgaria*,³⁸ significant reforms were implemented to enhance police oversight and accountability, particularly in relation to police brutality. The Ministry of Interior revised its regulations to establish clearer guidelines on the use of force, emphasising the principles of necessity and proportionality. These reforms aimed to improve the investigation and prosecution of police misconduct cases. Additionally, measures were introduced to ensure thorough and independent investigations into deaths occurring in police custody, which included stricter protocols for documenting injuries and circumstances surrounding such deaths, as well as the involvement of independent bodies in the investigation process to enhance transparency and accountability.

Despite modifications to the legal framework, violations of the ECHR continued in similar cases, leading to ongoing enhanced supervision of the

³⁶ *Case of Lukanov v. Bulgaria*, App. No. 21915/93, 20 March 1997, § 42.

³⁷ *Case of Assenov and Others v. Bulgaria*, App. No. 24760/94, 28 October 1998, § 102.

³⁸ *Case of Velikova v. Bulgaria*, App. No. 41488/98, 18 May 2000.

Velikova group, which remains in effect today. In the decisions from December 2023, the Committee of Ministers commended the significant legislative reforms introduced that year, particularly the right to appeal a refusal to open a criminal investigation, while noting that the practical application of these reforms still needed assessment.³⁹

Bulgarian authorities were urged to criminalise the extortion of confessions from suspects who have not yet been formally charged. Furthermore, there was a recommendation for the systematic use of video recordings during interrogations.⁴⁰ There remains an ongoing necessity for specific actions that guarantee detainees receive prompt access to legal counsel; notification of a third party; as well as timely, confidential, and precise medical examinations.⁴¹ The Committee of Ministers has urged the Government to consider various tangible measures to ensure that detainees are evaluated by appropriately trained medical professionals who possess both formal qualifications and practical independence. It is also imperative that doctors in correctional facilities are mandated to report any injuries discovered directly to a prosecutor, among other responsibilities. The 2023 legislative reforms in Bulgaria marked a significant progress, resulting in the closure of supervision on the Velikova case.⁴² The group of cases under enhanced supervision has been renamed to the new leading case “Dimitrov and Others”. This group continues to address issues related to deaths; ill-treatment; and the lack of timely medical assistance during arrest, police detention, or in places of deprivation of liberty; as well as the absence of effective investigations into these matters.⁴³

4.2. Impact of the ECHR on the Executive Branch

The Directorate for Legal Representation of the Republic of Bulgaria before the ECtHR is a specialised administrative unit within the Ministry of Justice, established to oversee the state’s legal representation in proceedings before the Court. Its primary responsibilities include preparing and defending Bulgaria’s position in cases concerning allegations of human rights violations, negotiating amicable settlements with opposing parties,

³⁹ CM/Del/Dec(2023)1483/H46-11, point 4.

⁴⁰ Ibid, point 5.

⁴¹ Ibid, point 6.

⁴² See 17 Annual Report of the Committee of Ministers “Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2023,” p. 13. [Online]. Available at <https://rm.coe.int/annual-report-2023/1680af6e81> (Accessed: 12 August 2024).

⁴³ CM/Del/Dec(2025)1531/H46-10, point 1.

and drafting agreements for approval by the Council of Ministers.

The Directorate is also tasked with implementing finalised ECtHR decisions. Over the years, it has played an important role in coordinating the execution of these judgments, ensuring that necessary reforms – such as legislative changes and administrative improvements – are enacted to comply with the Court’s rulings. The Directorate also analyses violations of the ECHR and formulates proposals for specific measures, including legislative changes, to address these violations. Its advisory role is critical in shaping legislative initiatives aimed at preventing future human rights infringements and aligning national laws with European standards. The Directorate’s staff actively study and disseminate ECtHR case law, fostering a deeper understanding and application of these legal principles.

In 2012, the Parliament mandated the Council of Ministers to present an annual summary report on the implementation of ECtHR judgments against Bulgaria.⁴⁴ Since then, the Directorate has initiated several projects focused on capacity building and establishing a clear legal framework for fulfilling Bulgaria’s positive obligations under the ECHR, including delineating responsibilities within the government and setting clear procedures for their execution.

In 2020, the Directorate launched a project titled “Enhancing the National Capacity for Effective Implementation of the Judgments of the European Court of Human Rights”.⁴⁵ As part of this initiative, it developed a campaign to promote human rights education in Bulgarian universities. In 2022, the Council of Ministers adopted a regulation making “Human Rights Protection” a compulsory subject in higher legal education.⁴⁶ Another key aspect of the 2020 project involved analysing the barriers to effective implementation of ECtHR judgments, with the goal of improving mechanisms through engagement with relevant institutions. In April 2024, the Ministry of Justice announced the preparation of a draft regulation to establish a National Coordination Mechanism for the effective implementation of ECtHR judgments.

To enhance access to human rights law materials, the Directorate also

⁴⁴ Resolution of the National Assembly, adopted on 21 September 2012, Prom. SG. 74/2012.

⁴⁵ See: <https://eeagrants.org/archive/2014-2021/projects/BG-JUSTICE-0005> (Accessed: 11 August 2024).

⁴⁶ Regulation on the Unified State Requirements for the Acquisition of Higher Education in the Specialty “Law” and the Professional Qualification “Lawyer”, adopted by Decree of the Council of Ministers No. 165 of 12.07.2022 (Prom. SG 55/15.07.2022).

launched an online platform featuring translated ECtHR judgments in cases against Bulgaria.⁴⁷ It has also begun translating ECHR law textbooks and commentaries⁴⁸ into Bulgarian, distributing these resources to judges, lawyers, and academics.

4.3. Impact of the ECHR on the Judiciary

The 1991 Constitution granted the judiciary a fundamental role in human rights protection.⁴⁹ However, Bulgaria's legal framework has always lacked a key mechanism: the individual constitutional complaint. In parallel, the ECHR has enhanced judicial authority vis-à-vis the legislative and executive branches across all Member States of the Council of Europe.⁵⁰

4.3.1. How the Absence of Individual Constitutional Complaints Has Driven Reliance on the ECtHR

The 1991 Constitution restricted access to the Constitutional Court to a limited number of institutions, including one-fifth of the Members of Parliament, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, and the Chief Prosecutor. In 2006, the Ombudsman was granted the right to challenge laws before the Constitutional Court, followed by the Supreme Bar Council in 2015, but only on the grounds that such laws violated citizens' constitutional rights and freedoms. Notably, they were not allowed to contest parliamentary legislation based on inconsistencies with human rights instruments ratified by Bulgaria.

The constitutional reform enacted in 2023 expanded the capacity of all courts to refer cases to the Constitutional Court if they found that relevant parliamentary legislation was unconstitutional.⁵¹ While this development holds promise for strengthening human rights protections, it remains

⁴⁷ See: <https://mjs.bg/home/index/48312690-3f31-497b-88ba-3ee5e458e500> (Accessed: 11 August 2024).

⁴⁸ For instance, in 2015, the Bulgarian translation of the third edition of Harris, O'Boyle, and Warbrick's "Law of the European Convention on Human Rights" (2014) was published. Similarly, in 2024, the Bulgarian translation of the eighth edition of Jacobs, White, and Ovey's "The European Convention on Human Rights" (2020) was released.

⁴⁹ Article 117, paragraph 1 of the Constitution of the Republic of Bulgaria.

⁵⁰ Keller and Stone, 2008, p. 21.

⁵¹ Before the 2023 constitutional reform, only panels of the Supreme Court of Cassation and the Supreme Administrative Court could refer such matters to the Constitutional Court.

uncertain how national judges will implement this new avenue.

Prior to 2023, Bulgarian judges had to rely primarily on the ECHR and its superior legal status to safeguard human rights against conflicting national laws. However, this approach proved inadequate for overturning problematic legislation.

The lack of individual constitutional complaints has significantly limited the ability of citizens and legal entities to directly challenge the constitutionality of laws and actions affecting them, thereby restricting their access to constitutional remedies. Without this mechanism, Bulgarians have to navigate other, often more complex and indirect, legal routes to address potential human rights violations. These alternatives can lead to protracted judicial processes that may not provide timely or satisfactory relief.

4.3.2. Increased References to the ECHR in Bulgarian Case Law

Over the past two decades, significant efforts have been made to enhance Bulgarian judges' awareness and understanding of the ECHR and the jurisprudence of the ECtHR. Judicial training programs, workshops, and seminars focused on human rights have equipped judges with the knowledge to apply the ECHR more effectively in their rulings. Established in 2003, the National Institute of Justice, which is responsible for the professional training of judges and prosecutors,⁵² has collaborated closely with the Ministry of Justice, particularly the Directorate for Legal Representation of Bulgaria before the ECtHR, to develop a comprehensive training approach.⁵³ This approach includes not only occasional workshops and training sessions⁵⁴ but also a mandatory ECHR law course for junior judges. To further demonstrate its commitment to human rights education, the National Institute of Justice has created the Human Rights Forum – a

⁵² See <https://nij.bg/en> (Accessed: 10 August 2024).

⁵³ For example, the project “Enhancing the Capacity of the Judiciary and Training on the European Convention for the Protection of Human Rights and Fundamental Freedoms at the NIJ”, which began in February 2013 and spanned three years, aimed to strengthen the competencies of national courts and the Prosecution Office of the Republic of Bulgaria. The project focused on improving the interpretation and application of national legislation in alignment with the principles and standards set by the ECHR and the case law of the ECtHR. [Online]. Available at: <https://www.nfm7-nij.bg/en/continuity/> (Accessed: 10 August 2024)-

⁵⁴ For instance, the National Institute of Justice conducted three sessions of the Human Rights Forum on 3 May 2023, 26 June 2023, and 5 April 2024.

platform for exchanging up-to-date information, professional knowledge, and experience in these areas.

As Bulgarian courts lack the authority to directly overturn unconstitutional legislation, they often resort to an alternative method for protecting fundamental rights through a form of “conventionality” control.⁵⁵ As Bulgarian citizens have become increasingly aware of their rights under the ECHR, there has been a rise in human rights-related litigation, prompting the judiciary to engage more deeply with the Convention and reference it more frequently in case law. In the absence of a robust system of rights and judicial review, the ECHR has effectively filled the gap, serving as a substitute for constitutional rights.

Over the years, references to the ECHR in Bulgarian case law have significantly increased, with a growing number of decisions grounded in ECtHR jurisprudence. Adverse rulings against Bulgaria by the ECtHR have highlighted the need for better integration of ECHR principles into national law, encouraging judges to consistently reference the Convention to avoid similar outcomes.

Bulgarian judges have begun to shift their approach to interpreting and enforcing human rights, placing greater emphasis on the availability of effective remedies. Some judges have even invoked the well-known phrase from ECtHR case law,⁵⁶ emphasising that the Convention is intended to guarantee ‘not theoretical or illusory rights, but rights that are practical and effective’.⁵⁷

The term “effective remedies” first gained prominence in Bulgarian case law following a series of ECtHR judgments that underscored the excessive length of procedures and other deficiencies within the legal system.⁵⁸ The pilot judgment in *Neshkov v. Bulgaria*⁵⁹ was particularly

⁵⁵ Ibid, p. 144.

⁵⁶ See *Case of Airey v. Ireland*, App. No. 6289/73, 09 October 1979. This case is one of the earliest instances where the Court articulated this principle, emphasising that the rights guaranteed by the ECHR must be effective in practice, not just in theory.

⁵⁷ This phrase was first cited in the case law of the Supreme Cassation Court - Decision No. 548 of 4 March 2009 r., Criminal Case No. 553/2008, Supreme Cassation Court, Second Criminal Division, Criminal College. It gained popularity and was subsequently cited in case law by the Supreme Administrative Court and numerous first-instance courts in Bulgaria.

⁵⁸ For example, *Case of Anguelova v. Bulgaria*, App. No. 38361/97, 13 June 2002; *Case of Vachev v. Bulgaria*, App. No. 42987/98, 08 July 2004; *Case of Djangozov v. Bulgaria*, App. No. 45950/99, 08 July 2004; *Case of Dimitrov v. Bulgaria*, App. No. 47829/99, 23 September 2004; *Case of Rachevi v. Bulgaria*, App. No. 47877/99, 23 December 2004;

significant, highlighting systemic issues in Bulgarian prisons, including inhuman and degrading treatment due to poor conditions, overcrowding, and the absence of effective legal remedies. The lack of such remedies was also a major concern in the *S.Z. group/Kolevi* group of cases under enhanced supervision, addressing the broader structural problem of ineffective criminal investigations in Bulgaria.⁶⁰

In the past 15 years, references to the presence or absence of effective remedies have increased substantially in Bulgarian case law. However, the proportionality test of the ECtHR, which is applied in cases involving a state's margin of appreciation, has yet to be fully integrated into Bulgarian jurisprudence. Judges rarely use this standard when addressing *ultra vires* claims, typically referencing it only when citing ECtHR judgments. Incorporating the proportionality test into case law would enhance the judges' authority over state actions, by requiring more rigorous justification and assessment. Experience in other Member States suggests that thus "Europeanised", the powers of domestic judges could be enriched,⁶¹ making them more effective in protecting human rights.

4.3.3. Tensions between Bulgarian Courts and the ECtHR on Contentious Issues

As national judges accumulate experience in human rights adjudication, the Convention tends to gain stronger traction within the national legal framework. However, in some contentious cases in Bulgaria, particularly those related to LGBTIQ rights, a contrary trend seems to emerge.

Case of Kolev v. Bulgaria, App. No. 50326/99, 28 April 2005; *Case of Ivanovi and others v. Bulgaria*, App. No. 46336/99, 24 November 2005; *Case of Radoslav Popov v. Bulgaria*, App. No. 48137/99, 01 December 2005, among others.

⁵⁹ *Case of Neshkov and Others v. Bulgaria*, App. Nos. 36925/10, 21487/12, 72893/12, 50297/12, 53363/13, 18923/14, 27 January 2015.

⁶⁰ *S.Z. group / Case of Kolevi v. Bulgaria*, App. Nos. 29263/12 and 1108/02, 05 November 2009. See CM/Del/Dec(2018)1310/H46-5; CM/Del/Dec(2019)1340/H46-5; CM/Del/Dec(2020)1377bis/H46-9; CM/Del/Dec(2021)1419/H46-8; CM/Del/Dec(2022)1436/H46-6; CM/Del/Dec(2023)1459/H46-5; M/Del/Dec(2023)1475/H46-12; CM/Del/Dec(2023)1483/H46-10; CM/Del/Dec(2024)1501/H46-10.

⁶¹ Keller and Stone, 2008, p. 148.

A) Reversal of Long-Standing Human Rights Protections

A notable example of this tension is Interpretative Decision No. 2/2023 by the General Assembly of the Civil College of the Supreme Cassation Court. In this decision, the majority of civil judges⁶² concluded that the incorporation of the ECHR, particularly Article 8, into the national legal order does not imply that all provisions of the Convention are directly applicable or “self-executing”.

In essence, this means that the Convention does not automatically create rights for citizens or impose obligations on the Republic of Bulgaria without corresponding national legislation.

Although such judicial interpretations that limit the scope of the Convention’s norms and deny their inherent direct effect are rare, they highlight the tension between national courts and the ECtHR on controversial issues. The Supreme Cassation Court ultimately ruled that current Bulgarian law did not permit judicial authorisation for changes to the sex, name, or uniform civil number in the civil status records of applicants who identify as transgender.

This interpretative decision marked a significant reversal of over 30 years of Bulgarian case law that had previously allowed transgender and intersex individuals to legally change their sex on ID documents upon presenting sufficient medical evidence. The shift was notably opposed by 21 dissenting judges, who cited two ECtHR cases – *Y.T. v. Bulgaria*⁶³ and *P.H. v. Bulgaria*⁶⁴ – which are under enhanced supervision. During its meeting from 19 to 21 September 2023, the Committee of Ministers discussed the developments in Bulgaria regarding these cases and expressed deep concern over the 2023 Interpretative decision by the Supreme Court of Cassation. The Committee remarked that this ruling has significantly heightened uncertainty for affected individuals and could lead to further human rights violations.

B) Selective and Formal Reference to ECtHR Case Law Against Its Spirit

A troubling pattern is emerging in Bulgarian courts, where judges formally reference ECtHR jurisprudence to demonstrate familiarity but ultimately issue rulings that contradict its logic and spirit. A notable example is the

⁶² The majority of 28 civil judges prevailed over 21 who remained in the minority and signed the dissenting opinion.

⁶³ *Case of Y.T. v. Bulgaria*, App. No. 41701/16, 09 July 2020.

⁶⁴ *Case of P.H. v. Bulgaria*, App. No. 46509/20, 27 September 2022.

Supreme Administrative Court's final decision in an anti-discrimination case involving rock singer Milena Slavova. In June 2021, Slavova posted about "Sofia Pride 2021" on her widely followed Facebook profile, referring to participants in gay parades as "perverts" and contrasting them with "people". She was subsequently sued for discriminatory harassment. The first-instance administrative court ruled against her, emphasising that her statements deliberately stigmatised gay individuals and cited the ECHR to discuss the balance between the right to free expression and the right to respect for individual dignity.

However, the Supreme Administrative Court overturned this judgment, arguing that Slavova's remarks targeted "individual participants" in Sofia Pride 2021 rather than "all people who self-identify as having a homosexual orientation". This reasoning obscured and dismissed the first-instance court's finding that she intended to "stigmatise", "belittle", and "incite a negative societal attitude" towards those with a homosexual orientation. The Supreme Administrative Court contended that Slavova's social standing did not imply any official public power that could influence the regulation or prohibition of Sofia Pride. This argument was based on ECtHR case law concerning the mayors of Moscow and Warsaw, who also made public statements against gay parades.⁶⁵ The Court asserted that only statements made by individuals in positions of power, or those aspiring to such roles, could be deemed relevant to discriminatory harassment. This perspective overlooked the significant influence public figures can have on societal perceptions and stereotypes. By selectively and narrowly interpreting ECtHR jurisprudence, the Supreme Administrative Court concluded that the singer's statements were not discriminatory.

In summary, while Bulgarian judges have made strides in their understanding of ECHR law and ECtHR jurisprudence, the domestic legal system still falls short of providing human rights protection that aligns with international standards. Many Bulgarians view the Strasbourg Court as their only hope for adequate protection and redress against human rights violations. However, this process can be time-consuming and may not effectively address issues within the national context.

⁶⁵ See *Case of Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09, 21 October 2010; *Case of Bączkowski and Others v. Poland*, App. No. 1543/06, 03 May 2007.

4.4. ECHR Law and Bulgarian Legal Education and Scholarship

In Bulgaria, the principles upheld by the ECtHR have recently come under considerable pressure due to various challenges, including a crisis of liberal democracy, the Constitutional Court's ideological shift towards "traditional values", widespread anti-gender propaganda, and reactionary responses across all branches of power. Despite the progress made over the past 30 years, it is evident that the rights and obligations safeguarded by the ECHR remain vulnerable.

In this context, the contributions of Bulgarian legal scholarship have been insufficient in establishing a conceptual framework for institutions aimed at upholding the principles of democracy, rule of law, and human rights. Although the Ministry of Justice has made efforts to engage legal academics in promoting and developing human rights protection courses, particularly those focusing on ECHR law, most universities have not introduced substantial research initiatives or made significant changes to their curricula.

At many universities, the newly mandated legal education course has been designed as a lecture-only program, lacking accompanying seminars.⁶⁶ The course content is divided among lecturers specialising in legal theory, constitutional law, EU law, and international law, allowing them to merely extend their existing lectures on horizontal human rights education, supplemented with select ECtHR case law on specific rights.⁶⁷ The first published textbooks have also adhered to this structure.⁶⁸ However, this approach fails to provide students with a comprehensive understanding of the interaction between various human rights protection mechanisms or to deepen their knowledge and competencies in ECHR law and ECtHR jurisprudence.

Most legal academic approaches to human rights in Bulgaria predominantly focus on the formal interpretation of statutory provisions and case law, with limited engagement in critical analysis.⁶⁹ This tendency is rooted in the legacy of legal scholarship and education during the totalitarian regime from 1944 to 1989, and Bulgaria has made only modest progress in adopting advanced methodologies and contemporary legal

⁶⁶ Except for New Bulgarian University, Sofia.

⁶⁷ For example, in Sofia University "St. Kliment Ohridski".

⁶⁸ Чернева et al., [Cherneva et al.] 2023.

⁶⁹ Христов, [Hristev], 2023; Вучков, [Vuchkov], 2023.

research practices.⁷⁰ Few human rights studies in individual articles move beyond uncritical reproduction to engage in conceptual analysis, such as the horizontal effect of fundamental rights in private-party relations.⁷¹

The narrow focus is further exacerbated by a prevailing absence of interdisciplinary research,⁷² which limits the exploration of human rights issues from diverse perspectives such as political science, history, social work, and psychology. Consequently, legal scholarship in Bulgaria remains doctrinal, restricting critical analysis and innovation, particularly in the field of human rights. This approach has ultimately produced generations of legal professionals who are skilled in applying the law literally but are less equipped to critically assess and enhance the legal system's response to evolving human rights challenges.

5. Landmarks Cases against Bulgaria before the ECtHR

By the end of 2023, Bulgaria had 166 cases pending execution of ECtHR judgments or decisions, a decrease from 182 in 2022 and an increase from 164 in 2021. Among these, 32 were leading cases classified under enhanced procedure (compared with 30 in 2022 and 20 in 2021), and 56 were leading cases classified under standard procedure.⁷³

The pending cases notably encompass issues related to prison conditions, living conditions in social care homes, the lack of independent investigations against the Chief Prosecutor, ineffective investigations, freedom of association, and police misconduct.

In 2023, the Court identified new violations, including instances of ethnically motivated expulsions of Roma from their homes, inadequate protection for a minor victim of domestic violence, and the absence of legal recognition and protection for same-sex couples. Throughout the year, the Committee of Ministers reviewed and adopted decisions on 11 leading cases or groups of cases under the enhanced procedure.

As of 2024, Bulgaria ranks fifth in the number of cases under enhanced supervision by the Committee of Ministers, highlighting ongoing

⁷⁰ For an in-depth analysis of the ideological framework and its impact on socialist legal science, see Марчева, [Marcheva], 2021, pp. 182-191, 211-224.

⁷¹ Цонева, [Tsoneva], 2019.

⁷² With some exceptions, such as the Interdisciplinary Human Rights Seminar series at New Bulgarian University, which began in 2016 and continues to this day.

⁷³ See 17 Annual Report of the Committee of Ministers "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2023", p. 86.

challenges in implementing ECtHR decisions. The European Implementation Network assesses that there are 93 leading judgments pending implementation, with an average duration of six years and 10 months for these cases. Alarming, 55% of leading cases from the past decade remain unresolved.⁷⁴

Identifying landmark ECtHR cases against Bulgaria involves selecting those that have prompted substantial reforms in national law, spotlighted systemic human rights issues, and elicited significant criticism for non-compliance. Some of these cases have already been discussed, but in this section, I explore additional cases that have defined Bulgaria's trajectory in human rights law and its ongoing dialogue with the ECtHR. These cases have left an indelible imprint on Bulgarian society and have shaped the human rights narrative within the country.

5.1. Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria

The case *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*⁷⁵ focused on the legality of Bulgaria's secret surveillance measures. The application was filed by Mihail Ekimdzhiev, a prominent human rights lawyer, in collaboration with a non-governmental organisation dedicated to human rights protection. They challenged the Bulgarian legislation, expressing concerns about the inadequate legal safeguards against the widespread interception of communications, which allowed for arbitrary and unnecessary intrusions into private lives.

The applicants argued that the Bulgarian legal framework for secret surveillance was vague and susceptible to abuse, violating individuals' privacy rights. They pointed out the lack of effective legal remedies for those who suspected their communications had been unlawfully intercepted.

In 2007, the ECtHR ruled that Bulgarian legislation did not meet the "quality of law" standard required by the Convention. The Court specifically criticised the absence of any external and independent review of the implementation of secret surveillance measures. There were no regulations outlining how collected intelligence should be screened, preserved, or destroyed. Control over the secret surveillance system was solely in the hands of the Minister of the Interior, without clear legal

⁷⁴ See: <https://www.einnetwork.org/bulgaria-echr> (Accessed: 12 August 2024).

⁷⁵ *Case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, App. No. 62540/00, 28 June 2007.

guidelines on how this control should be exercised. Furthermore, individuals subjected to surveillance were not informed of it at any point. Consequently, the Strasbourg court found that Bulgarian law was incapable of limiting surveillance to what was strictly necessary, resulting in a violation of Article 8 of the ECHR, which protects the right to respect for private life and correspondence. The Court also ruled a violation of Article 13, as Bulgarian law did not provide an effective remedy to challenge the legality of surveillance measures or seek redress. This case set an important precedent for ensuring that state surveillance activities are governed by clear and detailed legal frameworks.

Despite the initial judgment, Bulgarian authorities did not adequately reform the laws. Although this case and similar ones were later placed under enhanced supervision,⁷⁶ the lack of substantial legal changes prompted a subsequent application by Mr. Ekimdzhiev and another lawyer, Mr. Aleksandar Kashamov. This expanded the complaints to include not only the incompatibility of domestic laws on secret surveillance but also the retention of electronic communications data by service providers and access to this data by law enforcement. In 2022, the Strasbourg court issued another judgment against Bulgaria,⁷⁷ identifying significant shortcomings in both systems, which failed to meet the “quality of law” standard, lacked effective safeguards against abuse, and were inadequate in restricting state interference to what was necessary in a democratic society.

In September 2023, the Committee of Ministers decided to discontinue monitoring the *AEIHR and Ekimdzhiev* case but continued supervision of *Ekimdzhiev and others*.⁷⁸ Bulgaria has been urged to swiftly adopt the measures that were previously outlined.⁷⁹ These include permitting surveillance solely when it is essential; instituting legal standards for transparency and justification in the retrieval of communications data; enhancing regulations concerning data retention, destruction, and notification; as well as guaranteeing that effective remedies are accessible.

⁷⁶ See the following: CM/Del/OJ/DH (2008)1043; DH-DD(2012)711E; DH-DD(2013)76F; CM/Inf/DH(2013)7; CM/Del/Dec(2013)1164/8; CM/Del/Dec(2017)1288/H46-7; and CM/Del/Dec(2019)1348/H46-5.

⁷⁷ *Case of Ekimdzhiev and Others v. Bulgaria*, App. No. 70078/12, 11 January 2022.

⁷⁸ CM/Del/Dec(2023)1475/H46-10.

⁷⁹ CM/Del/Dec(2022)1451/H46-7.

5.2. *Miroslava Todorova v. Bulgaria*

The case *Miroslava Todorova v. Bulgaria*⁸⁰ concerned disciplinary proceedings and sanctions imposed by the Supreme Judicial Council (SJC) against the applicant – a judge and president of Bulgaria's main professional association of judges.

Todorova publicly criticised the SJC regarding certain judicial appointments and government policies, arguing they undermined judicial independence. In response, the SJC accused her of delays in delivering judgments and reduced her salary in July 2011. A year later, the SJC dismissed her, but Todorova appealed. The Supreme Administrative Court overturned the dismissal and remanded the case to the SJC, which then demoted her to a lower court for two years.

The ECtHR later determined that these disciplinary actions were politically motivated and aimed at silencing Todorova's critical views, thus violating her freedom of expression. The sanctions were found to be excessively harsh and intended to intimidate her, serving as a form of retaliation for her criticism. The court emphasised that leaving the violation of Article 10 unaddressed could have a chilling effect on the entire national judiciary.

This case was placed under enhanced supervision, during which the Committee of Ministers noted ongoing reforms aimed at strengthening judicial independence in Bulgaria.⁸¹ In June 2024, the Committee welcomed the 2023 constitutional amendments that established a new SJC – a body with no prosecutors and a majority of members elected by their peers, as recommended by the Venice Commission. However, in July 2024, the Constitutional Court ruled these amendments unconstitutional,⁸² stating they fell under the jurisdiction of the Grand National Assembly.

5.3. *United Macedonian Organisation Ilinden and Others v. Bulgaria*

The case *United Macedonian Organisation Ilinden and others v. Bulgaria*⁸³ involved applicants who claimed that their request for organisational registration was unjustly denied. UMO Ilinden sought official recognition of

⁸⁰ *Case of Miroslava Todorova v. Bulgaria*, App. No. 40072/13, 19 October 2021.

⁸¹ CM/Del/Dec(2023)1468/H46-7; CM/Del/Dec(2024)1501/H46-9.

⁸² Decision No. 13 issued on 26 July 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2024.

⁸³ *Case of United Macedonian Organisation Ilinden and Others v. Bulgaria*, App. No. 59491/00, 19 January 2006.

the Macedonian minority in Bulgaria, but domestic courts argued that the organisation's objectives threatened national unity and could incite ethnic hatred. Concerns were expressed that UMO Ilinden's separatist stance posed a risk to Bulgaria's territorial integrity. The language and aims outlined in the organisation's founding documents were interpreted as undermining state sovereignty and potentially leading to societal unrest, thus representing a threat to national security and public order.

The ECtHR concluded that the refusal to register the organisation violated the applicant's rights to freedom of association as protected by Article 11 of the ECHR. The Court emphasised that while states may impose restrictions for legitimate purposes, such as national security, these restrictions must be necessary and proportionate. It asserted that the mere expression of separatist views did not automatically warrant a refusal to register an organisation. Ultimately, the Strasbourg court determined that the concerns raised by Bulgarian authorities did not sufficiently justify the refusal, underscoring the importance of protecting the rights of minority groups in a democratic society.

The case *United Macedonian Organisation Ilinden and others* marked the beginning of a series of applications and judgments against Bulgaria by the ECtHR,⁸⁴ all identifying violations stemming from the unjustified refusals of Bulgarian courts to register associations seeking recognition for the "Macedonian minority in Bulgaria". Courts based their decisions on national security concerns, the protection of public order, and the rights of others – alleging separatist intentions – and the constitutional prohibition against associations with political objectives, as well as failures to meet formal legal requirements.⁸⁵

In September 2019, the Committee of Ministers urged Bulgarian authorities to provide updates on necessary individual and general measures to address the long-standing issues faced by UMO Ilinden and other similar organisations struggling for Convention-compliant registration. The Committee emphasised the need for legislative measures to enhance the

⁸⁴ *Case of United Macedonian Organisation Ilinden and Others v. Bulgaria* (no. 2.), App. No. 34960/04, 18 October 2011; *Case of United Macedonian Organisation Ilinden and Others v. Bulgaria*, App. No. 29496/16, 11 January 2018; *Case of Yordan Ivanov and Others v. Bulgaria*, App. No. 70502/13, 11 January 2018; *Case of Vasilev and Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror v. Bulgaria*, App. No. 23702/15, 28 May 2020; *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria*, App. No. 67197/13, 28 May 2020.

⁸⁵ Thus summarised in CM/ResDH(2020)197.

Registration Agency's capacity to assist associations in rectifying registration issues and to ensure comprehensive identification of defects in registration files. Bulgaria has yet to align registration practices with the requirements of the Convention.⁸⁶

Over 18 years after the first judgment in the group *United Macedonian Organisation Ilinden and others*, associations seeking recognition of the Macedonian minority continue to face routine refusals for registration. This ongoing issue is exacerbated by a broader opposition to their objectives, compounded by a persistent practice among authorities of citing new reasons for refusal during repeated reviews of registration documents. This group of cases continues to be one of the most contentious issues in the Bulgarian political landscape, particularly after the Constitutional Court's decision declaring the political party UMO – Ilinden – PIRIN unconstitutional.⁸⁷ This ruling has reinforced prevailing narratives that portray the UMO-Ilinden case as part of a long-standing “anti-Bulgarian campaign” in Macedonia,⁸⁸ which diverges significantly from the Strasbourg perspective on human rights protection.

5.4. *Stanev v. Bulgaria*

The case *Stanev v. Bulgaria*⁸⁹ pertained to an applicant diagnosed with schizophrenia, who contested his indefinite and involuntary placement under partial guardianship in a psychiatric institution where he faced degrading conditions. In 2000, a court declared Mr. Stanev partially incapacitated without his knowledge. Consequently, in 2002, he was placed in a remote social care home for individuals with mental disorders, isolating him from his community and support networks.

Official visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2003 and 2004 revealed deplorable living conditions in the institution, marked by inadequate facilities and a lack of therapeutic activities. Independent psychiatric evaluations confirmed that the environment was harmful to his mental health, indicating that his placement contradicted his actual needs and constituted inhumane and degrading treatment.

⁸⁶ See: CM/Del/Dec(2023)1475/H46-11, p. 2, and CM/Del/Dec(2024)1492/H46-7, p. 4.

⁸⁷ Decision No. 1, issued on 29 February 2000 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/1999.

⁸⁸ Kojouharov, 2005; Ivanov, 2008.

⁸⁹ *Case of Stanev v. Bulgaria*, App. No. 36760/06, 17 January 2012.

Despite his desire to leave and regain his legal capacity, Stanev's requests were repeatedly denied based on medical assessments. A 2006 independent evaluation suggested that his diagnosis was inaccurate and that his confinement was detrimental to his mental well-being. His identity papers were withheld by the staff, and he was under constant supervision, severely limiting his autonomy and privacy. He could only leave home with explicit permission, effectively confining him against his will.

National legislation may impose restrictions to prevent excessive applications, but these should not result in automatic denial of access. Instead, alternative measures, such as limiting the frequency of applications or implementing prior admissibility reviews, could be considered.

In 2012, the ECtHR found that Bulgaria had violated Stanev's rights under the Convention by unlawfully depriving him of his liberty and subjecting him to degrading treatment. The Court highlighted significant deficiencies in Bulgarian law regarding the rights of incapacitated individuals, noting the absence of automatic periodic reviews of guardianship validity. While there may be valid limitations on access to the courts, the right to request a court review of incapacity is fundamental. Individuals should generally have direct access to courts, with the State determining the procedure. While national laws might establish limitations to curb an overabundance of applications, these should not lead to outright denial of access. Instead, alternative approaches such as restricting the frequency of applications or conducting preliminary admissibility assessments could be considered.

The *Stanev v. Bulgaria* case has been pivotal in sparking significant policy and academic discussions in Bulgaria, advocating for comprehensive reform of the legal status of incapacitated individuals.⁹⁰ However, legislative reforms in 2017 only permitted partially incapacitated individuals to directly access courts to request the restoration of their legal capacity. The Committee of Ministers continued to urge Bulgarian authorities to establish additional safeguards regarding temporary placements and the procedures for placing individuals who cannot express their will.⁹¹

By 2021, the Committee acknowledged positive advancements within the *Stanev group*, particularly the implementation of new regulations that empower individuals under partial guardianship to make informed choices

⁹⁰ Генова et al., [Genova et al.] 2014. Тодорова, [Todorova] 2015;

⁹¹ See point 2 of CM/Del/Dec(2017)1288/H46-8.

about residential services.⁹² Simultaneously, Bulgarian authorities were urged to ensure that individuals under full guardianship were consistently heard in court and strengthen safeguards for the termination and review of placements. The Committee commended the country's commitment⁹³ to closing all social care homes and providing alternative care for individuals with mental health disorders by 2035. However, the Council of Europe continued to monitor living conditions closely, emphasising the urgent need for measures to address critical issues such as increasing staffing levels to prevent neglect and serious hygiene problems among vulnerable residents. The Bulgarian government was also encouraged to evaluate whether "family-type" homes, built on the same grounds as existing remote social care facilities, could serve as a viable solution given the ongoing risk of neglect due to insufficient qualified staff.

By 2024, the Committee of Ministers recognised improvements in the living conditions of social care homes in Bulgaria, as indicated by the latest CPT report, which found no significant hygiene issues.⁹⁴ However, further action is still needed to prevent neglect stemming from inadequate staffing levels. The Committee suggested establishing a national map of social services and an integrated system to monitor staff recruitment. Regarding legal safeguards, Bulgarian authorities are expected to ensure that individuals under partial guardianship are consulted about their placements and that those under full guardianship have their voices heard in court, along with appropriate evaluations of their mental health.

5.5. *Kulinski and Sabev v. Bulgaria*

In the case *Kulinski and Sabev v. Bulgaria*,⁹⁵ the ECtHR examined Bulgaria's constitutional and legislative ban that restricted voting rights for citizens serving prison sentences. The first applicant, Mr. Kulinski, was convicted of hooliganism and served over a year in Sofia Prison from November 2008 to December 2009. The second applicant, Mr. Sabev, received a whole-life sentence for robbery and murder, which was later commuted to a "simple-life" sentence. During their incarceration, both

⁹² CM/Del/Dec(2021)1406/H46-8.

⁹³ National Strategy for Long-Term Care, [Online]. Available at: <https://www.mlsp.government.bg/uploads/1/en-long-term-care-strategy-final.doc> (Accessed: 16 August 2024).

⁹⁴ CM/Del/Dec(2024)1492/H46-6.

⁹⁵ *Case of Kulinski and Sabev v. Bulgaria*, App. No. 63489/09, 21 July 2016.

applicants were denied the right to vote in the European Parliament elections on 7 June 2009, and the Bulgarian parliamentary elections on 5 July 2009.

A comparative law study conducted during related proceedings⁹⁶ revealed that as of 2012, seven Convention States – Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia, and the United Kingdom – automatically revoked the right to vote for all convicted prisoners while they served their sentences. By contrast, 19 imposed no restrictions on voting rights for prisoners,⁹⁷ while 17 adopted an intermediate approach, where disenfranchisement depended on the nature of the offense or the length of the custodial sentence.⁹⁸

The Strasbourg Court noted that the applicants were denied the right to vote due to a blanket prohibition applicable to all convicted individuals in detention – a restriction rooted in the Constitution and reflected in various laws. It was clarified that removing voting rights without a specific judicial decision did not inherently violate Article 3 of Protocol No. 1; however, states must ensure that any restrictions are not general, automatic, or indiscriminate. The ECtHR emphasised that Bulgaria's constitutional and legislative provisions failed to consider the individual circumstances of offenders, unlike other laws that allowed for more nuanced restrictions, and that resulted in a violation of Article 3 of Protocol No. 1 for both applicants.

The *Kulinski and Sabev* case, along with other cases concerning the blanket ban on voting rights for prisoners⁹⁹ or incapacitated persons¹⁰⁰ in Bulgaria, was grouped and placed under enhanced supervision. The Committee of Ministers noted that any general, automatic, and indiscriminate restriction of the right to vote applicable to all convicted persons is not compliant with the ECHR.

Consequently, it has been concluded that Bulgaria needs to undergo constitutional reform to create a framework that aligns with the Convention concerning the voting rights of individuals who are under partial

⁹⁶ *Case of Coppola v. Italy (No. 3)*, App. No. 126/05, 22 May 2012, §§ 45-48.

⁹⁷ Albania, Azerbaijan, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Moldova, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland, North Macedonia, and Ukraine.

⁹⁸ Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Italy, Luxembourg, Malta, Monaco, the Netherlands, Poland, Portugal, Romania, San Marino, Slovakia, and Turkey.

⁹⁹ *Case of Dimov and others v. Bulgaria*, App. No. 45660/17, 8 June 2021.

¹⁰⁰ *Case of Anatoliy Marinov v. Bulgaria*, App. No. 26081/17, 15 February 2022.

guardianship and those who are incarcerated.¹⁰¹

5.6. *Koilova and Babulkova v. Bulgaria*

In a recent ruling, the ECtHR addressed the lack of legal recognition and protection for the family life of same-sex couples in Bulgaria in the case *Koilova and Babulkova v. Bulgaria*.¹⁰² The applicants, who have been living together since 2009 and were married in the United Kingdom in 2016, sought to have their marital status updated in Bulgarian civil registration records. Despite possessing a valid UK marriage certificate, Bulgarian authorities, including domestic courts, refused to acknowledge their marriage, citing conflicts with Bulgarian public order and asserting that it threatened fundamental societal values.

The applicants argued that the absence of official recognition relegated their relationship to a mere *de facto* union under national law, severely limiting their ability to manage legal and administrative matters as a couple. This situation forced them to navigate private contracts as individuals rather than as a legally recognised couple, adversely affecting their legal status and personal identity, as they were denied the same respect and rights afforded to opposite-sex couples.

In its defence, the Bulgarian government claimed that societal attitudes towards same-sex unions were evolving and that there was growing acceptance of LGBTIQ rights within Bulgarian society.¹⁰³ The Strasbourg court noted that Bulgaria's position differed from that of Russia in the case *Fedotova and Others v. Russia*,¹⁰⁴ where the recognition of same-sex couples was framed as conflicting with traditional family values. Instead, the Bulgarian government focused on disputing the existence of a positive obligation under Article 8 to grant legal recognition to same-sex couples and urged the Court to allow for future social and legislative developments in Bulgaria.¹⁰⁵

The ECtHR reaffirmed the evident trend among member states towards recognising same-sex family unions¹⁰⁶ and concluded that

¹⁰¹ CM/Del/Dec(2023)1459/H46-4, point 4.

¹⁰² *Case of Koilova and Babulkova v. Bulgaria*, App. No. 40209/20, 05 September 2023.

¹⁰³ *Ibid*, § 32.

¹⁰⁴ *Case of Fedotova and others v. Russia*, App. Nos. 40792/10, 30538/14 and 43439/14, 17 January 2023.

¹⁰⁵ *Case of Koilova and Babulkova v. Bulgaria*, App. No. 40209/20, 05 September 2023., §§ 55-57.

¹⁰⁶ *Ibid*, § 56.

Bulgaria's lack of a legal framework failed to meet the fundamental needs of the applicants as a couple. Ultimately, the Court determined that Bulgaria had exceeded its margin of appreciation by not providing any legal recognition for same-sex couples, thereby violating individuals' rights to respect for private and family life under Article 8 of the ECHR.

7. Conclusion

Over the past 30 years, the ECHR and the judgments from the Strasbourg court have significantly enhanced human rights protections in Bulgaria. Despite facing difficulties associated with controversial issues and the prolonged non-implementation of various ECtHR rulings against Bulgaria for over a decade, the Convention has had a significant impact on the nation's legal framework. This influence is particularly evident in legislation and judicial decisions that have embraced a more rights-focused perspective, promoting a culture of government accountability and respect for individual rights. However, this progress has not come without obstacles. Societal attitudes and prejudices, political resistance, and gaps in legal scholarship and education continue to pose challenges. Bulgaria still grapples with implementation issues concerning contentious human rights matters, such as privacy rights in the context of secret surveillance, voting rights for prisoners, LGBTQI rights, the rights of incapacitated persons, and the rights of the Macedonian minority, among others. The tension between the jurisprudence of the ECtHR and the rulings of the Constitutional Court – particularly regarding the unconstitutionality of the Istanbul Convention – has intensified discord within domestic case law, which has recently led to a growing disconnection between Bulgarian jurisprudence and supranational legal standards.

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IHOR METELSKYI *

Human Rights Protection under the European Convention on Human Rights and Eastern Europe: Ukraine **

ABSTRACT: This article is devoted to the study of the issue of human rights protection in Ukraine in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as on the basis of the case law of the European Court of Human Rights. The author examines the historical development of human rights and their protection in Ukraine, based on the main legal acts in force in different historical periods of Ukraine's development. The relations between Ukraine and the Council of Europe in terms of human rights protection were studied. The author analyses international legal instruments, in particular, individual conventions of the Council of Europe on human rights to which Ukraine is a party (in particular, the main focus is on the European Convention for the Protection of Human Rights and Fundamental Freedoms) and their place in the system of Ukrainian legislation, and also examines the issues of national implementation (process and time of accession / succession / ratification) of the Council of Europe conventions on human rights. The author highlights how the obligations to protect human rights arising from the ECHR are reflected in the Constitution of Ukraine. The author analyses the main legislative processes in Ukraine due to the ECHR, as well as the most significant cases considered by the ECtHR against Ukraine, their main points, and how the decisions on the latter affected Ukrainian legislation and human rights and their protection in general. The author concludes that the Council of Europe conventions, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, have a significant impact on the protection of human rights in Ukraine, as they set common European standards that contribute to the improvement of national legislation and practice. In addition, the ECHR guarantees fundamental rights and freedoms such as the right to life, liberty and security of person,

* PhD in Law, Senior Lecturer, Head of Department of Security and Law Enforcement Activities, Western Ukrainian National University, Ternopil, Ukraine.
<https://orcid.org/0000-0001-8518-9321>, mdigor@ukr.net.

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fair trial, freedom of thought, conscience and religion, and protection from torture and inhuman or degrading treatment. Ukrainian citizens have the right to apply to the European Court of Human Rights in case of violation of their rights guaranteed by the ECHR. This provides an additional level of protection when all national remedies have been exhausted. ECHR judgments against Ukraine often become the basis for changes in national legislation and court practice to bring them into line with the standards of the Convention. Ukraine's ratification of Council of Europe conventions and implementation of their provisions is an important tool for improving the human rights protection system, raising standards of democracy and the rule of law, and adapting national legislation to European norms.

KEYWORDS: human rights, Council of Europe, case law of the European Court of Human Rights, human rights protection mechanisms, Ukrainian legislation.

Human rights enshrined in the Constitution of Ukraine are the basis and foundation of the existence of the Ukrainian people. Without effective legal regulation and enforcement mechanisms, these rights cannot be recognized as valid in a state governed by the rule of law. If such mechanisms are lacking or do not function properly, rights and freedoms may remain a mere declaration without any real possibility of their application. Therefore, the state must create effective mechanisms that will enable every person and citizen to exercise their rights and freedoms. According to the general theory of law, human rights and freedoms are legal opportunities that are necessary for the existence and development of the individual. They must be inalienable, universal, and equal for all, and must be ensured and protected by the state consistent with international standards.¹ Human rights can be compared to armour that protects us; it is a framework that sets the rules for our behaviour and serves as an arbiter to whom we can appeal. Like emotions, human rights are abstract, but they cannot be ignored because they exist regardless of circumstances. Human rights are like nature, because they cannot be trampled on, and like spirit, because they cannot be destroyed. They apply to everyone without exception: rich and poor, old and young, white and black, tall, and short. The foundational concept of human rights is to provide us respect and, at the same time, demand respect for others. Like kindness, truth and justice,

¹ Tsvik, Petryshyn and Avramenko, 2009, C. 447.

human rights can have different interpretations, but their violations are easily recognizable.²

Although scholars often use terms such as "rights" and "freedoms" synonymously, they are not identical. Human rights are opportunities protected and guaranteed by the state to perform certain actions and satisfy needs that are essential for existence and development. Human freedoms include opportunities that are important for human existence and development, such as freedom of thought, conscience, religion, movement, and choice of residence. According to the Constitution of Ukraine, human rights and freedoms, as well as their guarantees, determine the direction and content of the state's activities. The state is responsible to its citizens for its actions. The main duty of the state is to ensure and affirm human rights and freedoms.³ All persons legally staying on the territory of Ukraine have rights and freedoms in accordance with the current legislation, with certain peculiarities for specific categories of persons. In the modern world, human rights are taking on a new colour, constantly evolving, and new ones are emerging, which relates to the development of humanity and science. At the same time, it is quite expected that there are problems with the state creating an effective mechanism to ensure their implementation, restoration of violated rights, etc. New responsibilities, including those of a legislative nature, are constantly being imposed on the state to create appropriate conditions that enable everyone to properly exercise their rights and benefit from them. According to Article 21 of the Constitution of Ukraine, every person is free in his or her rights, which, among other things, means that he or she can exercise his or her rights at his or her own discretion, and all people have equal rights, that is, there can be no situation where one person has more rights than another. The same article of the Basic Law also affirms the fact of inviolability and inalienability of human rights.⁴

The historical development of human rights in Ukraine has been a long and difficult journey, covering various periods of statehood, occupation, foreign domination, and the modern period of the formation of an independent Ukrainian state. Since the declaration of independence in 1991, Ukraine has embarked on a course of democratic reforms and

² What are human rights? [Online]. Available at: <https://www.coe.int/uk/web/compass/what-are-human-rights-> (Accessed: 02 September 2024).

³ Constitution of Ukraine: June 28, 1996. Article 141.

⁴ Constitution of Ukraine: June 28, 1996. Article 141.

integration into the international community. The 1996 Constitution of Ukraine became the main document that enshrined human and civil rights and freedoms. Ukraine has also ratified several international human rights treaties, including the European Convention on Human Rights (ECHR). In the 21st century, following the Revolution of Dignity events in 2013–2014, the country embarked on a course of reforming its judicial system, decentralizing power, fighting corruption, and strengthening the rights and freedoms of citizens. In 2014, Ukraine signed and ratified the Association Agreement with the European Union that facilitated the implementation of European human rights standards. After Russia's military aggression began in 2014 and a full-scale invasion in 2022, Ukraine faced extensive human rights protection issues in the context of the military conflict. The protection of the rights of military personnel, internally displaced persons (IDPs), war victims, social protection, and the fight against war crimes is being strengthened, all of which requires further reforms in the areas of justice, law enforcement, social support, and protection of vulnerable groups. Ukraine is continuing to reform its human rights legislation to align with European standards, ensuring real protection of citizens' rights at the national and international levels. In this context, Ukraine's membership in the Council of Europe and other European and global international organizations is a positive development. Ukraine became a member of the Council of Europe on 9 November 1995, and the 37th member state of this organization. At the same time, the Permanent Mission of Ukraine to the Council of Europe was established. The Council of Europe actively supports Ukraine in its efforts to harmonize its national legislation, institutions, and practices with European standards in the field of human rights, rule of law and democracy, enabling Ukraine to fulfil its obligations as a member state. On 17 July 1997, the Verkhovna Rada of Ukraine ratified the ECHR, which entered into force for Ukraine on 11 September of the same year. This gave Ukrainians the opportunity to apply to the European Court of Human Rights (ECtHR) after exhausting all national remedies in the event of any violation of the rights and freedoms guaranteed by the Convention. To support the fulfilment of Ukraine's obligations as a member of the Council of Europe, Action Plans, which are strategic documents for a certain period, are being implemented since 2005. Currently, the Council of Europe Action Plan for Ukraine for 2023–2026 entitled "Resilience, Recovery and Rebuilding" is being implemented.⁵ As part of this plan, projects are being implemented to

⁵ Council of Europe Action Plans for Ukraine. [Online]. Available at:

support human rights, democracy, and the rule of law in Ukraine. The Action Plan envisages a four- year program of cooperation with the flexibility to adapt to changing conditions and needs. The document will be updated consistent with the situation in Ukraine to reflect new priorities. The assessment of risk and threat mitigation strategies will be conducted together with the Ukrainian authorities. The total budget of the four-year cooperation program is estimated at around €50 million.

On 16–17 May 2023, at the Council of Europe Summit in Reykjavik, Iceland, the Heads of State and Government of the 46 member states decided to establish a Register of Damage Caused by the Aggression of the Russian Federation, as a first step towards an international Compensation Mechanism. Leaders agreed to strengthen the Council of Europe and its work in the areas of human rights, democracy and the rule of law by adopting a declaration on the principles of democracy, reaffirming commitments to the ECHR and developing tools to address new challenges in technology and the environment.⁶ The main condition for countries to join the Council of Europe is recognition of the rule of law, the obligation to ensure the rights and fundamental freedoms of all persons under the jurisdiction of the state, as well as effective cooperation with other members of the Council to achieve its goals. Membership in the Council of Europe is a testament to the country's democratic choice and its consistency in implementing reforms aimed at protecting human rights and strengthening democratic institutions. For this reason, on 14 July 1992, Ukraine expressed its desire to join the Council of Europe.

Prior to its accession, Ukraine had already become a party to several of the organization's conventions, including the European Cultural Convention, the European Framework Convention on Transfrontier Cooperation between Territorial Communities or Authorities, and the European Convention on Information on Foreign Legislation. In September 1995, Ukraine acceded to six Council of Europe conventions in the field of crime. On 15 September 1995, the Framework Convention for the Protection of National Minorities was signed. During the same period, the Council of Europe, in particular the European Commission for Democracy through Law (Venice Commission), conducted a legal examination of drafts of

<https://coe.mfa.gov.ua/spivrobotnictvo/plani-dij-radi-yevropi-dlya-ukrayini> (Accessed: 02 September 2024).

⁶ Council of Europe and Ukraine. [Online]. Available at: <https://www.coe.int/uk/web/kyiv/the-coe/about-coe> (Accessed: 02 September 2024).

certain articles of the new Constitution of Ukraine, the Family and Administrative Codes, and the draft Law of Ukraine on Local Councils of People's Deputies.

On 15 September 1995, the Council of Europe Information and Documentation Centre was opened in Kyiv based on the Ukrainian Legal Foundation. The Secretary General of the Council of Europe, D. Tarshis, attended the opening ceremony. The Centre for Information and Documentation promotes the core values of the Council of Europe among the population of Ukraine. Ukraine's accession to the Council of Europe confirmed the European community's recognition of the progressive political and economic reforms implemented in Ukraine in a relatively short time.

After becoming a member, Ukraine undertook to reform its national legislation in line with the Council of Europe's standards, adopt relevant laws, and accede to several conventions. The Council of Europe expressed its readiness to provide comprehensive expert assistance. The Council studies Ukraine's problems in the process of democratic transformation, develops recommendations and engages European countries in solving them. For example, on 26 January 1996, the Parliamentary Assembly of the Council of Europe adopted Resolution 1078 (1996) on the economic situation in Belarus, Russia, and Ukraine, calling on European states to intensify trade and economic relations with these countries and avoid protectionism. Resolutions 1087 (1996) of 26 April 1996 and 1127 (1997) of 24 June 1997 were devoted to the problems of liquidating the consequences of the Chernobyl accident and preventing similar tragedies in the future. Resolution 1180 (1999) of 28 January 1999 addressed the consequences of the economic crisis in Russia and Ukraine in 1998. Recommendation 1455 (2000) of 5 April 2000 dealt with the repatriation and integration of Crimean Tatars in Ukraine.

So far, Ukraine has signed and ratified almost all international legal instruments envisaged by the Opinion of the Parliamentary Assembly of the Council of Europe No. 190 (1995).⁷

Applying the provisions of the ECHR and the case law of the ECtHR is extremely important issue for Ukraine, its authorities and society, as the course chosen for European integration, membership in the European Union, increasing its authority in the international arena, and eventually

⁷ Ukraine and the Council of Europe. [Online]. Available at: <http://kimo.univ.kiev.ua/MOrg/98.htm> (Accessed: 02 September 2024).

strengthening the principles of the rule of law both within our country and in foreign affairs requires unconditional compliance with and implementation of the ECHR and enforcement of ECtHR judgments. In this context, it is necessary to establish the place of the ECHR in the hierarchy of national legislation. Thus, in accordance with Article 9 of the Basic Law of the Ukrainian State, international treaties in force, as ratified by the Verkhovna Rada of Ukraine, that is, ratified by the Parliament, are part of the national legislation.⁸ Given that the Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols Nos. 2, 4, 7 and 11 to the Convention', the Verkhovna Rada of Ukraine has expressed its consent to be bound by it, the provisions of the ECHR are part of national legislation.⁹ In addition, according to Article 19 of the Law of Ukraine "On International Treaties of Ukraine", part one of which is actually duplicated from the Basic Law, states that the international treaties of Ukraine in force, the consent to be bound by which has been given by the Verkhovna Rada of Ukraine, are part of the national legislation and applied in the manner prescribed for the norms of national legislation.¹⁰

The provision of part 2 of this Article indicates the legal force of international treaties and their place in the hierarchy of Ukrainian legislation. Thus, if an international treaty of Ukraine, which has entered into force in accordance with the established procedure, establishes rules other than those provided for in the relevant act of legislation of Ukraine, the rules of the international treaty shall apply,¹¹ which effectively means that international treaties ratified by the Verkhovna Rada of Ukraine have a higher legal force than the national legislation.

Regarding the ECtHR case law, it is worth noting that its role in the national legal system is also determined at the legislative level. Thus, in accordance with Article 17 of the Law of Ukraine "On Enforcement of Decisions and Application of the Practice of the European Court of Human

⁸ Constitution of Ukraine: June 28, 1996. Article 141.

⁹ The Law of Ukraine "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols Nos. 2, 4, 7 and 11 to the Convention" of 17.07.1997, No. 475/97-BP. Bulletin of the Verkhovna Rada of Ukraine, 1997, N 40, p. 263.

¹⁰ The Law of Ukraine "On International Treaties of Ukraine" of 29.06.2004 No. 1906-IV. The Bulletin of the Verkhovna Rada of Ukraine, 2004, No. 50, p. 540.

¹¹ The Law of Ukraine "On International Treaties of Ukraine" of 29.06.2004 No. 1906-IV. The Bulletin of the Verkhovna Rada of Ukraine, 2004, No. 50, p. 540.

Rights" of 23 February 2006 with subsequent amendments and additions, courts apply the ECHR and ECHR practice as a source of law when considering cases.¹² In addition, according to part 5 of Article 19 of the Law, ministries and other central executive bodies ensure systematic control over compliance with administrative practice within their departmental subordination that aligns with the ECHR and the ECtHR case law.¹³ Article 32 of the ECHR states that the jurisdiction of the ECtHR extends to all questions of interpretation and application of the ECHR and its Protocols submitted to it for consideration in accordance with Articles 33, 34, 46, 47.¹⁴

Since the beginning of the full-scale aggression of the Russian Federation, the importance of the ECHR in the context of Ukrainian events has increased significantly. In the public space, as well as in professional legal circles, attention has increased to the jurisdiction of the ECtHR, which is considering several strategically important cases, including those related to the annexation of Crimea, the armed conflict in Donbas, and the seizure of Ukrainian sailors in the Kerch Strait, among others. These proceedings are not only legally important but also have symbolic significance for the restoration of justice and consolidation of Ukraine's international legal position.¹⁵ The ECtHR judgments play an important role in recognizing human rights violations, formulating recommendations for member states to address the consequences of such violations, and standardizing the approaches of national courts to the consideration of similar cases. Ukrainian courts, in particular the Supreme Court and the Constitutional Court of Ukraine, are increasingly

¹² The Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights" of 23.02.2006 No. 3477-IV. The Bulletin of the Verkhovna Rada of Ukraine, 2006, N 30, p.260.

¹³ The Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights" of 23.02.2006 No. 3477-IV. The Bulletin of the Verkhovna Rada of Ukraine, 2006, N 30, p.260.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights). Protocol of 04.11.1950. [Online]. Available at: https://zakon.rada.gov.ua/laws/show/995_004#Text. 23 Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights). Protocol of 04.11.1950. [Online]. Available at: https://zakon.rada.gov.ua/laws/show/995_004#Text (Accessed: 02 September 2024).

¹⁵ Test by war: Decisions, statements and challenges of the European Court of Human Rights. (n.d.). Yurydychna Gazeta. Retrieved July 20, 2025, [Online]. Available at: <https://yur-gazeta.com/golovna/perevirkaviynoyu-rishennya-zayavi-ta-vikliki-evropeyskogo-sudu-z-prav-lyudini.html> (Accessed: 20 September 2025).

considering the ECtHR case law in their judgments, which contributes toward strengthening the human rights culture and bringing national justice closer to European standards. It is worth emphasizing that the ECtHR maintains communication with national jurisdictions through joint events such as seminars, conferences, and training, creating a favourable environment for professional dialogue. During the proceedings, Ukrainian courts provide the ECtHR with responses to inquiries regarding the circumstances of the case, which allows the ECtHR to better understand the national context. This mechanism contributes to both the formation of proper procedural justification and strengthening confidence in European justice in Ukraine.¹⁶

Given the above, we believe that an important step towards further improvement to the human rights protection mechanism is the institutionalization of cooperation between the ECtHR and national courts. It is advisable to introduce a special advisory mechanism under the Supreme Court to analyse the ECtHR case law and develop standard recommendations for judges. At the same time, a national monitoring platform should be created to monitor the implementation of ECtHR judgments, and it should include representatives of the Ukrainian Parliament Commissioner for Human Rights, human rights organizations, and the academic community. This step will ensure systematic control and transparency of procedures.

Additionally, in the context of Ukraine's European integration and future EU membership, it is necessary to enshrine the commitment to the priority of ECtHR judgments in the national legal system at the legislative level, specifically the Law of Ukraine "On the Judiciary and the Status of Judges" and the Criminal Procedure Code. Thus, the ECtHR case law should serve not only as an indicator of Ukraine's compliance with its international obligations but also as an incentive for a qualitative upgrade of the judicial system. This will strengthen both trust in the courts and the overall legal culture in the country. According to scholars, and supported by us, among all the international legal mechanisms for the protection of human rights existing on the European continent, the ECtHR occupies a special place and is rightly considered the most effective tool for the protection of human rights and freedoms. Its effectiveness is primarily determined by the legally binding force of its judgments, which is unique among other international institutions. Unlike the advisory provisions of most international human rights bodies, the ECHR judgments are mandatory for

¹⁶ Denysova and Sirko, 2024, p. 725.

all states that are parties to the European Convention on Human Rights and are subject to mandatory implementation in accordance with Article 46 of the Convention. In addition to its legal force, the ECtHR is distinguished by its dynamism and ability to adapt to the social and legal transformations occurring in the European space. It demonstrates openness to the evolutionary interpretation of legal norms, while considering the latest human rights challenges, such as armed conflicts, terrorism, information security, migration crisis, among others. Owing to its ability to adapt that the Court retains its relevance and authority in the European justice system. In this context, it can be argued that the ECtHR not only ensures the implementation of a specific mechanism for the protection of human rights but also serves as a catalyst for the evolution of human rights in the legal systems of the Council of Europe member states, including Ukraine. From this perspective, its functioning is not just legally significant, but strategically necessary for strengthening the rule of law in the region.¹⁷ The ECtHR has experienced a significant institutional transformation since the turn of the twenty-first century in response to a sharp increase in the number of applications received for its consideration. Such a rapid increase in applications demonstrates the high level of confidence in the Court as an effective means of international protection of human rights and freedoms, which is confirmed by the practice of applications from citizens of different states.¹⁸ At the same time, the ECtHR remains a supranational body with powers limited by the framework established by the Convention for the Protection of Human Rights and Fundamental Freedoms, considering respect for the sovereignty of member states. Accordingly, implementation of its judgments depends not only on the professional capacity of the Court, but also on the political will of states to ensure the implementation of these judgments. As Matyashova rightly notes, the implementation of the ECtHR judgments is a key prerequisite for its effectiveness: only if national authorities implement measures arising from the Court's judgments, can we discourse about the real elimination of violations and ensure fair satisfaction to victims.¹⁹ Such dynamics requires states to continuously improve the mechanisms of implementation of the ECtHR judgments, including reform of

¹⁷ Matyashova, 2015, p. 98.

¹⁸ ECHR - Analysis of statistics 2014. [Online]. Available at: http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf (Accessed: 02 September 2024).

¹⁹ Matyashova, 2015, p. 99.

national legislation, strengthening the role of domestic courts and raising awareness of law enforcement practice with the Court's precedents. Concomitantly, the international community should support the institutional capacity of the ECtHR by ensuring adequate funding and improving access procedures. Ultimately, it is the balanced interaction between the Court and member states based on the good faith enforcement of judgments, that is, a determining factor in the stability and effectiveness of the entire human rights protection system in Europe.

Importantly, among other things, the full-scale aggression against Ukraine had a significant impact on the human rights protection mechanism. Thus, the military aggression against Ukraine has clearly demonstrated the significant limitations of the current system of international humanitarian law, specifically its insufficient ability to effectively respond to the challenges of hybrid conflicts. The inability to ensure timely prosecution of the aggressor state indicates a crisis of international control instruments. In this regard, there is a growing need to update the treaty and legal norms of the international law to factor in the challenges of modern armed confrontation, including the latest forms of warfare – cyber operations, information and psychological influence, and the use of private military companies. The introduction of martial law in Ukraine was a necessary measure to protect sovereignty, but it also revealed several gaps in national legal regulation, particularly about ensuring human rights under conditions of limited freedoms. The improvement of Ukrainian legislation should be carried out through the implementation of international humanitarian law into the national legal system, considering the specifics of the ongoing armed conflict.²⁰ There is an urgent need for further development of an international specialized tribunal to try cases of aggression, war crimes, and crimes committed against humanity on Ukraine territory. In addition, amendments to the Rome Statute of the International Criminal Court should be initiated to extend its jurisdiction to cases of aggression in the form of hybrid wars. In the national context, the key task is to create an integrated system for recording and investigating violations of international humanitarian law (IHL), which involves coordination between law enforcement agencies, prosecutors, civil society representatives, and international experts. It is also advisable to develop and implement a single digital platform for documenting war crimes with an appropriate level of data protection. At the same time, judges, prosecutors, lawyers, and investigators should be

²⁰ Vasyliiev, 2025, p. 841.

provided systematic training on IHL and international criminal law to increase the effectiveness of law enforcement under martial law. Thus, a comprehensive update of both international and national legal frameworks, factoring in new threats and wartime needs, is a prerequisite for ensuring effective human rights protection and the formation of a sustainable system of legal liability for aggressor states.

In the context of a full-scale war, and in the Ukrainian reality, the issue of ensuring human rights in the occupied territories is also extremely important. Currently, Ukraine lacks effective control over the temporarily occupied territories; objectively, this makes it impossible to implement the provisions of the Constitution of Ukraine and international laws on these lands. At the same time, as the occupying power, the Russian Federation systematically violates not only the norms of international humanitarian law but also numerous provisions of multilateral human rights treaties, demonstrating disregard for the international legal order.²¹ The institution of prosecution for war crimes performs a key function in the system of human rights protection.²² However, residents of the occupied territories face major restrictions on the exercise of their rights owing to a lack of access to national courts and international human rights institutions. Although the norms of international laws impose the obligation to protect human rights on the occupying power, the actual compliance with these obligations remains dependent on the political will of the latter. In the case of Russia, we are witnessing a deliberate disregard for international legal norms, which indicates a degradation of international legal responsibility by a permanent member of the UN Security Council. In this context, the ECtHR has a special role, as it remains one of the few effective institutions for the affected citizens of Ukraine. Since the beginning of Russia's aggression in 2014, thousands of Ukrainians have filed applications with the ECtHR, including those related to the events in Crimea and Donbas, illegal detention, torture, restrictions on freedom of movement, property rights, among others. The ECtHR has already found Russia liable for numerous violations of the ECHR, including freedom of expression, the right to a fair trial, prohibition of discrimination, among others. Although such judgments are critical for setting an international precedent, Russia's actual compliance with them remains problematic. In June 2024, the ECtHR unanimously confirmed systematic human rights violations in occupied Crimea, which was an

²¹ Katerenchuk, 2022.

²² Skrypniuk, 2022.

important signal to the international community. At the same time, however, the ECtHR is facing challenges: an excessive number of cases, delays in consideration, and problems with the implementation of judgments. This calls for reforms of the ECtHR: reduction of the terms of consideration, optimization of procedures, and increased capacity to monitor the implementation of judgements.²³ In our opinion, it is advisable to legislatively regulate the possibilities for class actions in international courts, which will unify the process of legal protection. This will primarily be an effective protection of human rights during times of war and will also raise the practices of the ECtHR and the ECtHR itself to a new level of law enforcement.

As we have already established, the ECHR is part of national legislation, and its provisions are binding on the territory of Ukraine. Therefore, the role of the ECtHR case law is also indicated by Article 46(1) of the ECHR, according to which the High Contracting Parties undertake to abide by the final judgments of the ECtHR in any case to which they are parties,²⁴ and this obligation indicates the binding force of decisions and their execution.

According to clause 5 of part 1 of Article 1 of the Law of Ukraine 'On the Execution of Judgments and Application of the ECtHR Practice', a judgment of the ECtHR is as follows:

- A final judgment of the ECtHR in a case against Ukraine, which recognizes a violation of the ECHR
- The final judgment of the ECtHR on just satisfaction in the case against Ukraine
- The judgement of the ECtHR on a friendly settlement in the case against Ukraine
- The judgment of the ECtHR on approval of the terms of the unilateral declaration in the case against Ukraine.²⁵ That is, these are the types of judgments delivered by the ECtHR that are subject to

²³ Tkachuk, Hryn and Mkrtchian, 2025, p. 405.

²⁴ Council of Europe. (1950, November 4). Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), with protocols. [Online]. Available at: https://zakon.rada.gov.ua/laws/show/995_004#Text (Accessed: 02 September 2024).

²⁵ Law of Ukraine "On the Execution of Judgements and Application of the Practice of the European Court of Human Rights," No. 3477-IV, February 23, 2006, Bulletin of the Verkhovna Rada of Ukraine, 2006, No. 30, p. 260.

mandatory execution. In addition, to fully understand the role of the ECtHR case law while interpreting the provisions of the ECHR, it is necessary to refer to the Vienna Convention on the Law of Treaties of 1969, to which Ukraine is a signatory (accession to the Convention in accordance with Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR 'On Accession of the Ukrainian Soviet Socialist Republic to the Vienna Convention on the Law of Treaties' of 14.14.04.1986 No. 2077-XI to the so-called general rule of interpretation, according to which '...along with the context (author's note - treaty), the following practice of application of the treaty, which establishes the agreement of the parties on its interpretation, shall be taken into account, among other things...'.²⁶

It is also worth noting that the ECtHR 'provides the final authoritative interpretation of the rights and freedoms set out in Title I of the ECHR and will take into account whether the national authorities have sufficiently taken into account the principles arising from its judgments, even if they concern other states'.²⁷ Thus, the ECHR states parties are recommended to take into account the conclusions drawn in the ECtHR judgments on the establishment of violations of the ECHR even by other states. This practice, in our opinion, is appropriate, as it ensures uniform application of the ECHR by all its parties, as well as precise understanding of its provisions. At the same time, Ukraine should take into account such provisions, considering the Ukrainian context of the case and necessarily focus on the national legislation and the practice of its application. Given that the ECtHR makes different types of judgments, the question arises as to which judgment should be considered when applying the ECtHR case law? Ratio decidendi judgments should be considered. In addition, different bodies of the ECtHR may deliver the judgments. For example, judgments rendered by the Grand Chamber are public; have a precedential character; address key issues of interpretation and application of the ECtHR; and provide for extraordinary circumstances (for example, the ECHR judgment *Burmych and Others v. Ukraine*²⁸). The Chamber's judgments are public, precedent-setting; they resolve standard issues of interpretation and application of the ECtHR (e.g.,

²⁶ Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR "On the Accession of the Ukrainian Soviet Socialist Republic to the Vienna Convention on the Law of Treaties" of 14.04.1986, No. 2077-XI. Vidomosti Verkhovnoi Rady, 1986, No. 17, p. 343.

²⁷ *Case of Opuz v. Turkey*, App. No. 33401/02, 9 June 2009.

²⁸ *Case of Burmych and Others v. Ukraine*, App. No. 46852/13, 12 October 2017.

Kaverzin v. Ukraine²⁹). Decisions issued by the Committee are public; they are not precedent setting; they resolve issues that are the subject of established practice. Finally, judgements delivered by a single judge are not public. While considering the ECtHR judgments, it should also be understood that the ECtHR is a "living instrument", which means that as society develops, so does the ECtHR and the ECtHR's positions, and therefore there may be cases when the Court, at the beginning of its activity, interpreted and applied the ECHR based on the circumstances of the time, and today the same rule may be applied differently, based on the current circumstances. For example, in the case of *Tyrer v. the United Kingdom* (1978), the ECtHR, for the first time, noted that the ECHR is a living instrument that should be interpreted in the light of modern conditions.³⁰

The next issue that is important for our study is the enforcement of ECtHR judgments. Article 1 of the Law of Ukraine "On the Enforcement of Judgments and Application of the ECtHR Case Law" provides that there are two types of enforcement of ECtHR judgments:

- payment of compensation to the claimant, and taking additional measures of an individual nature; and
- taking measures of a general nature.³¹
- Accordingly, individual measures may include:
- Reimbursement of court costs, compensation for moral and material damage, effective investigation (Case "Kaverzin v. Ukraine")
- Prohibition of extradition or deportation (*Kabulov v. Ukraine*³²)
- Reinstatement in office (case of *Oleksandr Volkov v. Ukraine*³³)
- Review of the case (*Shabelnyk v. Ukraine*³⁴)
- Resettlement to a safe place (*Dubetska and Others v. Ukraine*³⁵)
- Release from custody (Case "Assanidze v. Georgia"³⁶)
- General measures may include:

²⁹ *Case of Kaverzin v. Ukraine*, App. No. 23893/03, 15 August 2012.

³⁰ *Case of Tyrer v. the United Kingdom*, App. No. 5856/72, 25 April 1978.

³¹ The Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights" of 23.02.2006 No. 3477-IV. The Bulletin of the Verkhovna Rada of Ukraine, 2006, N 30, p. 260.

³² *Case of Kabulov v. Ukraine*, App. No. 41015/04, 19 November 2009.

³³ *Case of Oleksandr Volkov v. Ukraine*, App. No. 21722/11, 9 January 2013.

³⁴ *Case of Shabelnyk v. Ukraine*, App. No. 16404/03, 19 February 2009.

³⁵ *Case of Dubetska and Others v. Ukraine*, App. No. 30499/03, 10 February 2011.

³⁶ *Case of Assanidze v. Georgia*, App. No. 71503/01, 8 April 2004.

- Amending the current legislation and practice of its application
- Providing professional training on the Convention and ECtHR case law
- Amending administrative practices
- Providing legal expertise of draft laws.

According to Article 3 of the Law of Ukraine "On Enforcement Proceedings", decisions subject to enforcement include judgments of the European Court of Human Rights, taking into account the specifics provided for by the Law of Ukraine "On the Enforcement of Judgments and Application of the Practice of the ECtHR ", as well as judgments of other international jurisdictional bodies in cases provided for by an international treaty of Ukraine.³⁷

Having concluded that the ECtHR judgments are of great importance for Ukraine, it is important to focus on specific judgments that required implementation of general measures. As there are several such judgments, we will try to group them together and analyse those judgments that have had a significant impact on Ukrainian legislation separately.

The Kaverzin group of judgments in the ECtHR concerns systemic problems with torture and ill-treatment practiced by Ukrainian law enforcement agencies. Its name originates from the 2012 judgment in the case of Kaverzin v. Ukraine, where the ECtHR found a violation of Article 3 of the ECHR, attributable to the ill-treatment of prisoners and ineffective investigations into these cases. The ECtHR emphasized that these problems are systemic and require urgent reforms to prevent torture, ensure proper investigation, and protect human rights in Ukraine.

Kaverzin's case illustrates the ongoing practice of using force to extract confessions, which the court recognized as inhuman treatment. In a broader context, this group encompasses other cases of violations, including ineffective investigations and deficiencies in the legal system. Despite certain reforms, such as the creation of the State Bureau of Investigation (SBI) and the adoption of the new Criminal Procedure Code of Ukraine in 2012, implementation of the ECtHR judgments remains incomplete, and the process continues to be monitored by the European Committee of Ministers.³⁸

³⁷ Law of Ukraine "On Enforcement Proceedings" of 02.06.2016 No. 1404-VIII. Bulletin of the Verkhovna Rada, 2016, No. 30, p. 542.

³⁸ *Case of Kaverzin v. Ukraine*, App. No. 23893/03, 15 May 2012.

The Hailo group of judgments concerns human rights violations in Ukraine, in particular inadequate conditions of detention and lack of proper medical care in places of detention. Its name originates from the judgment in the case of *Hailo v. Ukraine*, where the ECtHR found that Ukraine had violated Article 3 of the ECHR, which forbids torture and inhuman or degrading treatment. In its judgment in the case of *Hailo v. Ukraine* (2015), the court pointed to the systemic problems in the Ukrainian penitentiary system, including poor detention conditions, lack of access to adequate medical care for prisoners, and ineffective investigation of complaints of such violations. The ECtHR stressed that such issues should be addressed at the systemic level through appropriate reforms.³⁹ This group of cases can be identified with other similar groups, such as the *Kaverzin*, concerning the conditions of detention, general attitude towards prisoners, and the effectiveness of the human rights protection system in Ukraine.

The Petukhov No. 2 group of ECtHR judgments addresses the systemic problems in the Ukrainian penitentiary system, especially the conditions of life imprisonment and access to justice for those sentenced to life imprisonment. This group is named after the case of *Petukhov v. Ukraine* (no. 2), in which the ECtHR found serious violations of Article 3 of the ECHR. In the case of *Petukhov No. 2* (2019), the ECtHR stated that the conditions of serving a life sentence in Ukraine do not meet European standards, as there is no possibility of reviewing the sentence or parole. The Court noted that this problem is systemic and requires legislative reform. The main criticism was that the system of life imprisonment in Ukraine did not actually allow for a realistic prospect of release, which contradicts international standards on the rights of prisoners.⁴⁰ This judgment highlights the need for changes in the national legal system with regard to access to a fair trial and the possibility of reviewing life sentences to ensure humanity and compliance with the ECHR.

The Fedorchenko and Lozenko group of judgments concern violations related to racial discrimination and ineffective investigations by the Ukrainian state authorities. The case of *Fedorchenko and Lozenko v. Ukraine* was decided by the ECtHR in 2012. This case concerns the murder of five members of a Roma family following an arson attack on their home in 2001. The applicants accused a local police officer of organizing the crime, but the investigation did not lead to the prosecution of the perpetrators. The

³⁹ *Case of Hailo v. Ukraine*, App. No. 52985/09, 18 December 2015.

⁴⁰ *Case of Petukhov v. Ukraine (No. 2)*, App. No. 41216/13, 12 March 2019.

ECtHR found a violation of Article 2 (right to life) and Article 14 (prohibition of discrimination) of the ECHR, as the Ukrainian authorities failed to ensure an effective investigation of the crime and did not take consider the racial motive of the murder.⁴¹ This case highlighted the problem of racial discrimination against Roma in Ukraine and revealed systemic shortcomings in the work of law enforcement agencies to protect minorities from violence and discrimination.

The Ignatov group of ECtHR judgments concerns violations related to unjustified detention and non-compliance with the right to a fair trial. The main case is the judgment in the case of Ignatov v. Ukraine, delivered by the ECtHR in 2016. The core issues raised in this group of judgements are:

- Prolonged detention: The ECtHR found a violation of Article 5 (right to liberty and security of person) based on the applicant's prolonged pre-trial detention without proper justification for the need for detention. In this case, the Ukrainian courts did not provide justifiable reasons for the extension of the preventive measure, and this was recognized as human rights violation.
- Insufficient justification of court decisions: The ECtHR noted that domestic courts often use general wording to justify a decision to detain a person in custody, without a detailed analysis of the individual circumstances of the case.
- Violation of the right to a hearing within a reasonable time: The ECtHR stressed that prolonged detention without proper judicial control violates the right to a speedy trial, which is also a violation of Article 5 of the ECHR.⁴² This group of judgments revealed significant problems in the Ukrainian judicial system, particularly abuse of detention and the formal approach to justify decisions on detention, which needs to be reformed to ensure fair trial.

The Nevmerzhytskyi group of judgements concerns systemic human rights violations in Ukraine, including ill-treatment, torture, prolonged detention, and inadequate conditions of detention. The main issues raised in this group are:

Ill-treatment and torture: In the case of Nevmerzhytskyi v. Ukraine (2005), the ECtHR found a violation of Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment. The case concerned the

⁴¹ *Case of Fedorchenko and Lozenko v. Ukraine*, App. No. 387/03, 20 September 2012.

⁴² *Case of Ignatov v. Ukraine*, App. No. 40583/15, 15 December 2016.

applicant being tortured and denied access to adequate medical care in detention.

- Prolonged detention and conditions of detention: In this group of judgments, the ECtHR examined the applicants' prolonged pre-trial detention without sufficient justification, in violation of Article 5 (right to liberty and security of a person) of the ECHR. The conditions of detention in places of detention also did not meet international standards, which was the basis for numerous decisions.
- Lack of adequate medical care: One of the key issues raised in this case was the lack of adequate medical care for prisoners, which was also recognized by the ECtHR as a violation of Article 3.⁴³ This group of judgments emphasizes the need to reform the detention system and improve detention conditions in Ukraine.

The group of judgments of the ECtHR "Yaremenko" deals with human rights violations in criminal proceedings in Ukraine, specifically violations related to the right to a fair trial and ill-treatment during interrogations. In this group, the ECtHR found that trials did not comply with Article 6 of the ECHR (right to a fair trial). In the case of *Yaremenko v. Ukraine*, the ECtHR found that the applicant was deprived of the right to a fair trial. The case was considered in violation of the requirements for the collection and use of evidence, which affected the outcome of the proceedings. In addition, torture and ill-treatment: The ECtHR also found a violation of Article 3 of the ECHR (prohibition of torture) during the applicant's detention. The case concerned the use of physical force against the applicant during interrogations, which violated the standards on the prohibition of torture and inhuman treatment. The ECtHR also found that unlawful evidence had been used, meaning that confessions obtained under pressure or ill-treatment could not be the basis for conviction. The applicant's guilty plea was obtained through pressure and abuse during the pre-trial investigation, which led the court to declare the evidence illegal.⁴⁴ These judgements highlight the systemic problems in the Ukrainian judicial system, particularly with respect to human rights during criminal proceedings and pre-trial investigations.

Another group of ECtHR judgments is the Merit group. *The Merit group of judgments* concerns systemic problems in Ukraine related to the

⁴³ *Case of Nevmerzhytskyi v. Ukraine*, App. No. 54825/00, 5 April 2005.

⁴⁴ *Case of Yaremenko v. Ukraine*, App. No. 32092/02, 12 June 2008.

conditions of detention in places of detention, ill-treatment, and violation of prisoners' rights to a fair trial. The main case, which gave the group its name, is the judgment in the case of *Merit v. Ukraine* (2004). In this case, the ECtHR found that Ukraine had violated Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment, due to the appalling conditions of the applicant's detention in the pre-trial detention centre, as well as insufficient medical care. The main problems of the Merit group are poor conditions in places of detention, which often include overcrowding, unsanitary conditions, poor nutrition and inadequate medical care; physical and psychological violence, specifically during interrogation or detention; lack of adequate protection and procedural guarantees for detainees, specifically lack of access to adequate legal assistance.⁴⁵ This group of judgments indicates the need for serious reforms in Ukraine's penitentiary system and the observance of human rights in places of detention.

In our opinion, the most striking example of Ukraine's successful implementation of ECtHR judgments is the Balytskyi group of judgments. The ECtHR raises issues related to violations of the rights to a fair trial and the right to defence in criminal proceedings. In these cases, the applicants complained of ill-treatment by law enforcement agencies, insufficient guarantees of the rights of suspects, and the lack of effective legal mechanisms to protect their rights. The main problems and issues raised in the judgement were:

Violation of Article 6 of the ECHR – the right to a fair trial: unlawful conviction or detention of the applicants; lack of adequate legal assistance and violation of the right to defence; falsification of evidence or improper procedure for its collection.

Violation of Article 3 – prohibition of torture and ill-treatment: Ill-treatment in detention, torture to extract confessions; lack of proper investigation by the authorities in cases of complaints of torture.

The judgments stated systemic problems with Ukrainian legislation. The ECtHR judgments highlighted systemic shortcomings in Ukraine's law enforcement system that required immediate reform, particularly in terms of ensuring the rights of suspects and their protection during the investigation and trial. As a result of such decisions, the legislation was amended, and the following steps were taken to reform the judicial and law enforcement systems.

⁴⁵ *Case of Merit v. Ukraine*, App. No. 66561/01, 30 March 2004.

1. Reform of the police: the structure and activities of law enforcement agencies were reformed to reduce the number of human rights violations during pre-trial investigations. The Law of Ukraine on the National Police was adopted on 2 July 2015. This was an important step in reforming Ukraine's law enforcement system. After the Euromaidan and the Revolution of Dignity, Ukraine needed to reform its law enforcement agencies. Corruption, lack of efficiency, and distrust in the police became serious problems. In addition, the armed conflict in the east of the country has also highlighted the need to strengthen the rule of law and increase the effectiveness of law enforcement agencies. International organizations and Ukraine's partners also called for reform of law enforcement agencies. As a result, the law replaced the militia with the National Police, which became a new, independent structure designed to ensure public order and security. It also introduced requirements for the education and professional skills of candidates. The reform also aimed to improve the public image of law enforcement and restore trust in them. The law enforcement officers introduced new approaches to combat corruption and abuse. The police reform also included decentralization and increased efficiency of local police work. Since 2015, positive developments have been recorded, including improved public service and fewer cases of corruption. At the same time, the reform has faced several challenges, including resistance from old structures, funding, and resource issues. Overall, the new police received positive feedback from the public for its professionalism and transparency, although some problems remain to this day. The reform of the National Police was an important step in Ukraine's overall reform process, but further steps and support from the state and society are needed to achieve long-term results.

2. Adoption of the new Criminal Procedure Code of Ukraine: The Criminal Procedure Code of Ukraine (CPC) was adopted on 13 April 2012. This code was an important part of the legal reform in Ukraine and was aimed at modernizing the criminal justice system. Prior to 2012, Ukraine was governed by the Soviet criminal procedure law, which did not meet modern requirements of justice and human rights. The need to update the procedural rules became urgent. Ukraine sought to integrate into the European Union and comply with European standards of justice, particularly the requirements for procedural rights and freedoms, which resulted in the update of legislation. The need to fight corruption and abuse

in the law enforcement system was one of the important reasons for reforming the criminal procedure legislation. Civil society and human rights organizations also demanded reforms to increase the transparency and fairness of the judiciary. The adoption of the CPC of Ukraine in 2012 introduced new guarantees of individual rights and freedoms in criminal proceedings, including the right to a defence, the right to free legal aid for those who cannot afford a lawyer, and other rights. The principle of the presumption of innocence was enshrined, which means that a person is presumed innocent until proven guilty in court. The Code strengthened the role of judicial control at all stages of the criminal process, which was aimed at reducing abuses by law enforcement agencies. New rules and procedures for investigative (detective) actions were introduced to increase their legality and transparency. The Code provided for simplification of procedural procedures to hasten the consideration of criminal cases and reduce delays. While the 2012 CPC was an important step, further improvements and adaptations are required to ensure its effective functioning. Overall, the adoption of the CPC in 2012 was an important step towards the modernization of criminal proceedings in Ukraine and compliance with modern standards of justice.

3. Establishment of the State Bureau of Investigation: The State Bureau of Investigation (SBI) was established in Ukraine as part of the reform of the law enforcement system to ensure independent investigation of criminal cases, especially offences committed by law enforcement officers (police, prosecutors, judges) and high-ranking officials. The relevant Law on the establishment of SBI was adopted by the Verkhovna Rada of Ukraine on 12 November 2015. The main purpose of its creation was to ensure effective and independent investigation of crimes committed by law enforcement officials, as well as to reduce corruption and abuse. The SBI investigates offences committed by law enforcement officers and other high-ranking officials. Since its inception, the SBI has gradually taken over the pre-trial investigation function from the Prosecutor's Office, which has finally established the latter's status as a judicial body under the Constitution of Ukraine. The legal status of the SBI is quite complicated, given that it is a central executive body with a special status. At the same time, this state body is a law enforcement agency, as it has law enforcement functions. Thus, according to Article 1 of the Law of Ukraine "On the State Bureau of Investigation", 'the State Bureau of Investigation

is a state law enforcement agency entrusted with the tasks of preventing, detecting, stopping, solving and investigating criminal offences within its competence'.⁴⁶ The law enforcement orientation of the SBI is also evident in its tasks, as stated in Article 5 of the Law.⁴⁷ The place of the newly established SBI in the system of public authorities expands the scope of power of this body in terms of anti-corruption policy and may have negative aspects in terms of achieving specific results of the SBI's activities.⁴⁸ The establishment of the SBI was envisaged by the Transitional Provisions of the Constitution of Ukraine back in 1996. However, almost 19 years have passed since then until its creation! Within the scope of its competence, the SBI may, during the investigation of crimes, interfere in the activities of senior officials, judges, law enforcement officers, and other persons who have committed crimes. These persons may influence the course of criminal proceedings, so the law contains broad guarantees of the independence of this body.

It is also worth focusing on the foreign experience of the effectiveness of the ECtHR's human rights protection. Thus, according to Gerards & Fleuren, expressed in «Implementation of the ECHR and of the judgments of the ECtHR in national case law», specifically in the chapter "The European Court of Human Rights and the national courts - giving shape to the notion of 'shared responsibility'", national constitutional and administrative courts play a key role in the implementation of the ECtHR case law in the domestic system. In countries where ECtHR judgments are analysed at the constitutional level, their implementation is more efficient and law enforcement practices are consistent with European standards.⁴⁹ This approach shows that the principle of "shared responsibility" increases the effectiveness of protection when constitutional courts become a guarantor of compliance with national law. The authors of the article «The Aggression Against Ukraine and the Effectiveness of Inter-state Cases in Case of War, ECHR», highlight the experience of Ukraine's interstate applications to the ECtHR. The author expresses the position that although such applications have symbolic and legal potential, their effectiveness is limited by the lack

⁴⁶ On the State Bureau of Investigation. Law of Ukraine of 12.11.2015 No. 794-VIII. Bulletin of the Verkhovna Rada (VRU), 2016, No. 6, p. 55.

⁴⁷ On the State Bureau of Investigation. Law of Ukraine of 12.11.2015 No. 794-VIII. Bulletin of the Verkhovna Rada (VVR), 2016, No. 6, p. 55.

⁴⁸ Ilchenko, 2017, pp. 281–283.

⁴⁹ Gerards and Fleuren, 2014, pp. 13–94.

of an effective mechanism for the enforcement of judgments (especially compensation), based more on international pressure than on the enforcement of the judgment.⁵⁰ This option is indeed capable of generating an international outcry, but remains primarily theoretical without enforcement mechanisms, and therefore its effectiveness for victims is uncertain. Jeton Shasivari, in his article «The constitutional complaint in North Macedonia», which is an effective legal instrument with narrow effects analyses the mechanism of constitutional complaint in North Macedonia. The author demonstrates that although this instrument has the potential to be an effective remedy, its operation is limited by narrow jurisdiction, low court activity, and procedural barriers.⁵¹ We believe that a constitutional complaint can become an important domestic remedy, but only if its priority competence is expanded and is accessible to applicants. According to Jerzy Jaskiernia, in his article «Actual challenges for the implementation of judgments of the ECtHR», the key problem with the implementation of ECtHR judgments in Poland is delays, long-term failures in the implementation of such judgments, particularly under Article 3 ECHR (conditions of detention), which is confirmed by the statistics of the Committee of Ministers of the Council of Europe.⁵² The author insists on a more active role of civil society, the Ombudsperson, and the Venice Commission to strengthen control over the implementation of decisions.⁵³ According to the authors of the publication «Assessing the Implementation of ECtHR Judgments by Poland and Moldova», both countries demonstrate structural failures, that is, lack of political will in the executive branch of the government leads to public distrust of domestic justice and massive appeals to the ECtHR.⁵⁴ The authors point out that even with a relatively well-established control mechanism, the Committee of Ministers faces a number of cases without execution.⁵⁵ Indeed, the weakness of domestic judicial and administrative institutions reduces confidence in national justice, stimulating applications to the ECtHR, which creates an additional burden on the ECtHR and reduces its productivity. The report of the Secretary

⁵⁰ Dzehtsiarou and Tzevelekos, 2022.

⁵¹ Shasivari, 2024. pp. 77–92.

⁵² Jaskiernia, 2022.

⁵³ Jaskiernia, 2022.

⁵⁴ Assessing the Implementation of ECtHR Judgments by Poland and Moldova, *Przegląd Konstytucyjny*, 2020, Issue 3, pp. 20–38.

⁵⁵ *Assessing the Implementation of ECtHR Judgments by Poland and Moldova*, *Przegląd Konstytucyjny*, 2020, Issue 3, pp. 20–38.

General of the Council of Europe states that the decisions of the Constitutional Tribunal of Poland during 2021–2022 undermine the application of Article 6 of the ECHR and challenge the jurisdiction of the ECtHR. This situation leads to violations of the right to a fair trial and raises serious concerns of the Committee of Ministers.⁵⁶ When national constitutional bodies oppose the interpretation of the ECtHR, it undermines the institutional basis of the rule of law and compliance with human rights standards in the country. Poland's experience with freedom of speech demonstrates that even individual articles of the Convention can become a driving force for legislative reform and increase the effectiveness of rights protection.⁵⁷

The following key conclusions can be drawn from the analysed sources. First, the integration of the ECtHR case law into national legislation and judicial practice through the participation of a constitutional or similar body increases the implementation of judgments.⁵⁸ Second, inter-state applications, although of strategic importance⁵⁹, require additional enforcement mechanisms – without which their potential remains unrealized. Third, the effectiveness of a constitutional complaint as a domestic instrument depends on its accessibility, jurisdictional coverage, and ease of use.⁶⁰ Therefore, it is advisable for Ukraine to:

- Enshrine the priority of ECHR norms in national legislation and establish advisory mechanisms under the Constitutional Court or the Supreme Court to analyse ECtHR judgments.
- Develop a legislative institution of inter-state applications with an international fund for the enforcement of judgements.
- Introduce or expand the institution of constitutional complaint and remove procedural barriers to its effective application. These steps will help transform the experience of the ECtHR into a real protective potential of the national justice system.

At the same time, an analysis of the scientific literature leads to the conclusion that not all reforms in Ukraine are implemented properly or lead to the expected results. Thus, the article by Iurii Bedratyi, Serhii Khaliuk, and

⁵⁶ Council of Europe, Report of the Secretary General: PACE Initiative, Doc. 15741, Strasbourg, November 2022, section 2.2.9, pp. 36–39.

⁵⁷ Dziurda, Gołąb and Zembrzuski, 2024, pp. 1–50.

⁵⁸ Gerards and Fleuren, 2014.

⁵⁹ Dzehtsiarou and Tzevelekos, 2022.

⁶⁰ Shasivari, 2024; Saveski, 2018

Oleksandr Savka. « Judicial Reform in Ukraine: Results and Further Steps» presents a systematic analysis of the judicial reform in Ukraine, describes the key stages during 2014–2025, results of the High Anti-Corruption Court (HACC) establishment, introduction of the e-court, and outlines the main problems, such as low level of trust (only 14% trust the judiciary), corruption risks, staffing shortages, administrative inefficiency, and the preservation of political influence on the court. The authors argue that the success of the reforms depends not only on legislative initiatives, but also on the active participation of the public in restoring trust in the justice system.⁶¹ This is a very relevant and empirically based material as it emphasizes that without public support and proper staffing, judicial reform risks remain formal. Other scholars have studied how the active role of Ukrainian civil society acts as an informal institution in the judicial reform process. The authors show that civil society organizations and experts control the reform, especially in the context of constitutional control through the Constitutional Court of Ukraine. Monitoring, analysis, and public reports of civil society have a significant impact on reforms, despite the lack of formal participation status.⁶² In the article «Guarding the guardians: Ukraine's security and judicial reforms under Zelensky» European Council on Foreign Relations (ECFR) describes the failures in the reform of security agencies (SBU, Office of the Prosecutor General), their stagnation since 2016, weakness of qualification assessment, political influence on courts, personnel abuse and sabotage of reforms by judicial and law enforcement institutions. The authors express concern that without high-quality personnel, reforms remain declarative.⁶³

The analysed sources unanimously show that the key to successful implementation of reforms in Ukraine is active participation of civil society as an informal but influential monitoring mechanism; transparency in the adoption of laws and personnel procedures, especially in the judiciary; consistent implementation of laws and decisions of institutions, including the Anti-Corruption bodies and the Constitutional Court; no use of war as a tool to delay reforms; ensuring real independence of the judiciary

⁶¹ Bedratyi, Khaliuk and Savka. 2025.

⁶² Lashyn, Leshchyshyn and Popova, 2023.

⁶³ European Council on Foreign Relations (ECFR), *Guarding the Guardians: Ukraine's Security and Judicial Reforms under Zelensky* (2024), Finnish Institute of International Affairs (FIIA). [Online]. Available at: https://ecfr.eu/publication/guarding_the_guardians_ukraine_security_and_judicial_reforms_under_zelensky/ (Accessed: 05 July 2025).

through personnel policy and institutional guarantees. In view of this, important recommendations are as follows: legislate the role of public in monitoring reforms; ensure transparency of appointments to the Higher Qualification Commission of Judges of Ukraine; introduce internal control over the implementation of decisions (for example, a monitoring group); avoid regulatory adoption of reforms without a practical mechanism for their implementation.

Thus, summing up the results of our research, it is worth emphasizing that it is the duty of each state to create an effective legal mechanism to ensure proper implementation and protection of human and civil rights and freedom on its territory. During different historical periods of its existence, the state of Ukraine and its authorities provided these guarantees in various ways, more during some periods more and less during others. A landmark event was the ratification of the ECHR. At the same time, this process intensified after Ukraine gained independence in 1991. An important factor in this process was Ukraine becoming a member of the Council of Europe and adopting a course of European integration. The various institutions of the Council of Europe institutions are effective in influencing member states to respect human rights. One of these institutions is the ECtHR. Its case law is of great importance in ensuring human rights. This is, of course, confirmed by changes in the state legal mechanism because of the ECtHR judgements in relation to Ukraine and other states. In addition, we would like to note that the implementation of human rights and its mechanism remain controversial issues, despite the large number of ECtHR judgments in which the court finds violations and directs the state to correct these violations, including through amendments to legislation, which we have analysed in this study. An important factor in these decisions is the implementation of reforms across various spheres of public life. As stated above, not all reforms are effective, which is due to various reasons. We believe that the implementation of the recommendations outlined in this paper will help to remedy this situation in human rights protection through the mechanism of the ECtHR. Implementation of our recommendations into the mechanism itself, we believe, will contribute to increasing its effectiveness. The challenges of martial law greatly complicate the situation but should not hamper the establishment of the rule of law. Moreover, the proposed mechanisms for protecting human rights in occupied territories are aimed at safeguarding people, their life and health, honour, and dignity, regardless of the authorities exercising power in a particular territory.

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NATASA PLAVSIC*

European Convention on Human Rights from the perspective of the Republic of Serbia**

ABSTRACT: This article explores the role of the European Convention on Human Rights (ECHR) in the constitutional and legal order of the Republic of Serbia. It outlines the historical development of the constitutional guarantees of human rights and the gradual incorporation of international human rights standards into domestic constitutional law. The paper discusses the constitutional status of the ECHR and the obligation of the domestic authorities to interpret national law in accordance with the case-law of the European Court of Human Rights. Particular focus is placed on the role of the Constitutional Court as a key domestic mechanism for the protection of Convention rights. The paper analyses selected landmark cases against Serbia and highlights the transformative effect of the ECtHR jurisprudence on national law and judicial practice. The paper concludes that effective implementation of the Convention remains essential for ensuring sustainable human rights protection in Serbia.

KEYWORDS: European Convention on Human Rights, European Court of Human Rights, Republic of Serbia; constitutional system, national human rights protection, constitutional complaint, landmark cases of the ECtHR.

1. Historical development of human rights in Serbia

The historical context and various forms of state in which Serbia has existed and functioned in the last two centuries have affected the development and constitutionalisation of human rights in the country. Although the idea of human rights has its roots in the early stages of the medieval Serbian state¹

* PhD, Judge, the Constitutional Court of the Republic of Serbia, Serbia. natasaplavsic7@gmail.com, natasa.plavsic@ustavni.sud.rs.

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¹ The document most often considered as the first written text in Serbia that provided and safeguarded what was to become of modern human rights is Dušan's code from 1349. [Online]. Available at: https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/javno-pravo/srbija/Dusanov_zakonik.pdf (Accessed: 16 December 2025).

and human rights were recognised by the Ottoman Empire that once ruled Serbia, the establishment and development of human rights are usually linked to the emergence of modern Serbian constitutionalism.

Several historical periods of Serbian constitutionalism can be distinguished from textbooks on constitutional law.² From 1835 to 1918, the Principality of Serbia and the Kingdom of Serbia experienced their first period of constitutionalism. The second period occurred in the first Yugoslav state – the Kingdom of Serbs, Croats and Slovenes (renamed the Kingdom Yugoslavia from 1929) – of which Serbia was an integral part; it lasted from 1918 to 1941. The next phase of constitutionalism took place in the second Yugoslav state, and lasted from 1943 to 2003. Serbia's modern constitutional period began with the fall of the Yugoslav state and the breakup of the State Union of Serbia and Montenegro. Each of these periods is characterised by the adoption of several constitutions; from 1835 to the present, Serbia has enacted numerous constitutions that recognised and incorporated human rights as an integral part of constitutional documents. Yet, the scope of human rights and their protection differed according to the context and circumstances accompanying the adoption of each new constitution.

Six constitutions were declared during the first phase of constitutionalism; three were promulgated under the Ottoman Empire, and three were proclaimed following Serbia's independence in 1878 after the Berlin Congress. The first Serbian Constitution, also known as the Sretenjski Constitution, was adopted in 1835, when Serbia was granted the special status of internal autonomy within the Ottoman Empire and established internal governance under this special status. Despite its brief implementation, it remains an important symbol of Serbia's aspiration for independence and modernisation, and represents the first written constitutional document that included provisions on human rights.³ Chapter 11 of this Constitution declared 23 articles on the so-called rights and liberties of citizens – although it failed to include a guarantee of traditional political rights⁴ – including the right to a fair trial, the right to property, freedom of movement and residence, the inviolability of the home, and the

² Marković, 2009, pp. 91-147; Simović and Petrov, 2018, pp.61-83; Petrov, 2022, pp. 73-86.

³ On the importance of the Sretenje Constitution and its similarities with *Magna Carta Libertatum*, see Avramović, 2010, pp. 37-65.

⁴ Petrov, 2022, p. 75.

right to choose one's occupation. Equal protection under the law and before courts was also guaranteed, as was the *ne bis in idem* principle.

Adopted in 1838, the second Serbian Constitution – also known as the Turkish Constitution – established the fundamental requirements for the autonomous status of the Serbian vassal principality.⁵ The 14 articles of this Constitution, which guaranteed the right to appeal, freedom of trade, freedom of religion, inviolability of property, protection from unjustified prosecution and harassment, and the declaration of the principle of individual criminal responsibility, regulated human rights in a more “limited” manner.⁶

The Viceroy's Constitution of 1869, the third Serbian Constitution,⁷ lacked the human rights provisions that were essential “to obtain a free citizen”.⁸ One significant achievement was the first-ever guarantee of freedom of expression. However, rights and freedoms could be restricted by law, and suspended in the event of an immediate threat to public safety.

The declaration of independence at the 1878 Berlin Congress marked the beginning of the Kingdom of Serbia's constitutionalism, which resulted in significant progress in the domain of human rights. Three constitutional texts were adopted between the Berlin Congress, the end of the Serbian Kingdom, and the establishment of the first Yugoslav state (the Kingdom of Serbs, Croats and Slovenes). The first was the Kingdom of Serbia's 1888 Constitution, popularly referred to as the Radical Constitution.⁹ This modern constitution included provisions on basic human rights in significantly greater depth than earlier ones and established all rights and freedoms as directly applicable based on the Constitution. Notably, in addition to the well-known individual and civil rights, it also introduced the first political rights such as the freedom of the press, freedom of assembly, and freedom of association. The April Constitution of 1901¹⁰ and the Parliamentary

⁵ For more on the Turkish Constitution, see Radojević, 2010b, pp. 411-426.

⁶ Ibid, p. 421.

⁷ For more on the Namesnički/Viceroy's Constitution, see Radojević, 2010a, pp. 457-486 and Krstić-Mistridžević, 2018, pp. 267-286.

⁸ Marković, 2009, p. 99.

⁹ [Online]. Available at: <https://ius.bg.ac.rs/wp-content/uploads/2020/11/USTAV-KRALJEVINE-SRBIJE-1888.pdf> (Accessed: 16 December 2025).

¹⁰ [Online]. Available at: <https://www.uzzpro.gov.rs/doc/biblioteka/digitalna-biblioteka/1901-ustav-kraljevine-srbije.pdf> (Accessed: 16 December 2025) and Pavlović, 2013, p. 513.

Constitution of 1903,¹¹ the two subsequent constitutions of the Kingdom of Serbia, did not introduce any significant improvements concerning the recognition and protection of human rights.

After the First World War, when the Kingdom of Serbia was incorporated into the newly formed Kingdom of Serbs, Croats and Slovenes in 1918 (the Kingdom of Yugoslavia from 1929), Serbia continued to safeguard human rights within this first Yugoslav state.¹² The Vidovdan Constitution of 1921,¹³ the first constitution of the Kingdom of Serbs, Croats, and Slovenes, proclaimed generally recognised civil and political rights; nevertheless it guaranteed them only in accordance with the law – that is, subject to potential restrictions prescribed by law.¹⁴ The document was innovative in its acknowledgement of fundamental socioeconomic rights and duties in a separated section¹⁵; however, they were reserved for the legislator's discretion rather than being applied directly in accordance with the Constitution.¹⁶

Following the constitutional crisis, the 1931 Constitution was adopted. It formally remained in force until 1946, when the monarchy was overthrown and Serbia became part of the newly established second Yugoslav communist state. The 1931 Constitution included individual or civil and political rights and freedoms that were earlier known and protected; nevertheless, it provided fewer social and economic rights compared to the 1921 Constitution.

After the Second World War, Serbia became one of the six republics of the newly established second (communist) Yugoslav federative state, where human rights continued to be recognised within both the republican and federal constitutions.¹⁷ The first constitution of this newly established

¹¹ [Online]. Available at: <https://projuris.org/wp-content/uploads/2022/09/Ustav-Kraljevine-Srbije-1903.pdf> (Accessed: 16 December 2025).

¹² From 1918 until 1941, the Yugoslav state was a unitary state; from 1943 until 1992, it was a federal state, see Marković, 2009, p. 99.

¹³ [Online]. Available at: <https://radnici.ba/wp-content/uploads/2018/04/Ustav-kraljevine-SHS-Vidovdanski-ustav-1921.pdf> (Accessed: 16 December 2025).

¹⁴ For more on the Vidovdan Constitution, see Jevtić, 1988.

¹⁵ Simović and Petrov, 2018, p. 96.

¹⁶ Marković, 2009, p. 115; Petrov, 2022, p. 82.

¹⁷ When federal constitutions were approved during the Second Yugoslavia, Serbia's republican constitutions were also adopted concurrently, namely, the People's Republic of Serbia Constitution from 1947, the Socialist Republic of Serbia Constitution from 1963, the Socialist Republic of Serbia Constitution from 1974, and the Republic of Serbia Constitution from 1990. This paper examines the protection of human rights guaranteed by

state, the 1946 Constitution of the Federative People's Republic of Yugoslavia,¹⁸ reflected the accomplishments of the socialist revolution; legislation was strongly influenced by the 1936 Soviet Constitution, as indicated by its limited list of recognised human rights.¹⁹

The next Yugoslav Constitution, adopted in 1963,²⁰ consolidated the idea of socialist self-government; the principle of self-government permeated the entire Constitution.²¹ Its legacy was an extensive list of social and economic rights, centred on the working class's freedom from all forms of exploitation and arbitrariness, and social self-government and solidarity. A second important contribution of this Constitution was the establishment of federal and republican constitutional courts, and the creation of the first mechanism for the protection of individual human rights.²²

The 1974 federal Constitution²³ recognised previously guaranteed rights and freedoms of "men and citizens",²⁴ particularly social and economic rights. All rights and freedoms were subject to the interests of other individuals and by the constitutionally specified socialist community interests. Freedom of scientific, cultural and artistic creativity was proclaimed, and the protection and improvement of the environment was introduced. Some provisions of this Constitution regarding the status of the federal unit are often considered a key factor in the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY).²⁵ After the collapse of the second Yugoslav state, the remaining two federal republics, Serbia and Montenegro, created the so-called third Yugoslav state, which had two constitutional documents – that of 1992 and 2003.²⁶

Yugoslavia's federal constitutions because of Serbia's status as a federative unit within Second Yugoslavia and the power granted to the federal state. Moreover, federative units' constitutions had to conform with the federal constitution.

¹⁸ [Online]. Available at: <https://www.pfsa.unsa.ba/pf/wp-content/uploads/2019/05/Ustav-SFRJ-iz-1963.pdf> (Accessed: 16 December 2025).

¹⁹ Simović and Petrov, 2018, p. 72.

²⁰ [Online]. Available at: <https://www.pfsa.unsa.ba/pf/wp-content/uploads/2019/05/Ustav-SFRJ-iz-1963.pdf> (Accessed: 16 December 2025).

²¹ Petrov, 2022, p. 84.

²² Ibid, p. 84.

²³ [Online]. Available at: <https://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf> (Accessed: 16 December 2025).

²⁴ Chapter III.

²⁵ Simović and Petrov, 2018, p. 75

²⁶ First was 1992 Constitution of the Federative Republic of Yugoslavia, and second was 2003 Charter of the State Union of Serbia and Montenegro.

Concurrently, in 1990, the Constitution of the Republic of Serbia was adopted. This document marked a “most significant qualitative shift” in the domain of human rights protection.²⁷ The importance of this Constitution is reflected in the extensive list of guaranteed rights, and the quality of the guarantees. The catalogue of guaranteed rights “was realistic”²⁸ and included all internationally recognised civil and political rights and freedoms, as well as economic and social rights.

Finally, after the dissolution of the State Union, the current Serbian Constitution of 2006 was adopted. It expanded on the prior Constitution to generate the most comprehensive list of guaranteed rights and freedoms.²⁹ This Constitution also strengthened the protection of rights by giving a special constitutional status to the previously established institution of the Ombudsman,³⁰ and introduced an effective mechanism for the direct protection of human rights – a constitution appeal before the Constitutional Court.

2. The Council of Europe and Republic of Serbia

Despite being among the founding members of the United Nations,³¹ Yugoslavia’s relationship with the Council of Europe (CoE) was far more complicated, and the country joined the CoE much later. Although the CoE was conceived as a regional European organisation that would gather all European countries around common goals – democracy, the protection of human rights, and the rule of law³² – for years, the “doors of the Council of Europe”³³ remained closed to many European nations, including Yugoslavia, of which Serbia was a part. The cooperation and relationship between Yugoslavia and the CoE went through several phases across many

²⁷ Simović and Petrov, 2018, p. 78.

²⁸ Petrov, 2022, p. 87.

²⁹ Simović and Zekvica, 2023, p. 252.

³⁰ Law on the Protector of Citizens was adopted in 2005 (Official Gazette, no. 79/05, 54/07) and became a constitutional institution with the 2006 Constitution.

³¹ The Democratic Federal Yugoslavia was one of the founding members of the United Nations in 1945. Following the dissolution of Yugoslavia, Serbia (then known as the Federal Republic of Yugoslavia) reapplied for membership and was admitted to the UN in 2000.

³² The Statute of the CoE. [Online]. Available at: <https://rm.coe.int/1680306052> (Accessed: 16 December 2025).

³³ Milikić, 2014, p. 279.

years, nearly from the organisation's founding until Yugoslavia's (i.e., Serbia and Montenegro's) admission in 2003.

During the first phase, which lasted from 1949 to 1960, the CoE established its first, "somewhat tentative"³⁴ connection with the Yugoslav leadership and attempted to bring the then-communist state ideologically closer to the organisation founded on Western values. Yugoslavia was mentioned positively in CoE reports, and the organisation was mentioned in speeches and addresses by Yugoslav officials; yet, no formal requests for admission were submitted.³⁵ Across the second phase, which lasted from 1961 until 1970, relations generally weakened, as the Yugoslav foreign policy remained committed to the Non-Aligned Movement.³⁶ Relations improved after the events of 1968,³⁷ and the CoE provided access to Eastern European nations with more liberal systems of government such as Yugoslavia, which embraced the invitation to cooperate and establish relationships at the intergovernmental level on non-political issues.³⁸ In the next phase, between 1971 and 1980, relations developed progressively, and it is particularly significant that in 1977, Yugoslavia became the first country in Eastern Europe to join three CoE conventions as a non-member.³⁹ In the following decade, Yugoslavia received special status within the Parliamentary Assembly (PACE) of the CoE, ratified the European Cultural Convention (ETS No. 018)⁴⁰ and in 1990, requested full membership in the organisation.⁴¹ However, the 1991 disintegration of the

³⁴ Ibid, p. 280.

³⁵ Ibid, 2014, pp. 119-266.

³⁶ Milikić, 2017, pp. 17-115.

³⁷ The Warsaw Pact countries – the Soviet Union, Bulgaria, East Germany, Hungary, and Poland –invaded Czechoslovakia on 20 August 1968, in order to stop the reforms leading to political liberalization.

³⁸ See Milikić, 2017, p. 112.

³⁹ The European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS No. 015), the European Convention on the Equivalence of Periods of University Study (ETS No. 021) and the European Convention on the Academic Recognition of University Qualifications (ETS No. 032). [Online]. Available at: <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaty-detail&treatynum=021> and <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaty-detail&treatynum=032> (Accessed: 16 December 2025).

⁴⁰ [Online]. Available at: <https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaty-detail&treatynum=018> (Accessed: 16 December 2025).

⁴¹ Milikić, 2012, pp. 21-111.

state and the Yugoslav conflict ultimately halted the membership process. After 2000, when Serbia and Montenegro were formed as a new State Union and the political scene in Serbia shifted, the admission process to the CoE resumed.⁴² After a long period of variable cooperation and interaction with the CoE, the State Union⁴³ – at the time comprising Serbia and Montenegro – became a full member of the organisation on 26 March 2003. However, after a referendum on independence was held in Montenegro three years later, Serbia's Parliament declared the country's restoration to independence. The State Union ceased to exist, and Serbia remained a full member of the CoE as a legitimate successor to the State Union.

By joining the organisation, Serbia accepted the Statute of the CoE and simultaneously acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms – the most important document on human rights in Europe – and all additional protocols. Moreover, Serbia has signed and ratified numerous additional CoE treaties since joining the organisation, including the European Convention on Extradition (ETS No. 024), the European Convention on Mutual Assistance in Criminal Matters (ETS No. 030), the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 051), European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (ETS No. 082), the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (ETS No. 105), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), the Convention on the Transfer of Sentenced Persons (ETS No. 112), the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126), the Framework Convention for the Protection of National Minorities (ETS No. 157), the European Social Charter (revised) (ETS No. 163), Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201),

⁴² Ibid, pp. 111-161.

⁴³ The State Union of Serbia and Montenegro existed from 4 February 2003 to 5 June 2006.

and the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210).⁴⁴

3. Position of the ECHR and practice of the ECtHR in the legal system of the Republic of Serbia⁴⁵

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) was signed by the State Union of Serbia and Montenegro on 3 April 2003, ratified on 26 December 2003, and entered into force with respect to Serbia on 3 March 2004. As a member of the State Union, Serbia included the ECHR in its legal framework. In line with Article 60 of the Constitutional Charter,⁴⁶ Serbia, as the legitimate successor to the State Union after its dissolution, acquired membership in the CoE and the ECHR, which raised the “issue of the constitutional legal importance of the European Convention within the constitutional system of the Republic of Serbia”.⁴⁷

There is no legal obligation to incorporate the Convention into the domestic legal system, and Contracting States retain the discretion to determine its place and status in their national legal systems.⁴⁸ According to Article 1 of the Convention, and the general obligation of the State to respect and secure human rights, the substance of the rights and freedoms outlined in the Convention must be secured, in some form, under the domestic legal order for everyone within the jurisdiction of the Contracting States.⁴⁹ Another positive obligation of the Contracting States, under Article 13 of the ECHR, is to guarantee the availability of an effective remedy at

⁴⁴ For the list of all CoE Conventions signed and ratified by Serbia, see, [Online]. Available at:

<https://www.coe.int/en/web/conventions/by-member-states-of-the-council-of-europe?module=treaties-full-list-signature&CodePays=SAM&CodeSignatureEnum=&DateStatus=&CodeMatiere=> (Accessed: 16 December 2025).

⁴⁵ Some of the points from the author’s previously published article are used in the Chapter 3; see Plavšić, 2019.

⁴⁶ [Online]. Available at: http://demo.paragraf.rs/demo/combined/Old/t/t2005_06/t06_0210.htm (Accessed: 16 December 2025).

⁴⁷ Nastić, 2009, p. 499.

⁴⁸ Ibid, p. 503.

⁴⁹ *Case of Lithgow and others v. UK*, App. Nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, 8 July 1986, § 205.

the domestic level – a national mechanism for the protection of human rights. The protection provided by Article 13 does not go so far as to require any particular form of remedy, since the Contracting States are being afforded a margin of discretion in conforming to their obligations under this provision.⁵⁰

The 2006 Serbian Constitution does not specifically mention the Convention; however, the ECHR's status, place, and function within the Serbian constitutional legal system are implicitly regulated by general constitutional rules governing the status and position of all ratified international treaties. Several constitutional provisions are relevant in this regard.⁵¹

The Serbian Constitution is clearly based on the monistic principle,⁵² and the Convention – as the most important and, certainly, the most effective international instrument on human rights – is an integral part of the Serbian legal system and directly applicable.⁵³ The Convention is situated between the Constitution and laws – placed directly under the Constitution but with greater legal authority than laws⁵⁴ – and national authorities interpret the Constitution to avoid inconsistencies between national and international rules.⁵⁵ The Serbian Constitution also emphasises the direct application of ratified international treaties by the courts, indicating that courts must base their decisions on the Constitution, laws, and ratified international treaties.⁵⁶ This means that Serbian courts are empowered to

⁵⁰ *Case of Budayeva and Others v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, § 190.

⁵¹ [Online]. Available at: <https://www.paragraf.rs/propisi/constitution-of-the-republic-of-serbia.html> (Accessed: 16 December 2025).

⁵² Krstić, 2016, pp. 89-93.

⁵³ Plavšić, 2019, p. 2. Article 16 para 2 of the Constitution stipulates that ratified international treaties are an integral part of the legal order of the Republic of Serbia and are, therefore, directly applicable and must be in accordance with the Constitution. Article 18 para 2 of the Constitution further states that the Constitution shall guarantee, and as such, directly implement human rights guaranteed by ratified international treaties.

⁵⁴ Krstić and Marinković, 2016, p. 261. Article 194 of the Constitution declares that ratified international treaties shall not contradict the Constitution, which is the highest domestic legal act, and that law and other general acts must not contradict ratified international treaties.

⁵⁵ European Commission for democracy through law, *Opinion on the Constitution of Serbia*, Strasbourg, March 19, 2007, point 17. [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-e) (Accessed: 16 December 2025).

⁵⁶ Article 142 para 2 of the Constitution.

interpret and apply the Convention in the same manner as the European Court of Human Rights (the ECtHR or the Court).

Regarding the protection of human rights in Serbia, the primary responsibility lies with the “regular” courts,⁵⁷ since Article 22 of the Constitution explicitly guarantees everyone the right to judicial protection, and the right to have the consequences of the violation removed. In addition to judicial protection, the Constitutional Court of Serbia provides constitutional-level protection of individual rights and freedoms through the constitutional appeal.⁵⁸ Notably, according to the legal position of the Constitutional Court, it protects human rights guaranteed both by the Constitution and the ECHR.⁵⁹ Given this stance and the previously discussed hierarchy of legal norms, the ECHR is fundamentally recognised as having a quasi-constitutional status in Serbia.⁶⁰

The Constitution also sets out how the principles and case-law of the ECtHR are to be interpreted and applied by the Serbian courts and other state authorities. It stipulates that human rights provisions shall be interpreted in a way that promotes values of a democratic society, pursuant to valid international human rights standards and the case-law of international institutions that supervise their implementation, including the ECtHR.⁶¹ Therefore, when determining the scope and content of human rights guaranteed by both the Constitution and the Convention, Serbian courts and other state authorities can rely on the well-established case-law and general approach of Strasbourg Court as a useful and authoritative tool.⁶²

⁵⁷ The term “regular” refers to courts of general and special jurisdiction.

⁵⁸ Article 170 of the Constitution provides that a constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organizations exercising delegated public powers that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified.

According to Article 22 para 3 of the Constitution, besides the judicial and constitutional protection of individual rights, the citizens have the right to address international institutions to protect their constitutional rights and freedom, including the ECHR.

⁵⁹ See the opinion of the Constitutional Court, adopted at the sessions on 30 October 2008 and 2 April 2009, [Online]. Available at: <http://www.ustavni.sud.rs/page/view/163-100890/stavovi-suda>. (Accessed: 16 December 2025).

⁶⁰ Krstić and Marinković, 2016, p. 262.

⁶¹ Article 18 para 3 of the Constitution.

⁶² Plavšić, 2019, p. 2., see Krstić and Marinković, 2016, p. 260., see Tubić, 2017, p. 79.

The Convention itself addresses how the ECtHR rulings and case-law generally affect domestic law and the practice of national courts. According to Article 46 of the Convention, the High Contracting Parties agree to abide by the Court's final ruling in any case to which they are parties; the judgments are then sent to the Committee of Ministers of the CoE (CM) to supervise its execution. This indicates that the judgments of the ECtHR have *inter partes* effect, and that the ECtHR's expressed views and conclusions in a specific judgment are legally binding for the parties in that particular case.

However, there are clear indications that the Court's case law has a broader *erga omnes* effect and influences other member states beyond the parties to a specific case. This conclusion derives from the Court itself, which has stated that 'while the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases'.⁶³ The ECtHR has emphasised that its decisions serve to not only resolve individual dispute but also to clarify, protect, and develop the principles introduced by the Convention, thereby contributing to the fulfilment of the obligations accepted by states upon acceding to the Convention.⁶⁴

Additionally, the declarations adopted during the Interlaken process⁶⁵ of reforming the Convention system underline the need for better, more

⁶³ *Case of Christine Goodwin v. UK* (GC), App. No. 28957/95, 20 September 2002, § 74,

⁶⁴ *Case of Ireland v. UK*, App. No. 5310/71, 20 March 1978, § 154.

⁶⁵ Five ministerial conferences and other events have been organized as part of the Interlaken process to modify the Convention system, with the goal of ensuring improved implementation of the Convention at the national level. The conference was first held in February 2010 in Interlaken, then in April 2011 in Izmir, in April 2012 in Brighton, and in March 2015 in Brussels. In April 2018, the last conference took place in Copenhagen. Following each of these conferences, declarations comprising recommendations and measures that member states ought to implement domestically were adopted. On 16 and 17 May 2023, Reykjavík hosted the CoE Summit of Heads of State and Government, and the Reykjavík Declaration was adopted.

[Online]. Available at:
https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf
https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf
https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf
https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf
https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf
<https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1> (Accessed: 16 December 2025).

sustainable implementation of the Court's general positions and case-law by member states. These declarations emphasised the need for each member state to raise awareness among national authorities about the ECHR standards and to ensure their implementation, particularly by taking into account judgments identifying violations committed in situations involving similar legal or systemic problems.⁶⁶ They also reaffirmed that national authorities, especially courts, are the first guardians of human rights in legal systems in accordance with the principle of subsidiarity, and must to ensure the full, effective, and immediate application of the Convention in light of ECtHR case-law.

Therefore, the courts and other state authorities in Serbia can obtain a clear roadmap and an indication of how the Court in Strasbourg would treat the same or substantially similar case, by studying the views and the case-law of the ECtHR, not only in cases against Serbia but also against other member states. Due to the enhanced level of quality, efficiency, and equal protection of rights provided by the Convention system, domestic courts and other competent authorities have an obligation to analyse, respect, and ultimately apply the case-law of the ECtHR – first and foremost in favour of citizens. This also serves a practical function, as it reduces or eliminates the likelihood of a negative outcome before the ECtHR and Serbia's "conviction" before that Court.⁶⁷

⁶⁶ In addition to these declarations, PACE of the CoE adopted a special resolution on the execution of judgments of the Court, wherein it expressed the view that the principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court but also have to take into consideration the possible implications of judgments pronounced in other cases for their own legal system and practice. Resolution 1226 (2000) Execution of judgments of the European Court of Human Rights, point 3. [Online]. Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16834&lang=en> (Accessed: 16 December 2025).

⁶⁷ Plavšić, 2019, p. 5.

4. Landmark cases of the ECtHR regarding Serbia and the impact of its case-law on the domestic legal system

For more than twenty years, all natural or legal persons in Serbia have been able to access the Convention system for the protection of rights by filing complaints. In this time, Serbia consistently ranked among the top ten countries in the overall number of applications lodged.⁶⁸ Although this may at first imply that people endorse the protection provided by the Strasbourg Court, it also draws attention to an allegedly inadequate domestic system for the protection of human rights. This conclusion may be considered too narrow, as the data on the total number of filed applications alone may fail to produce findings that are meaningful and capable of improving the domestic system for the protection of human rights. The overall number of applications, when examined alongside other factors such as the content and nature of submitted complaints, outcome of the Court's proceedings, execution of the Court's judgment, and evaluation of the effectiveness of domestic remedies may contribute to the improvement of the domestic legal system. Consequently, it is useful to examine landmark cases and the potential influence they may have had on national legislation, domestic case-law, and harmonisation with ECtHR case-law⁶⁹. The next section analyses cases that the author considers noteworthy. The selection of cases is based on the following criteria – the Court's direct or indirect indication regarding general measures, the potential influence these cases may have had on the law-making process and on harmonisation of domestic case-law with that of the ECtHR.⁷⁰

⁶⁸ On day 31 December 2023, Serbia was at 9th place, with 1550 pending application and overall 2.2% of all pending application, [Online]. Available at: <https://www.echr.coe.int/statistical-reports> (Accessed: 16 December 2025).

⁶⁹ According to HUDOC, on 30 September 2024, the Court decided in total on 1220 cases related to Serbia, including friendly settlement decisions and those on unilateral declarations. There were 258 judgments delivered – two by the Grand Chamber, 141 by the Chamber, and 115 by the Committee.

⁷⁰ Because of this study's limited scope, landmark cases are provided in the text and other notable cases are referenced in the footnotes.

4.1. Non-enforcement or delayed enforcement of domestic judicial decisions given in the applicants' favour against socially- or state-owned companies – Kačapor group of cases

The case of *Kačapor and others v. Serbia*⁷¹ generated one of the most important groups of cases for Serbia.⁷² In the *Kačapor*, the ECtHR delivered its first ruling on the issue of non-enforcement or delayed enforcement of domestic judicial decisions rendered in the applicants' favour against socially or state-owned companies (so-called SOENT cases).⁷³ Socially-owned companies and "social capital" are relicts of the former Yugoslav brand of communism and "self-management".⁷⁴

The facts of the *Kačapor* are as follows: six applicants who were, at that time, employed by a "socially-owned company", were all "placed" on "compulsory" paid leave by their employer. Since the employer did not pay them benefits during this leave, they initiated civil proceedings wherein they obtained judgments in their favour. Subsequently, they filed requests for the enforcement of these judgments against their former employer, seeking payment of the awarded compensation for the period of paid leave and contributions for pension and disability insurance. Insolvency proceedings were later initiated against the former employer and debtor, and the applicants' claims were accepted. The applicants complained under Article 6§1 of the Convention about the State's failure to enforce the final judgments rendered in their favour. They also claimed that the State had infringed their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1 of the Convention.

At the admissibility stage, the ECtHR examined compatibility *ratione personae*, namely, it addressed the legal position of the debtor, a socially-owned company, and whether the State was liable for the debtor's outstanding obligations. After analysing the legal position of the socially-owned company, which predominantly comprised social capital, the Court concluded that the debtor, despite being a separate legal entity, did not enjoy "sufficient institutional and operational independence from the State" to absolve the latter of its responsibility under the Convention. Consequently,

⁷¹ *Case of Kačapor and others v. Serbia*, App. Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, 15 January 2008.

⁷² Plavšić, 2020, pp. 3-18.

⁷³ The cases of debts of so-called socially owned companies.

⁷⁴ *Case of Kačapor and others v. Serbia*, §§ 71-76.

the Court found that the applicants' complaints were compatible *ratione personae* with the Convention.⁷⁵

At the merits stage, the Court examined whether the delay in executing the applicants' judgments interfered with their rights and whether the State had taken all the necessary steps to enforce the final judgments by ensuring the effective participation of its entire apparatus. The Court reiterated the relevant general principles and, applying them to the specific circumstances, concluded that the Serbian authorities had failed to take the necessary measures to enforce the judgments in question, thereby violating Article 6§1 of the Convention.⁷⁶ Regarding the complaint under Article 1 of Protocol No. 1, the Court concluded that the State's failure to enforce the final judgments constituted an interference with the applicants' right to the peaceful enjoyment of their possessions, and that this interference was not justified in the specific circumstances of the case. In *Kačapor*, the Court decided on how to eliminate the negative consequences and provide just satisfaction to all applicants for their violated rights. Specifically, the Court found the Serbian State responsible for the debts of social-owned companies and for failing to enforce the domestic judgments, and ordered the Republic of Serbia to pay, from its own funds, the amounts awarded in the final domestic decisions.⁷⁷

Over the years, the Court has frequently addressed this type of cases regarding Serbia⁷⁸; these cases illustrate the ongoing dialog between the ECtHR and the Serbian authorities, notably the Constitutional Court, which is presented below.⁷⁹

The legal views adopted by the Court in *Kačapor* generated well-established case law (WECL)⁸⁰ that has been applied in all subsequent similar cases concerning Serbia, with further elaboration.⁸¹ Although the

⁷⁵ Ibid, §§ 92-99.

⁷⁶ Ibid, §§ 106-116.

⁷⁷ The Court also awarded different sums for the non-pecuniary damage suffered because of the impugned non-enforcement, § 129.

⁷⁸ See HUDOC EXEC status of execution of so called *Kačapor* group of cases: <https://hudoc.exec.coe.int/> (Accessed: 16 December 2025).

⁷⁹ Plavšić, 2019, p. 15.

⁸⁰ Following the Convention system reforms, the Committee decided most of these cases as WECL cases. These judgments are automatically final and have abbreviated reasoning with reference to the landmark judgment, most often the *Kačapor* judgment.

⁸¹ For example, in *Vlahović v. Serbia*, App. No. 42619/04, 16 December 2008, §§ 74-77 and 81, the Court elaborated that Serbia has consistently been held responsible for the non-enforcement of the judgments rendered against companies predominantly comprised of

Court never explicitly indicated any general measures, it examined whether an effective domestic legal remedy existed in Serbia for these type of cases.⁸² In *Vinčić and others against Serbia*⁸³, for the first time, the ECtHR declared that a constitutional appeal was, in principle, an effective domestic remedy for all applications introduced as of 7 August 2008,⁸⁴ including SOENT cases. This meant that anyone intending to submit an application to the ECtHR after this date had to first seek protection of his or her rights before the Constitutional Court.

The Court later re-examined its position on constitutional appeals⁸⁵ it found that constitutional appeal was not an effective remedy for this group of cases. However, once the Serbian Constitutional Court fully harmonised its approach with the ECtHR's case-law regarding the non-enforcement of

socially-owned capital regardless of whether such companies were in the process of liquidation or reorganization. In *Sekulić and Kučević v. Serbia*, App. No. 28686/06, 15 January 2014, §53 the Court emphasized that the same conclusion applies, *a fortiori*, in respect of the companies where there has been a subsequent change in their respective capital share structure resulting in the predominance of the State-owned and socially-owned capital. In *Marinković v. Serbia*, App. No. 5353/11, 22 January 2014, §39, the Court found that the State is directly liable for the debts of State-controlled companies irrespective of the fact whether the company at one point operated as a private entity. Furthermore, 'the fact that the State sold a large part of its share in the company it owned to a private person could not release the State from its obligation to honour a judgment debt which had arisen before the shares were sold. If the State transfers such an obligation to a new owner of the shares, the State must ensure that the new owner complies with the requirements'. In *Case of Kin-Stib and Majkić v. Serbia*, App. No. 12312/05, 4 October 2010; *Case of Brani and Jugokoka v. Serbia*, App. No. 60336/08, 5 November 2013; *Case of Majs Eksport-Import v. Serbia*, App. No. 35327/09, 5 November 2013; and *Case of Broyler DOO v. Serbia*, App. No. 48499/08, 26 November 2013, the Court found that the Serbian State directly liable for the State-controlled companies' commercial debts.

⁸² Plavšić, 2020, pp. 11-12.

⁸³ *Case of Vinčić and others v. Serbia*, App. nos. 44698/06..., 1 December 2009, § 51.

⁸⁴ The date on which the Constitutional Court's first decisions on the merits of the said appeals were published in the respondent State's Official Gazette.

⁸⁵ In decision *Milunović and Čekrić v. Serbia*, App. Nos. 3716/09 and 38051/09, 17 May 2011, since the Constitutional Court had failed to order the payment of the pecuniary damages, the Court declared that a constitutional appeal was inefficient domestic legal remedy for these type of cases. This "opened" direct paths to the Strasbourg Court, without submitting a constitutional appeal. Subsequently, the Constitutional Court reacted to this "signal" from Strasbourg and harmonised its case-law with that of the ECtHR. In two latter decisions, *Case of Marinković v. Serbia*, App. No. 5353/11, 29 January 2013 and *Case of Ferizović v. Serbia*, App. No. 65713/13, 26 November 2013, the Court acknowledged that the Serbian Constitutional Court had fully harmonized its approach with the Court's case-law.

judgments against socially- or State-owned companies, the ECtHR acknowledged this effort and “awarded” the Serbian Constitutional Court by declaring the constitutional appeal as an effective domestic remedy. Since the Constitutional Court began effectively fulfilling its role at the national level as a protector of individual rights in accordance with the principle of subsidiarity, the number of these cases, and the overall number of cases brought against Serbia, significantly decreased.⁸⁶

However, in the years following the adoption of the Law on the Protection of the Right to a Trial within a Reasonable Time in 2015, which introduced new domestic remedies,⁸⁷ the number of similar applications before the ECtHR began to rise again, indicating potential ineffectiveness of both the constitutional appeal and the newly created remedies. Since the Court neither declared the constitutional appeal or the new remedies ineffective, nor indicated any general measure under Article 46 of the Convention, the Committee of Ministers (CM) had to “step in” and issue several decisions in the supervision process. These CM decisions emphasised the longstanding complexity of the problem and insisted on the implementation of general measures.⁸⁸

Following this clear message from the CM, Serbia adopted Amendments to the 2015 Law in October 2023. These changes transferred the exclusive competence for SOENT cases from ordinary courts to the Constitutional Court. Before 2015, only the Constitutional Court had jurisdiction over these cases and was considered effective by the ECtHR. This renewed strategy – wherein the Constitutional Court is once again the sole authority for SOENT cases – has been recognised as a positive step. This revision of the national mechanisms for protecting individual rights through legislative change and strategic reform represents a clear example of ongoing efforts by Serbian authorities to maintain and enhance the functionality of the existing legal system. It aimed to provide effective

⁸⁶ Plavšić, 2019, p. 13. In the supervision of the execution of this group of cases, the Committee of Ministers of the CoE delivered numerous decisions and emphasized the effectiveness of a constitutional appeal. Action plans and CM decisions available at: <https://hudoc.exec.coe.int/> (Accessed: 16 December 2025).

⁸⁷ Request for acceleration of proceedings, appeal and action for fair redress.

⁸⁸ See DH decision from the 1451st meeting, 6-8 December 2022, reference document CM/Notes/1483/H46-35

protection of Convention rights in SOENT cases before national authorities, namely the Constitutional Court.⁸⁹

4.2. The Grand Chamber cases

Till date, the Strasbourg Court has delivered two Grand Chamber cases concerning of Serbia – *Ališić and Others v. Slovenia and Serbia*⁹⁰ and *Vučković and others against Serbia*.⁹¹ Both represent landmark cases that have had a significant impact on the domestic legal system.

4.2.1. Repayment of the applicant's "old" foreign currency savings – Ališić and Others v. Slovenia and Serbia

The *Ališić* case was the first pilot judgment regarding Serbia,⁹² and is linked to the dissolution of former Yugoslavia (SFRY). Before the disintegration of the SFRY, the applicant, Mr. Šahdanović, had deposited foreign currency in the Tuzla branch, located in Bosnia and Herzegovina, of Investbanka, a Serbian bank. According to the material in the Court's possession, on 3 January 2002, the balance in the applicant's accounts at the Tuzla branch of Investbanka was DEM 63,880, 4 Austrian schillings, and 73 USD. Following the fall of the SFRY in 1991–1992, these bank accounts remained "frozen" and became so-called "old" foreign currency savings. Although some SFRY successor states have agreed to pay specific amounts

⁸⁹All this has been recognized by the Committee of Ministers. See DH decision from the 1483rd meeting, 5-7 December 2023 (DH), reference document CM/Notes/1483/H46-35. In the so-called *Jevremović* group of cases, the Court often considered Article 6 of the Convention, either by itself or in conjunction with Article 13. This group of cases concerned violations of the applicants' right to a fair trial on account of the excessive length of different types of judicial proceedings – civil, family-related and commercial – pending between 1984 and 2019 (violations of Article 6 § 1). Some of these cases also concerned the lack of an effective remedy under domestic law at the time of the applicants' complaints about the length of the proceedings (violations of Article 13). Over the years, in the process of executing these judgments, Serbian authorities introduced a number of measures envisaged to expedite judicial proceedings, reduce pending backlog cases, improve the efficiency of justice, and improve the effectiveness of domestic remedies. See more on HUDOC EXEC: <https://hudoc.exec.coe.int/> (Accessed: 16 December 2025).

⁹⁰ *Case of Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], App No. 60642/08, 16 July 2014.

⁹¹ *Case of Vučković and others against Serbia*, judgment (preliminary objection), 2014.

⁹² The facts of the case regarding Slovenia (or other states), including its obligation under this judgment will not be discussed in this paper.

in these particular circumstances, each successor state adopted its own legal regime regarding those accounts. However, the applicant in the Serbian case was not allowed to withdraw his savings.

The applicant complained under the Convention as to his inability to access the aforementioned bank accounts and withdraw his foreign currency savings. The applicant claimed a breach of his property rights, taken alone and in conjunction with the prohibition of discrimination, and a violation of his right to an effective legal remedy.

In examining the case, the Court underlined that the foreign-currency deposits forming the subject matter of the applicant's complaints did constitute "possessions" within the meaning of Article 1 of Protocol No. 1, and that this Article was applicable. The Court further ruled on compliance with Article 1 of Protocol No. 1, and applied the proportionality test. First, the Court concluded that the applicant's inability to withdraw his savings, at least since the dissolution of the SFRY, had a legal basis in domestic law. The Court accepted that the principle of a "legitimate aim" was also respected, since, following the dissolution of the SFRY and the subsequent armed conflicts, the respondent States had to take measures to protect their respective banking systems and national economies. The Court also noted that Investbanka has remained liable for "old" foreign currency savings in its Bosnian-Herzegovinian branches under domestic law and courts practice since the dissolution of the SFRY. Next, the Court examined whether Serbia was responsible for the failure of Investbanka to repay its debt to the applicant, and after analysing ownership, and institutional and operational independence from the State, concluded that there were sufficient grounds to deem Serbia responsible for Investbanka's debt to Mr. Šahdanović. Finally, the Court examined whether there was any valid reason for the Serbian State's failure to repay the applicant for so many years. Although certain delays in repayment could be justified in exceptional circumstances, and despite the respondent State's wide margin of appreciation in this area, the Court determined that the applicant's continued inability to freely dispose of his savings for over twenty years was disproportionate, and thus in violation of Article 1 of Protocol No. 1.⁹³ In addition, the applicant did not have an effective remedy at his disposal; the Court found this to be a breach of Article 13.

Since the violations found by the Court affect thousands of people, the pilot judgment procedure for this systemic and structural problem was

⁹³ Ališić, §§ 109-125.

triggered. The Court indicated that it was necessary to adopt general measures at the national level. The ECtHR decided that Serbia must make all necessary arrangements, including legislative amendments, to allow Mr. Šahdanović and all others in his position to recover their “old” foreign-currency savings under the same conditions as Serbian citizens who held such savings in the domestic branches of Serbian banks.⁹⁴ The Court highlighted that the applicant and all others in his position must comply with the requirements of any verification procedure set by the Serbian State. However, the Court emphasised that no claim should be rejected solely due to a lack of original contracts or bankbooks, provided that the persons concerned can substantiate their claims by other means and that all verification decisions are subject to judicial review. Finally, the Court decided to postpone the examination of similar cases involving Serbia for one year, in order to allow the adoption of the *lex specialis* at the national level.

Concurrent to the delayed process of executing this judgment, Serbia undertook a major law-making process and, almost a year and a half after the indicated deadline, adopted the so called *Ališić* Implementation Act.⁹⁵ Under this Law, Serbia introduced a repayment scheme for the deposits held by citizens of SFRY successor states in Serbian banks.⁹⁶ Parliament amended the Law in 2019 to address certain outstanding issues that had arisen during the verification procedure, particularly the need to obtain reliable data on savings previously used in the privatisation process in Bosnia and Herzegovina.

In *Muratović* decision,⁹⁷ the ECtHR evaluated the *Ališić* Implementation Act from the perspective of the criteria set out in the *Ališić* pilot judgment. The Court noted that the repayment conditions were essentially the same as those applied to Serbian nationals in the initial repayment scheme, and considering the respondent State’s wide margin of appreciation, that the *Ališić* Implementation Act, in principle, fulfilled the

⁹⁴ Ibid, §§ 144-160.

⁹⁵ Zakon o regulisanju javnog duga Republike Srbije po osnovu neisplaćene devizne štednje građana položene kod banaka čije je sedište na teritoriji Republike Srbije i njihovim filijalama na teritorijama bivših republika SFRJ, “Official gazette RS”, no. 108/16, 113/17, 52/19 and 144/20.

⁹⁶ See status of the execution of this judgment, Action Report and CM decisions on HUDOC EXEC: <https://hudoc.exec.coe.int> (Accessed: 16 December 2025).

⁹⁷ *Case of Muratović v. Serbia* (dec.), App. No. 41698/06, 21 March 2017.

criterion of equal repayment conditions.⁹⁸ Regarding the second and third criteria set out in the pilot judgment (lack of original contracts or bankbooks and judicial review) the Court noted that those who no longer have original contracts or bankbooks may pursue civil proceedings to prove the existence and amount of their claims, and that all verification decisions are subject to judicial review. Thus, the *Ališić* Implementation Act fulfilled these two criteria.⁹⁹ Finally, the Court declared the remainder of the applications pending before it inadmissible and referred them back to Serbia for examination under the repayment scheme introduced by the *Ališić* Implementation Act.¹⁰⁰

The *Ališić* Implementation Act and its repayment scheme were effectively applied at the domestic level. According to the statistics provided by the Serbian Government in its Action Report, the majority of cases were resolved positively in Serbia, and repayment was ordered for 75% of the amounts claimed.¹⁰¹ The Committee of Ministers closed this case for further examination after evaluating the measures taken by the Serbian authorities and acknowledging the good practice demonstrated by the domestic legislative and judicial authorities.¹⁰²

4.2.2. The subsidiarity principle and applicants' obligation to raise complaints before domestic courts and comply with the national laws – Vučković and others against Serbia

*Vučković and others against Serbia*¹⁰³ is the second Grand Chamber case regarding Serbia, and dealt with complaints under Article 1 of Protocol No.1 and Article 14 of the Convention. This judgment had a significant impact on both the domestic legal system and the ECtHR, as more than 3,000 applications were pending before the Court raising the same issue at the

⁹⁸ Ibid, §10.

⁹⁹ Ibid, §11.

¹⁰⁰ Following *Ališić* pilot judgment and introduction at the domestic level a repayment scheme to all persons in a similar situation, the Court found that it is justified to apply the exception to the principle on exhaustion of domestic remedies.

¹⁰¹ See the Action Report of Serbia on HUDOC EXEC: <https://hudoc.exec.coe.int/> (Accessed: 16 December 2025).

¹⁰² Resolution CM/ResDH(2020)184 on the execution of the judgments of the ECHR in case *Ališić and Others against Serbia*, reference document, CM/Notes/1377bis/H46-34.

¹⁰³ *Case of Vučković and Others v. Serbia* (preliminary objections) [GC], App. Nos. 17153/11, 17157/11, 17160/11 et al, 25 March 2014.

time of the Grand Chamber judgment delivery. The case highlights the importance of the proper use of domestic remedies and the subsidiary role of the Convention protection system.

The facts of the case are as follows: the applicants were former Yugoslav army reservists who claimed entitlement to *per diem* allowances for military service performed in 1999. The Serbian Government initially rejected the claims; however, after negotiations in 2008, decided to pay allowances to those reservists who lived in “underdeveloped” municipalities. Since the applicants did not qualify for payment because they were not residents in the specified municipalities, they filed a civil lawsuit for payment, alleging that the terms of the 2008 agreement were discriminatory. However, their claims were rejected at both first instance and on appeal as being time-barred. Meanwhile, other reservists’ claims that had not been ruled as time-barred were upheld by courts throughout Serbia in a number of related cases decided between 2002 and early March 2009. The applicants contested the applicability of the statutory limitation period in their cases by filing a constitutional appeal with the Constitutional Court. Although the Constitutional Court ruled in their favour with regard to their complaints of judicial inconsistency in the application of the limitation period, it indirectly rejected their compensation claims.

Finally, the applicants complained to the ECtHR of discrimination in the payment of *per diem* allowances after the 2008 agreement, invoking Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. In the Chamber judgment, the Court found a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.¹⁰⁴ Since the Serbian Government argued that the applicants had not exhausted domestic remedies, as they had failed to raise the issue of alleged discrimination before the Constitutional Court, the case was referred to the Grand Chamber.

In addressing the objection regarding non-exhaustion of domestic remedies (specifically, the appropriate use of a constitutional appeal), the Grand Chamber observed that, although the applicants had used this remedy, they had not complied with the relevant national legal rules, which is one of the requirements to satisfy the exhaustion rule under Article 35 of the Convention. Specially, they had challenged the civil courts’ interpretation of the rules on statutory limitation before the Constitutional

¹⁰⁴ *Case of Vučković and others v. Serbia*, App. Nos. 17153/11, 17157/11, 17160/11, 28 August 2012.

Court; however, they had not raised their discrimination complaint, either expressly or in substance. The Court further emphasised the subsidiary principle, stating that there were ‘not any special reasons for dispensing the applicants from the requirement to exhaust domestic remedies in accordance with the applicable rules and procedure of domestic law. On the contrary, had the applicants complied with this requirement, it would have given the domestic courts that opportunity which the rule of exhaustion of domestic remedies is designed to afford States, namely to determine the issue of compatibility of the impugned national measures, or omissions to act, with the Convention and, should the applicants nonetheless have pursued their complaint before the European Court, this Court would have had the benefit of the views of the national courts. Thus, the applicants failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the European Court being subsidiary to theirs.’¹⁰⁵ Consequently, the Court found that although the civil and constitutional remedies had been sufficient and available to provide redress in respect of the applicants’ discrimination complaint, they had failed to exhaust these remedies.

4.3. The ‘missing babies’ case – Zorica Jovanović against Serbia

The case of *Zorica Jovanović against Serbia*¹⁰⁶ concerns complaints under Article 8 of the Convention and the right to respect for family life. It is most likely the most delicate and complex issue regarding Serbia, affecting hundreds of parents of “missing babies”.

In 1983, the applicant gave birth to a baby boy in a state-run hospital. She was told that her infant had passed away three days later, on the day of her discharge. The applicant and her family never received the baby’s remains, nor were they told when and where her son was supposedly buried. No indication was given as to the cause of death, and the death was not registered in the municipal records. Later, after several reports in the media about other similar cases, the applicant’s husband filed a criminal complaint; however, it was rejected in October 2003 without consideration. The applicant complained before the Court regarding the respondent State’s continued failure to provide her with any information about the real fate of her son. She further suspected that her son might still be alive, having been unlawfully given up for adoption.

¹⁰⁵ *Case of Vučković and Others v. Serbia* (preliminary objections) [GC], § 90.

¹⁰⁶ *Case of Zorica Jovanović v. Serbia*, App. No. 21794/08, 26 March 2013.

The Court acknowledged that under Article 8 of the Convention, there might be additional positive obligations inherent in this provision, extending to, *inter alia*, the effectiveness of any investigative procedures relating to one's family life. In other words, a State's positive obligations under Article 3 of the Convention to account for the whereabouts and fate of missing persons were broadly applicable, *mutatis mutandis*, to the specific context of positive obligations under Article 8 in this instance.¹⁰⁷

Taking into account the specific circumstances of the case, the Court noted that the applicant still had no credible information as to what had happened to her son, his body had never been transferred to her or her family, and the cause of death was never determined nor officially recorded. The outcome of the criminal complaint procedure and the absence of any explanation were also taken into consideration by the Court. The ECtHR observed that the Serbian authorities themselves had, on various occasions, acknowledged serious shortcomings in the legislation and procedures concerning the death of newborn babies in hospitals, and that the parents had legitimate concerns and were entitled to know the truth about their children's fate. Nevertheless, despite several official initiatives, the conclusion of the domestic working group was that no changes were necessary to already amended legislation, except with regard to the collection and use of medical data. The Court noted that this only improved the future situation and effectively offered nothing for parents such as the applicant whose ordeal was in the past. The Court concluded that the applicant had suffered a continuing violation of her right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son.¹⁰⁸

This judgment is noteworthy as the Court indicated that general measures were required under Article 46 of the Convention. Specifically, given the significant number of potential applicants, the Court ordered the respondent State to take appropriate measures within a year, preferably by means of a *lex specialis*, to secure the establishment of a mechanism aimed at providing individual redress to all parents in such a situation or one sufficiently similar to the applicant's. The mechanism was to be supervised by an independent body with adequate powers, capable of providing credible answers regarding the fate of each missing child and affording

¹⁰⁷ Ibid, §§69,70.

¹⁰⁸ Ibid, §§71-75.

adequate compensation. The Court decide to adjourn all similar applications already pending before the Court for the one-year period.¹⁰⁹

The CM supervised the implementation of this judgment in the enhanced procedure, and even issued several interim resolutions urging the Serbian authorities to establish an effective fact-finding mechanism, stressing the importance of the timely and effective execution of this judgment.¹¹⁰ In the extremely challenging and complex process of its execution, Serbia conducted extensive legislative work and, more than five years after the Court's deadline, in February 2020, adopted a *lex specialis*, aimed at introducing an independent investigative mechanism to provide individual redress to all parents of "missing babies".¹¹¹ The *Zorica Jovanović Implementation Act* introduced a two-track fact-finding system, first providing individual redress to parents of "missing babies" through courts, and second establishing an independent investigation mechanism ("Missing Babies Fact-Finding Commission") to establish the fate of the 'missing babies'. After the adoption of the *lex specialis*, the CM¹¹² expressed great satisfaction that the Serbian Parliament had adopted the law setting up an independent investigative mechanism; however, since there were – and still are – some outstanding issues, the CM invited the authorities to continue providing comprehensive information on its implementation and functioning.¹¹³

Parallel with the CM's activities, the Court rendered strike-out decisions in several cases¹¹⁴ concerning the alleged disappearance of newborn children and the authorities' failure to provide credible answers regarding their fate. The ECtHR noted that the applicants themselves had opted to make use of the new legal framework put in place under the *Zorica*

¹⁰⁹ Ibid, §§ 92, 93.

¹¹⁰ See status of the execution of *Zorica Jovanović* judgment on HUDOC EXEC: <https://hudoc.exec.coe.int> (Accessed: 16 December 2025).

¹¹¹ Zakon o utvrđivanju činjenica o statusu novorođene dece za koju se sumnja da su nestala iz porodilišta u Republici Srbiji, "Official Gazette", no. 18/20.

¹¹² See CM decision adopted at 1369th meeting, 3-5 March 2020 (DH), reference document CM/Notes/1369/H46-30.

¹¹³ The outstanding issue in the execution of this judgment remained the DNA database and the adoption of legislative amendments aimed at introducing a dedicated DNA database for the purpose of facilitating truth finding in the cases of "missing babies".

¹¹⁴ *Case of Mik and Jovanović v. Serbia*, App. No. 9291/14, 23 March 2021, §52; *Case of Radmila Ilić and 7 Others v. Serbia* (dec.), App. No. 33902/08, 6 July 2021, § 6; *Case of Radina Savković and Miroljub Savković v. Serbia* (dec), App. No. 9864/15, 7 September 2021, § 6.

Jovanović Implementation Act.¹¹⁵ After having analysed the *lex specialis*, the Court concluded that there were no particular reasons related to the respect for human rights that would require it to continue examining of these cases.

The complexity and sensitivity of this case could, to a degree, justify the delay in setting up an effective independent investigative mechanism to determine the whereabouts of the “missing babies”. However, the sensitivity of the issue made it necessary for the Serbian authorities to prioritise the prompt and appropriate execution of this judgment that posed considerable challenges at the time.

4.4. Unlawful suspension of payment by the Serbian Pensions Fund of pensions earned in the Autonomous Province of Kosovo and Metohija for more than a decade – Grudić against Serbia

The *Grudić* judgment¹¹⁶ dealt with property rights and the suspension of pension payment to insured persons in the Autonomous Province of Kosovo and Metohija (KiM). The KiM Branch Office of the Serbian Pensions Fund had granted the applicants, two Serbian nationals, disability pensions. They had regularly received their pensions until June 1999 and January 2000 respectively, when the monthly payments stopped without any explanation. In May 2004 and March 2005, the Fund formally decided to suspend payments from the dates of the last payments on the grounds that KiM was now under international administration. In 2006, the first-instance court annulled the Fund’s decisions after noting that they did not refer to the relevant law. The Fund’s subsequent appeals were rejected by the Supreme Court. In 2008, the Fund suspended the proceedings brought by the applicants for the resumption of pension payments until the entire issue was

¹¹⁵ Other interesting Article 8 cases, and the right to protection of private and family life are connected to authorities’ failure to fulfil their positive obligations due to the non-enforcement of custody decisions in respect of the applicant’s two children (*Case of Milovanović v. Serbia*, App. No. 56065/10, 8 October 2019); the disproportionate interference in three policemen’s private life due to their dismissal following the initiation of criminal proceedings against them, and unfair civil proceedings concerning their dismissal resulting in arbitrary judicial decisions (*Case of Milojević and others v. Serbia*, App. No. 43519/07, 12 January 2016); the exclusion from a final hearing in proceedings resulting in partial deprivation of the applicant’s legal capacity and denial of access to a court in proceedings concerning its restoration as well as disproportionate interference with private life due to the partial deprivation of legal capacity (*Case of Salontaji-Drobnjak v. Serbia*, App. No. 36500/05, 13 October 2009).

¹¹⁶ *Case of Grudić v. Serbia*, App. No. 31925/08, 17 April 2012.

resolved between the Serbian authorities and the international administration in KiM. The applicants complained about not receiving their disability pensions for more than a decade, and the Court examined the case under Article 1 of Protocol No. 1.

The ECtHR found that the suspension the applicants' pensions had not been in accordance with the relevant domestic law. Specifically, the impugned suspensions were based on the 2003 and 2004 Opinions of the competent ministries, which stated, *inter alia*, that the pension system in Serbia was based on the concept of "ongoing financing". These Opinions asserted that those who had already received the Fund's pensions in KiM could not anticipate continuing to receive them going forward, as the Serbian authorities were unable to collect any pension insurance contributions in these regions as of 1999. In addition, there was no evidence that these Opinions had ever been published in the Official Gazette of the Republic of Serbia. The Constitutional Court's case-law regarding the legal nature of such opinions – which indicates they are merely intended to facilitate the implementation of legislation – was central to the Court's determination of whether the suspension of property rights was lawful. Moreover, the Supreme Court noted that one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act and that recognised pension rights could not depend on whether or not current pension insurance contributions can be collected in a given territory.¹¹⁷

Since the Court recognised a large number of potential applicants, it gave an indication under Article 46 of the Convention for the adoption of general measures. Namely, the Court ordered the Serbian authorities 'to take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question. It is understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard.'¹¹⁸

The process of executing the *Grudić* judgment started with a 2013 public call to all eligible persons, which was published in several newspapers in Serbia and KiM, as well as on the website of the Serbian Pensions Fund, inviting them to apply for the resumption of pension payment earned in KiM. According to the Action Report on the execution of

¹¹⁷ Ibid, §§ 79, 80.

¹¹⁸ Ibid, § 90.

the *Grudić* judgment, the Serbian authorities received 8,238 applications of which 1,295 contained the required documents. Incomplete documents were received in the remaining 6,943 cases. A total of 1,244 applications were rejected on the ground that the applicants were receiving pensions in KiM – under the applicable legislative requirement, a pension recipient entitled to two or more pensions in Serbian territory may only exercise the right to one pension. In the *Grudić* case, the applicants had not received the so-called “Kosovo pensions”, hence their legal circumstances differed from those in the rejected cases. Regarding judicial review, the applicants had the option to initiate administrative proceedings and file a lawsuit with the Administrative Court. Thereafter, refusals to re-establish pension payments had a well-established legislative basis in domestic law and could be effectively challenged in court, including through a constitutional appeal before the Constitutional Court. Furthermore, in response to the Court’s findings in the *Grudić* case, the Constitutional Court developed a consistent body of the Convention-compliant case-law in similar pension related cases.¹¹⁹

In addition to the CM supervision, the ECtHR also examined the implementation of the Court’s orders from the *Grudić* judgment. Namely, in the *Skenderi and others* decision,¹²⁰ the Court declared most of the applications inadmissible for non-exhaustion of domestic remedies, since the applicants had not used the constitutional appeal. Specifically, unlike the applicants in *Grudić*, the second, third, fourth and fifth applicants all lodged their applications with the Court after 7 August 2008, and were thus required to exhaust the constitutional appeal procedure.¹²¹ Regarding the first applicant in the *Skenderi* case, the Court rejected the application concerning her claim for payment of her accrued pension between November 1998 and March 2003, which had been rejected based on the Obligations Act, providing for a three-year prescription period. The Court noted that this three-year prescription period – an issue that did not arise in *Grudić* – was envisaged in the Obligations Act and thus lawful. It also pursued a legitimate aim, and there was no arbitrariness in the application of the said time limit, nor was there any evidence that the three-year period was disproportionately short in the specific circumstances of the present

¹¹⁹ See Action Report in *Grudić* case on HUDOC EXEC: <https://hudoc.exec.coe.int/> (Accessed: 16 December 2025).

¹²⁰ *Case of Skenderi and others v. Serbia* (dec), App. No. 15090/08, 4 July 2017.

¹²¹ *Ibid.*, §109.

case. Lastly, as of September 2013, the Fund resumed payment of the first applicant's pension *pro futuro*.¹²²

4.5. Other important cases

Finally, a number of other noteworthy cases had an impact on the domestic legal system, although the Court did not make indications under Article 46 of the Convention regarding general measures. The following section summarises some of these cases.

4.5.1. Prohibition of discrimination cases

The Court examined a few cases under Article 1 of Protocol No. 12 regarding the general prohibition of discrimination, among which the case of *Negovanović and others*¹²³ is discussed. The applicants in the *Negovanović and others* case are blind chess players who won a number of medals for Yugoslavia between 1961 and 1992, as part of the national team. They complained that the Serbian authorities had discriminated against them by denying them certain financial awards provided under the 2006 Decree, such as a lifetime monthly cash benefit and a one-time cash payment, unlike all other athletes and chess players, including those sighted or disabled. Their discrimination lawsuits were dismissed by the domestic courts. The Court preformed a non-discriminatory test under Article 1 of Protocol No. 12 and concluded that there was no objective and reasonable justification for the differential treatment of the applicants merely on the basis of their disability.¹²⁴

¹²² According to the Action report in the *Grudić* case, no similar application had been communicated to the Government apart from *Skenderi and Others*, wherein the Court rendered a non-admissibility decision (p.27). Consequently, the CM adopted the Final Resolution and closed this case for further supervision; see Resolution CM/ResDH(2017)427, adopted by the CM on 7 December 2017 at the 1302nd meeting of the Ministers' Deputies.

¹²³ *Negovanović and others v. Serbia*, App. Nos. 29907/16, 25 January 2022.

¹²⁴ In *Paun Jovanović v. Serbia*, App. No. 394/15, 7 February 2023, the Court found a violation of this Article due to the judge's unjustified conduct that prevented the applicant – a lawyer – from using the Ijekavian variant of the Serbian language and enabled the use of the Ekavian, despite the official status of both variants being equal. Additionally, the Court found a violation of Article 6 due to the Constitutional Court's inadequate reasoning for rejecting the applicant's appeal. The Court also considered alleged discrimination under Article 14 in *Popović and others v. Serbia*, App. Nos. 26944/13, 30 June 2020, and found

4.5.2. An effective investigation into ill-treatment cases

Cases under Article 3 of the Convention regarding Serbia mainly concerned complaints about ineffective investigations or the lack of investigation into the allegations of ill-treatment by police officers; these cases fall under the so-called *Stanimirović* group,¹²⁵ wherein the Court found a violation of Article 3 of the Convention. Because of these rulings, numerous extensive domestic measures have been put into effect, all with the aim of preventing ill treatment by the police and conducting an effective investigation into such cases.¹²⁶

A particularly specific case under Article 3 of the Convention is the case of *Milanović v. Serbia*¹²⁷. The applicant, a member of the Hare Krishna religious community in Serbia, was attacked on several occasions in 2001, 2005, 2006 and 2007. The attacks were reported to the police and the applicant claimed that members of a far-right extremist group might have committed them. While the police questioned witnesses and several potential suspects, they were never able to identify any of the attackers or obtain more information on the extremist group they allegedly belonged to. Despite the numerous steps taken by the domestic authorities and the significant challenges they encountered during the investigation, the Court found that they had not taken all reasonable measures to conduct an adequate investigation and to prevent the applicant's repeated ill-treatment by unknown persons and thus established a violation of Article 3. The Court

no violation since disability benefits for civilian recipients were not discriminatory in compared to military beneficiaries.

¹²⁵ *Case of Stanimirović v. Serbia*, App. No. 26088/06, 18 October 2011; *Case of Almaši v. Serbia*, App. No. 21388/15, 8 October 2019; *Case of Zličić v. Serbia*, App. No. 73313/17, 26 January 2021; *Case of Stevan Petrović v. Serbia*, App. No. 6097/16, 20 April 2021.

¹²⁶ See Status of execution of *Stanimirović* group on HUDOC EXEC <https://hudoc.exec.coe.int/>.

For example, the Chief Public Prosecutor in 2017 issued the Methodology for Investigating Cases of Ill-Treatment by the Police and in March 2024, the Supreme Public Prosecutor issued a General Mandatory Instruction providing that a contact person (a prosecutor) would be assigned in all basic public prosecutor's offices to handle criminal cases involving the offences of Extortion of Confession, and Ill-treatment and Torture. Since there are some outstanding issues, the CM urged Serbian authorities to deliver a firm message of "zero tolerance" towards ill-treatment by police agents, and to take more resolute action against this serious and long-standing problem.

¹²⁷ *Milanović v. Serbia*, App. No. 44614/07, 14 December 2010.

also found a violation of Article 14 in conjunction with Article 3, since this was a racially motivated ill-treatment case – the domestic authorities had an additional duty to investigate whether religious hatred or prejudice may have contributed to the events, even in cases where private individuals were the perpetrators of the ill-treatment. The Serbian authorities failed to fulfil this obligation.¹²⁸

4.5.3. Detention cases

Several Article 5 cases and violations of the right to liberty are worth addressing. Over the years, the Court examined different aspects of Article 5 and the guarantees it enshrines.¹²⁹ In the case of *Kovač v. Serbia*,¹³⁰ the Court found a violation of the applicant's right to liberty on account of the failure of the domestic courts to hear him personally when considering the extension of his pre-trial detention, which lasted throughout the entire period of the judicial investigation, and was not in conformity with the "reasonable interval" requirement established in the Court's case-law.¹³¹ The case of *Radonjić and Romić v. Serbia*¹³² concerned the detention on remand for almost three and a half years of two former secret police officers suspected of murdering a well-known Serbian journalist and newspaper publisher. It also concerned the length of the proceedings before the Constitutional Court to review their detention. The Court found a violation of Article 5§3 since the competent courts did not give relevant and sufficient reasons when ordering the applicants' pre-trial detention. The ECtHR also found a violation of Article 5§4 on account of the failure of the Constitutional Court to comply with the requirement of "speediness" when deciding on the applicants' complaint challenging the lawfulness of their

¹²⁸ In the execution of this judgment, Serbia carried out legislative amendments. Namely, the Criminal Code was amended in 2012 to introduce the offence of hate crime and hatred as a motivation, including religious hatred as aggravating circumstance. Furthermore, in 2017, the Chief Public Prosecutor issued Guidelines for Prosecution of Hate Crimes and in 2018, adopted a binding instruction for all public prosecutor's offices to determine a contact person for hate crimes to increase effectiveness and uniformity of the public prosecutors' conduct in such cases. See Action Report on *Milanović* case on HUDOC EXEC: <https://hudoc.exec.coe.int> (Accessed: 16 December 2025).

¹²⁹ Regarding the status of execution of these judgments, see HUDOC EXEC: <https://hudoc.exec.coe.int> (Accessed: 16 December 2025).

¹³⁰ *Case of Kovač v. Serbia*, App. No. 6673/12, 18 January 2022.

¹³¹ Similarly, in *Case of Novaković v. Serbia*, App. No. 6682/12, 1 February 2022.

¹³² *Case of Radonjić and Romić v. Serbia*, App. No. 43674/16, 4 April 2023.

detention. In the *Mitrović* case,¹³³ the Court examined a detention based on a decision rendered by the Republic of Serbian Krajina, an internationally unrecognised self-proclaimed entity established on the territory of the Republic of Croatia during the wars in the former Yugoslavia. The Court found a violation of Article 5§1 since the applicant was detained on the basis of a non-domestic decision that had not been recognised domestically; thus, the detention lacked a legal foundation in domestic law, and the Article 5§1 requirement of lawfulness was not fulfilled.¹³⁴

5. Conclusion

According to the Serbian Constitution, the ECHR and the case-law of the ECtHR are an integral part of the constitutional legal system, implying that all national authorities, including courts and the Constitutional Court, are empowered to make decisions by directly interpreting and applying the Convention in a way that is consistent with the ECtHR. Yet, the total number of cases before the Court regarding Serbia could indicate that the interpretation of the Convention and “use” of the ECtHR’s case-law by domestic courts and other authorities has not always been sufficient or effective. On the other hand, it may suggest that unsatisfied citizens simply have more faith in the Convention system.

Most cases and violations before the ECtHR regarding Serbia originate from four or five categories of the same type with systemic and structural human rights problems,¹³⁵ wherein the Court’s or CM indications under Article 46 of the Convention have been fruitful and the additional introduction of general measures by Serbian authorities have provided effective protection of individual rights at the domestic level for future

¹³³ *Case of Mitrović v. Serbia*, App. No. 52142/12, 21 March 2017.

¹³⁴ See also the *Vrenčev* group of cases (*Vrenčev v. Serbia*, App. No. 2361/05, 23 September 2008; *Đermanović v. Serbia*, App. No. 48497/06, 23 May 2010; *Grujović v. Serbia*, 2015; *Milošević v. Serbia*, App. No. 31320/05, 28 July 2009); *Purić and R.B. v. Serbia*, App. No. 27929/10, 15 October 2019) regarding protection of rights in detention under Article 5 of the Convention. The Court examined several questions: excessive length of detention in police custody; failure to consider any alternative for detention on remand; unlawfulness of detention on remand, which was regularly extended on the ground of risk of absconding without subsequent verification whether these grounds remained valid at the advanced stage of the proceedings; lack of speedy review of detention orders before the Supreme Court and the absence of an oral hearing before it; and lack of an enforceable right to compensation for unlawful detention.

¹³⁵ e.g., *Kačapor* group, *Ališić* case, *Zorica Jovanović* case, *Grudić* case.

cases. The adoption of these general measures has usually been the result of a major law-making process and of the harmonisation of the domestic courts' case-law with that of the ECtHR, which demonstrates how the principle of shared responsibility functions. This is evident from the analyses of the Serbian landmark cases. In addition, a long-standing constitutional complaint, in general, has been the effective legal remedy for the protection of human rights.

All the efforts made by the Serbian authorities have been visible; however, they always come after the Court's findings of violations, indicating some potential difficulties in the preventive national protection system and the responsibilities that the Serbian state has under Article 1 of the Convention. While there is a constitutional basis for the bolder use of the Convention's tools by the Serbian authorities, for more effective national implementation of the Convention, it is important to implement awareness-raising activities in all fields. In the words of the Copenhagen Declaration, 'encouraging rights-holders and decision makers at the national level to take the lead in upholding Convention standards will increase ownership of and support for human rights'.¹³⁶ Thus, timely harmonisation of draft legislation with the Convention; improvement of effective domestic remedies for alleged violations of the Convention rights, particularly in situations of serious systemic or structural issues; and the full, effective and prompt execution of the ECtHR judgments are, and must remain, the main guiding principle for all Serbian authorities in providing effective enjoyment of human rights and, in case of violation, effective protection of.

¹³⁶ [Online]. Available at: <https://rm.coe.int/copenhagen-declaration/16807b915c>, p. 10 (Accessed: 16 December 2025).

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JULIANNA SZABÓ *

Protection of Human Rights under the European Convention on Human Rights and in Central Europe: Hungary**

ABSTRACT: This study examines the protection of human rights in Hungary, with particular attention to its evolving relationship with the European Convention on Human Rights (ECHR) and the Council of Europe. The analysis begins by outlining the historical developments of human rights in Hungary, emphasising key milestones that have shaped the country's constitutional and legislative framework during its democratic transition and beyond. This historical context is essential for understanding Hungary's current human rights commitments.

The analysis then turns to Hungary's engagement with the Council of Europe, focusing on its ratification and implementation of core human rights conventions. These include Protocol No. 1 to the European Convention for the Prevention of Torture, the European Social Charter, and the Framework Convention for the Protection of National Minorities. These international treaties play a vital role in shaping Hungary's human rights obligations and influencing the development of domestic legal standards.

Further, the article addresses Hungary's national implementation of the ECHR, illustrating how its provisions are reflected in the Fundamental Law and major legislative acts. Important law-making processes influenced by the ECHR are discussed, highlighting the impact of international human rights standards on domestic legislation.

Additionally, it reviews landmark cases brought against Hungary before the European Court of Human Rights, including *Rekvényi v. Hungary* on freedom of expression, *Gubacsi v. Hungary* regarding police ill-treatment, and *Karsai v. Hungary* concerning the right to respect for private and family life. These cases illustrate the ongoing challenges in meeting its human rights obligations and ensuring full compliance with European human rights jurisprudence.

In conclusion, the study stresses the importance of continued legal and

* Legal adviser, Department of Human Rights, Ministry of Justice, Hungary. sz.julia@hotmail.com.

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institutional reforms, as well as active engagement with both national and international legal frameworks to strengthen human rights protections.

KEYWORDS: Human Rights in Hungary; Constitutional Reform; National Implementation of International Law; Cooperation; Right to Respect for Private and Family Life; Ratification Process.

1. Historical Development of Human Rights in Hungary

The protection and enforcement of human rights in Hungary have undergone significant changes over the centuries, shaped by the country's monarchic, socialist, and eventually democratic eras. Until 1949, Hungary operated under a historical constitution, and human rights were regulated only through diverse acts.

Among the most important steps in the development of the Hungarian constitution was the Golden Bull, issued in April 1222 by King Andrew II of the *Árpád* dynasty. The Golden Bull granted numerous privileges and obligations, primarily aimed at protecting the rights of the nobility by limiting the king's power. Notable provisions of the document included the protection of private property, by introducing a prohibition on the donation and confiscation of lands acquired through service and making it mandatory to hold days for hearing grievance annually (*törvénylátó napok*), which can be seen as an early step towards the formation of a parliamentary system. Furthermore, it laid down principles that later served as the foundation for noble privileges, thus establishing the foundations of a feudal society. The Golden Bull was amended in 1231 and 1267.

As regards fundamental rights, the April Laws of 1848, which established Hungary as a constitutional monarchy, are particularly important. The April Laws included measures limiting the monarchy's legal institutions, regulating the state's organisation, ensuring civil liberties, and addressing economic matters. The April Laws extended suffrage, abolished censorship to ensure freedom of the press, introduced equality between officially recognised religious denominations, and affirmed the principle of freedom in education and learning.¹

The Austro–Hungarian Compromise of 1867 affected minority rights, as it enshrined the equality of Jewish citizens in both civil and political

¹ 1848. évi I. – XXXI. törvénycikk Ezer év törvényei. [Online]. Available at: <https://net.jogtar.hu/ezer-ev-torvenyei?pagenum=27> (Accessed: 12 October 2024).

ways.² After World War I, during the period of the Hungarian Soviet Republic, universal suffrage, right to work, and minority rights were regulated. In the ensuing period, Europe experienced severe economic damage and human rights violations, encouraging the European states to cooperate for recovery. Consequently, after World War II, major international organisations were established, such as the United Nations, the North Atlantic Treaty Organization (NATO), and the Council of Europe, which aimed to protect human rights, strengthen the economy, and maintain peace.

Following World War II, during the Soviet occupation of Hungary, serious human rights violations occurred as well.

Hungary's first written constitution was adopted in 1949. Act XX of 1949 (hereinafter referred to as the Constitution) granted a limited set of fundamental rights, such as the right to property, inheritance, education, work, rest and leisure, and gender equality.³ However, it did not fully reflect Hungary's national characteristics or democratic traditions.

In the late 1980s, a political transition began to replace the socialist regime with a democratic, republican state. Consequently, the new republic was proclaimed on 23 October 1989. In the same month, the National Assembly adopted numerous amendments to the Constitution, including the reintroduction of the office of the president and establishment of the fundamental rules for constitutional review. Consequently, the president of Hungary and the first members of the Constitutional Court were elected. In the following years, Hungary made significant progress in the protection of human rights, establishing connections with major international organisations such as the Council of Europe, NATO, and European Union.

On 6 November 1990, Hungary joined the Council of Europe and has been a member for over 30 years now. It subsequently ratified the Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights (hereinafter referred to as the Convention or ECHR). When depositing the instrument of ratification, the Government of the Republic of Hungary recognised the jurisdiction of the European Court of Human Rights (hereinafter referred to as the Court)

² 1867. évi XVII. törvénycikk. [Online]. Available at: <https://net.jogtar.hu/ezer-ev-torveny?docid=86700017.TV&searchUrl=/ezer-ev-torvenyei?pagenum%3D27> (Accessed: 12 October 2024).

³ 1949. évi XX. törvény a Magyar Köztársaság Alkotmánya (közlönyállapot) Net Jogtár. [Online]. Available at: <https://njt.hu/jogszabaly/1949-20-00-00> (Accessed: 12 October 2024).

regarding all matters related to the interpretation and application of the Convention and its protocols from the time they came into force for Hungary. Additionally, Hungary acknowledges the Court's judgments as binding and recognises its obligation to implement them, thereby accepting the monitoring mechanism associated with the Convention.⁴

Hungary submitted its application for membership to the European Union on 1 April 1994. A few years later, on 8 July 1997, along with the Czech Republic and Poland, Hungary was invited to begin accession negotiations with NATO, and it formally became a member on 12 March 1999, when its instruments of accession were deposited. After a thorough negotiation process, Hungary joined the European Union on 1 May 2004, along with nine other countries, marking the fifth enlargement of the European Union.⁵

Following its accession to the European Union, the protection of human rights in Hungary was significantly strengthened through the legal and institutional framework of the Union. Several European Union regulations contributed to the development of a more severe legal environment for human rights protection in Hungary, such as the Charter of Fundamental Rights of the European Union, the rulings of the European Court of Justice, and the Regulation 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).

On 18 April 2011, the National Assembly adopted the Fundamental Law of Hungary, which came into force on 1 January 2012, replacing the Constitution – a document that had undergone significant amendments during the transition to democracy in 1989. The Fundamental Law, in its “Freedom and Responsibility” section, outlines fundamental rights and obligations through 31 articles.

It is important to highlight the role of the Constitutional Court, which was established by the amendments of the Constitution in 1989 and underwent significant changes with the passage of Act CLI of 2011 on the

⁴ Az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről szóló 1993. évi XXXI. törvény. [Online]. Available at: <https://net.jogtar.hu/jogszabaly?docid=99300031.tv> (Accessed: 12 October 2024).

⁵ Blutman, 2013, p. 63.

Constitutional Court.⁶ The primary and most important task of the Constitutional Court is to protect the rights guaranteed by the Fundamental Law. In this capacity, it can conduct preliminary and subsequent constitutional review procedures and handle constitutional complaints submitted by individuals or organisations in specific cases, as well as review laws upon request by judges. In proceedings before the Constitutional Court, not only law but also judicial decisions can be challenged.⁷ The decisions of the Constitutional Court have *erga omnes* effect, meaning they are binding on everyone. The Constitutional Court closely follows the case law of the Court and the Court of Justice of the European Union and frequently applies them in its own decisions.

As an alternative human rights protection institution, the Commissioner for Fundamental Rights (hereinafter referred to as the Commissioner), is available, introduced into the Hungarian legal system based on the Swedish model.⁸ The Commissioner is assisted by the deputy commissioner responsible for protecting the rights of national minorities living in Hungary and by the deputy commissioner for protecting the interests of future generations. Anyone who alleges that an act or omission by a public authority listed in the legislation infringes or directly threatens a fundamental right, may apply to the Commissioner. The Commissioner prepares reports on investigations conducted and produces annual reports on the fulfilment of tasks related to the national preventive mechanism, which are made public.⁹

Apart from the abovementioned measures, Hungary is determined to protect the rights of Hungarians living across its borders.

2. Relationship between Hungary and the Council of Europe from a Human Rights Perspective

Following the ratification of the Convention in 1995, Hungary established its government representation before the Court. Currently, the Department of Human Rights, within the Ministry of Justice, is responsible for human

⁶ Trócsányi, Schanda, and Csink, 2016, pp. 407-408.

⁷ Act CLI of 2011 on the Constitutional Court. [Online]. Available at: <https://hunconcourt.hu/act-on-the-cc/> (Accessed: 12 October 2024).

⁸ Trócsányi, Schanda, and Csink, 2016, p. 304.

⁹ Act CXI of 2011 on the Commissioner for Fundamental Rights. [Online]. Available at: <https://www.ajbh.hu/en/web/ajbh-en/act-cxi-of-2011> (Accessed: 12 October 2024).

rights matters related to the Council of Europe. Among its primary duties are representing the Hungarian Government before the Court, assisting in the implementation of judgments of the Court, and participating in legislative work concerning human rights. A significant part of the workload of the Human Rights Department involves formulating Hungary's position on applications submitted to the Court and ensuring their execution.¹⁰

Annually, the Human Rights Department submits a report to the Committee of Justice of the Parliament, detailing the yearly caseload and related data, which is then subject to approval through a vote. The Human Rights Department continuously monitors the case law of the Court, regularly updating relevant authorities and occasionally contributing professionally to consultations organised by national universities and further training programs organised by national authorities.^{11 12}

Furthermore, the Human Rights Education for Legal Professionals (HELP) courses,¹³ created by the Council of Europe, have been incorporated into continuous training initiatives for national staff, which are attended by a broader range of professionals.

The Ministry of Justice maintains ongoing communication with the Department for the Execution of Judgments of the European Court of Human Rights (hereinafter referred to as the Department for the Execution of Judgments) regarding the implementation of judgments concerning Hungary, as reflected in the number of submissions made in various cases.

In October 2022, the Ministry of Justice and the Council of Europe co-organised a Round Table discussion titled “Professional Policing: Treatment of Apprehended Persons and Consequences”, addressing issues related to police ill treatment identified in the *Gubacsi group* of cases. The aim of the Round Table was to take further steps to reduce human rights

¹⁰ 5/2024. (VI. 20.) IM utasítás az Igazságügyi Minisztérium Szervezeti és Működési Szabályzatáról 1.3.4.2. pont. [Online]. Available at: <https://njt.hu/jogszabaly/2024-5-B0-06> (Accessed: 12 October 2024).

¹¹ Professzori Szalon a strasbourgi bíróság ítélkezési gyakorlatáról. [Online]. Available at: <https://rtk.uni-nke.hu/hirek/2022/09/12/professzori-szalon-a-strasbourgi-birosag-itelkezesi-gyakorlatarol> (Accessed: 12 October 2024).

¹² Az emberi jogvédelem Európában - Mivel jár Magyarország képviselete. [Online]. Available at: <https://mcc.hu/hir/az-emberi-jogvedelem-europaban> (Accessed: 12 October 2024).

¹³ The HELP programme is designed to enhance the knowledge of legal professionals on human rights, within the legal frameworks of the Council of Europe and the European Union.

violations resulting from police abuse and ensure proper redress for any infringements already committed. The event was attended by special guests, such as the Secretariat of Human Rights at the Council of Europe; former and current members of the European Committee for the Prevention of Torture (hereinafter referred to as the CPT); and experts of the Department for the Execution of Judgments, alongside national experts. Notable Hungarian professors and representatives from the Ministry of the Interior and the Prosecutor General's Office gave informative presentations, emphasising the importance of prevention through proper training for law enforcement officers at all levels, along with the establishment of specific procedural safeguards.

During the event, further information was shared about the current training provided to officers during their university education. The Committee of Ministers welcomed the efforts of Hungarian authorities for co-organising the Round Table, and it was further noted that important developments appear to have taken place in respect of the training of law enforcement authorities.¹⁴

The Department for the Execution of Judgments usually carries out an annual visit to Hungary, where they consult with national authorities, such as the Constitutional Court, the Curia, the National Judicial Council, and experts, on the implementation of specific cases.¹⁵

In addition to official visits to Hungary by representatives of the Council of Europe, high-level diplomatic meetings are also held in Strasbourg, including with the Secretary General of the Council of Europe and the President of the Court.

Apart from monitoring the execution of judgments of the Court, Hungary also collaborates with the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE) in preparing an annual report on hate crimes in the country and current regulations.

It is also important to note the role of the Permanent Representation to the Council of Europe of Hungary, which plays a vital role in promoting Hungarian interests before Strasbourg institutions and advancing Hungarian

¹⁴ CM/Notes/1451/H46-16. [Online]. Available at: <https://search.coe.int/cm?i=0900001680a91a95> (Accessed: 12 October 2024).

¹⁵ Visit to Hungary on the execution of ECHR judgments. [Online]. Available at: <https://www.coe.int/en/web/execution/-/visit-to-hungary-on-the-execution-of-echr-judgments> (Accessed: 12 October 2024).

cases. It is worth mentioning that the presidency of the Committee of Ministers is held by the ministers of member states in a six-month rotational system.¹⁶ Hungary first held the presidency between November 1998 and May 1999,¹⁷ and most recently between 21 May and 17 November 2021.

During its most recent presidency, Hungary outlined the following priorities: promoting the effective protection of national minorities, interreligious dialogue, children's rights, youth participation, Roma inclusion, and addressing technological and environmental challenges.¹⁸ During the presidency, several important professional conferences were organised online and in-person, both in France and Hungary.

Two key conferences were held during the time of Hungary's presidency of the Committee of Ministers. One conference focused on the "Current and Future Challenges of Coordinated Policies on AI Regulation", which aimed to discuss the challenges governments face in regulating artificial intelligence in a more organised manner. The other conference focused on "The Role of NGOs and Research Institutes in Promoting Council of Europe Norms and Standards on National Minority Rights".

It is also worth mentioning that Hungary, among others, is a member of the Group of States against Corruption (GRECO), the European Commission for Democracy through Law (Venice Commission), the European Commission for the Efficiency of Justice (CEPEJ), and the Consultative Council of European Prosecutors (CCPE).

¹⁶ Rules of Procedure of the Committee of Ministers (6th revised edition: 2020) Article 66 '*Subject to Articles 7 and 8 below, the Chair of the Committee of Ministers shall be held for a six-month term in turn by the representatives of the members in English alphabetical order. The Chair shall pass to a new Chair mid-May and mid-November, at a date to be fixed by the Committee of Ministers based on a joint proposal by the incoming and outgoing Chairs.*' [Online]. Available at: <https://search.coe.int/cm?i=09000016804e393a> (Accessed: 12 October 2024).

¹⁷ Previous Hungarian Presidency. [Online]. Available at: <https://huncoepres.mfa.gov.hu/eng/page/previous-hungarian-presidency> (Accessed: 12 October 2024).

¹⁸ CM/Inf(2021)9 Priorities of the Hungarian Presidency of the Committee of Ministers of the Council of Europe (21 May – 17 November 2021) [Online]. Available at: <https://search.coe.int/cm?i=0900001680a28829> (Accessed: 12 October 2024).

3. Hungary and the Human Rights Conventions Accepted within the Framework of the Council of Europe

As of today, Hungary has signed or ratified 96 out of the 225 conventions adopted within the framework of the Council of Europe, and signed an additional 18 without ratification. Among these, the following are particularly notable agreements.

3.1. *The Convention*

Hungary has been a member of the Council of Europe since 6 November 1990 and has been subject to the jurisdiction of the Court, since ratifying the Convention on 5 November 1992. The Court has played a pivotal role in the protection of fundamental rights in Hungary, with its judgments prompting significant legal reforms and strengthening domestic safeguards for individual rights.

3.2. *Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

Hungary ratified the protocol on 4 November 1993, committing to the prevention of torture and inhuman or degrading treatment in places of detention. The CPT, established under the Convention, regularly visits detention facilities, psychiatric institutions, and police stations in member states to assess conditions and treatment.

Until now, the CPT has conducted 11 visits to Hungary – seven periodic and four *ad hoc* – issuing reports and recommendations after each. These visits have addressed persistent issues such as prison overcrowding, conditions in psychiatric institutions, and the treatment of detainees. In response, Hungary has implemented measures to improve detention conditions and promote alternatives to imprisonment.¹⁹

3.3. *European Social Charter*

The European Social Charter was opened for signature in 1961, and Hungary ratified the Charter on 8 July 1999. The European Committee of Social Rights monitors the implementation of the Charter by member

¹⁹ The CPT and Hungary. [Online]. Available at: <https://www.coe.int/hu/web/cpt/hungary> (Accessed: 12 October 2024).

states.²⁰ Hungary submits regular reports on the implementation, which are assessed by the Committee to determine the extent to which Hungary meets the obligations set out in the Charter.²¹

3.4. European Commission Against Racism and Intolerance

The European Commission Against Racism and Intolerance (ECRI) was established in 1993 within the framework of the Council of Europe; it is dedicated to combating racism, racial discrimination, antisemitism, xenophobia, and other forms of intolerance. Similar to the CPT, it conducts periodic investigations in member states, prepares reports, and proposes solutions to the identified issues and monitors their implementation.

The ECRI has prepared six reports concerning Hungary, with the most recent published in 2022. The report addressed a range of issues, including the new curriculum in education, the situation of persons unlawfully staying in Hungary, the investigation of hate speech and hate crimes, the reception and integration of Roma and persons in need of international protection, as well as other equality-related matters.

3.5. Convention on Cybercrime (Budapest Convention)

The Budapest Convention, which entered into force on 1 July 2004, aims to support efforts to combat crimes committed through the use of technology, where devices are both the instruments and targets of these crimes, as well as cases where technology has been used to amplify other offenses, such as fraud. The Budapest Convention provides guidance for countries developing their own cybercrime laws and serves as a foundation for international collaboration among its signatories. Article 37 of the Budapest Convention gives any state the opportunity to join; currently, there are 76 parties and 20 countries that have signed or been invited to accede.²² The Budapest Convention is widely regarded as a milestone in international cybersecurity.

²⁰ Reporting system of the European Social Charter. [Online]. Available at: <https://www.coe.int/en/web/european-social-charter/reporting-system> (Accessed: 12 October 2024).

²¹ Country profiles – Hungary. [Online]. Available at: <https://www.coe.int/en/web/european-social-charter/hungary> (Accessed: 12 October 2024).

²² Convention on Cybercrime. [Online]. Available at: <https://rm.coe.int/1680081561> (Accessed: 12 October 2024).

3.6. Framework Convention for the Protection of National Minorities

The Framework Convention entered into force in 1998, with the aim of protecting the rights of national minorities. Hungary signed the convention on 1 February 1995, and it became effective from February 1998. By signing, Hungary committed to submitting a report every five years on the domestic implementation of the convention. Since then, Hungary has introduced several measures to protect national minorities.

3.7. Group of Experts on Action against Trafficking in Human Beings

Hungary ratified the Council of Europe's Convention on Action against Trafficking in Human Beings (GRETA) on 4 April 2013. To fulfil the obligations outlined in this convention, Hungary sanctions human trafficking and its various forms through the Criminal Code. Additionally, a national strategy has been developed to combat human trafficking.

4. National Implementation of the ECHR

The Convention was signed by Hungary on 6 November 1990. The Convention was ratified and entered into force on 5 November 1992.

Following the entry into force of the Convention, the Government of Hungary recognised the jurisdiction of the Court in matters arising from the interpretation and application of the Convention and its additional Protocols. The Government also acknowledged its obligation to implement the judgments of the Court, in cooperation with the Committee of Ministers of the Council of Europe, which supervises the execution of these judgments.

In Hungary, international treaties become applicable only after being integrated into the domestic legal system, which is typically done through legislation. Once promulgated, they become directly enforceable.²³ The ECHR was promulgated by Act XXXI of 1993 on the proclamation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, along with its eight additional Protocols. This act contains the original English text of the Convention, as well as its authentic Hungarian translation. The act reflects not only the original text of the Convention and its Protocols but also any subsequent amendments.

Prior to Hungary's accession to the ECHR, an analysis lasting approximately 18 months was conducted as part of the ratification process.

²³ The Fundamental Law of Hungary (25 April 2011) Article Q) (3).

The Hungarian National Assembly, in its reasoning for Resolution No. 76/1990 (XI. 2.) OGY on Hungary's accession to the Statute of the Council of Europe and the General Agreement on Privileges and Immunities of the Council of Europe, as well as on the signing of the ECHR, emphasised the necessity of this analysis, which was primarily aimed at aligning Hungary's legal system with the Convention.²⁴

As part of this analytical process, domestic legal experts studied the jurisprudence of the European Commission of Human Rights and the Court, along with the legal principles developed in the Court's case law, and all provisions of the Convention and its additional Protocols. The experts then compared these with the Hungarian legal provisions on human rights. During the early stages of the analysis, by reviewing key Strasbourg cases, the experts recommended that the relevant ministries begin legislative amendments.²⁵

The review found that under Act IV of 1978, Hungary's former Penal Code, violations of all rights contained in Chapter I of the ECHR were already subject to sanctions, including the following: homicide, aiding and abetting suicide, abortion (Article 2 Right to life); battery committed for a malicious motive or cruelty, coercion, mistreatment in official proceedings, third degree, unlawful detention with the victim's torment (Article 3 Prohibition of torture); coercion (Article 4 Prohibition of slavery and forced labour); violation of personal freedom, unlawful detention (Article 5 Right to liberty and security); false accusation, misleading authorities through false reports, third degree, perjury, subornation of perjury, suppressing extenuating circumstances, legal malpractice (Article 6 Right to a fair trial); breach of domicile, violation of privacy, violation of the privacy of correspondence, defamation, libel, desecration (Article 8 Right to respect for private and family life); violation of freedom of conscience and religion (Article 9 Freedom of thought, conscience, and religion); violation of freedom of association and assembly (Article 11 Freedom of assembly and association).²⁶

Additionally, Act IV of 1959 on the former Civil Code also protected

²⁴ 76/1990. (XI. 2.) OGY határozat az Európa Tanács Alapszabályához és az Európa Tanács kiváltságairól és mentességeiről szóló Általános Egyezményhez való csatlakozásról, valamint az Európai Emberi Jogí egyezmény aláírásáról. [Online]. Available at: <https://njt.hu/jogszabaly/1990-76-30-41> (Accessed: 12 October 2024).

²⁵ Bán and Bárd, 1992, p. 3.

²⁶ Wolters Kluwer Hungary, *Complex Jogtár*, 2022.04., Act IV of 1978 on the Criminal Code.

the human rights related to personal dignity and property rights guaranteed by the Convention.

Regarding the availability of adequate legal remedies for individuals in case of human rights violations, Article 70/K of the Constitution stipulated that individuals may turn to the courts to enforce claims arising from violations of fundamental rights committed by either private persons or public authorities.²⁷

As a result of the analysis, experts recommended minor amendments to 15 legal provisions and proposed one reservation. When formulating these recommendations, experts considered that the legal amendments made and the substantial legal reforms enacted in 1989 were already aligned with the Convention, and that at the time, the Court's case law had not yet covered all areas.²⁸

The Government accepted the proposed reservation, which pertained to criminal misdemeanours under Article 6. Accordingly, Hungary exercised its right to make a reservation concerning the right of access to a court guaranteed by Article 6 Paragraph 1 of the Convention, citing the need for time to establish a system for judicial review of administrative decisions, which was a lengthy process.²⁹ The Government later fulfilled this obligation by introducing the right to appeal decisions of administrative authorities to the courts under Act LXIX of 1999 on misdemeanours.³⁰

5. Reflection of Human Rights Protection Obligations Deriving from the ECHR in the Constitution and the Major Acts of Hungary

This section provides a brief, non-exhaustive overview of the relevant domestic regulations. It is important to highlight that in addition to the substantive and procedural rules of criminal and civil law, there are separate acts governing specific areas, for example freedom of assembly, right to education, and religious communities.

²⁷ A Magyar Köztársaság Alkotmánya 1949. évi XX. törvény. Available at: <https://njt.hu/jogszabaly/1949-20-00-00> (Accessed: 12 October 2024).

²⁸ Bán and Bárd, 1992, p. 5.

²⁹ Az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről szóló 1993. évi XXXI. törvény indokolása Wolters Kluwer Hungary, Complex Jogtár 2022.04.

³⁰ 1999. évi LXIX. törvény a szabálysértésekről 36. § [Online]. Available at: <https://mkogy.jogtar.hu/jogszabaly?docid=99900069.TV> (Accessed: 12 October 2024).

5.1. The Hungarian Constitution and ECHR

Hungary's first constitution was adopted in 1949, which was significantly amended over time and was still in effect at the time of ratification of the ECHR, naming certain fundamental rights. However, it stipulated that the rules regarding fundamental rights and obligations should be defined in separated acts.

Following the 1989 and 1990 amendments to the Constitution, a wider range of fundamental rights were guaranteed. The institutions of the Constitutional Court, the Parliamentary Commissioner for Citizens' Rights, and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities were established. As the Constitution has been repealed, it is advisable to look into the new legislation.

Hungary's Fundamental Law³¹ came into force on 1 January 2012. The Fundamental Law begins with the “National Avowal”, which acts as a preamble, followed by the “Foundation” section, which contains basic provisions regarding the state, core values, constitutional principles, state goals, and essential provisions related to the Fundamental Law and other laws.

Principles were established for the first time at the constitutional level, such as the separation of powers and the state's monopoly on the use of force; the origin of citizenship; the protection of the Hungarian language; the recognition of national and state holidays; support for childbearing; the recognition of an economy based on value-creating work; the principles of balanced, transparent, and sustainable budgeting; as well as the preservation and maintenance of a healthy environment.³²

The second part of the Fundamental Law is titled “Freedom and Responsibility”, with a focus on the individual and their inalienable and inviolable fundamental rights. The provisions concerning fundamental rights are based on the Charter of Fundamental Rights of the European Union.

The third part of the Fundamental Law, titled “The State”, sets out basic rules regarding the structure of the Hungarian state.

In the “Freedom and Responsibility” section of the Fundamental Law,

³¹ The Fundamental Law of Hungary. [Online]. Available at: <https://hunconcourt.hu/fundamental-law/> (Accessed: 12 October 2024).

³² Magyarország Alaptörvénye indokolása Wolters Kluwer Hungary, Complex Jogtár 2022.04.

the following fundamental rights are included, which support the realisation of the rights contained in the Convention. Article I of this section – similar to Article 1 of the Convention – defines the protection of fundamental human rights as a primary obligation of the state. Similar to the Convention, the Fundamental Law sets out fundamental rights in separate articles.

The Fundamental Law protects, among others, the right to life and human dignity (Convention Article 2); the right to liberty and security (Convention Article 5); the right to property (First Additional Protocol, Article 1); the right to respect for private and family life, home, communications, and good reputation (Convention Article 8); the right to freedom of thought, conscience, and religion (Convention Article 9); the right to peaceful assembly (Convention Article 11); the right to establish and join organisations, the right to freedom of expression (Convention Article 10); the freedom of scientific research and artistic creation, the freedom of learning and teaching, the right to education (First Protocol, Article 2); the right to elections (First Protocol, Article 3); the right to a fair trial (Convention Article 6); the right to freedom of movement and the free choice of residence (Fourth Protocol, Article 2); prohibition of torture, inhuman, and degrading treatment (Convention Article 3); and provision for procedural guarantees in criminal proceedings (Convention Article 7).

The Fundamental Law extends the right to life to include protection of the foetus, thereby granting protection from conception. With respect to the prohibition of torture, it establishes absolute bans, explicitly prohibiting inhuman and degrading treatment, slavery, human trafficking, experiments on the human body without consent, the use of the human body or its parts for financial gain, and human cloning.

It also defines key procedural guarantees in criminal proceedings, including the principles of *nullum crimen sine lege* (no crime without a law), *nulla poena sine lege* (no punishment without a law), and *ne bis in idem* (not being tried twice for the same offense).

Regarding the right to respect for private and family life, the Fundamental Law sets limitations on the exercise of freedom of expression and the right of assembly, stipulating that these rights must not infringe upon the rights to respect for private and family life. The protection of personal data, as well as the right to access public information, is ensured by an independent authority, which is currently the National Authority for Data Protection and Freedom of Information.

With respect to the right to peaceful assembly and freedom of

association, the Fundamental Law guarantees the right to form and join organisations, including political parties, trade unions, and other interest-representation bodies.

In terms of freedom of expression, the Fundamental Law protects the press, while also affirming that this freedom must not infringe upon the rights of others. Oversight of the press and media is conducted by the National Media and Infocommunications Authority, as an independent authority.

It is worth mentioning the provisions of the Fundamental Law that ensure free and compulsory primary education, as well as free and universally accessible secondary and higher education.

Regarding property rights, the Fundamental Law stipulates that the deprivation of property is only possible in exceptional cases defined by law.

The Fundamental Law declares that all individuals are equal before the law, thereby guaranteeing that the fundamental rights it enshrines apply to everyone. Additionally, it emphasises the equality of men and women.

Furthermore, the Fundamental Law establishes guarantees for the right to a fair trial, including independent and impartial proceedings, a requirement for decisions to be made within a reasonable time, and the right to appeal decisions made by state authorities.

Based on the above analysis, it is evident that the Fundamental Law guarantees a broader range of fundamental rights compared with the previous constitution, largely covering the rights protected by the Convention and its additional protocols. A number of these rights are further enshrined in additional legislative instruments.

5.2. The Hungarian Penal Code and ECHR

In Act C of 2012 on the Criminal Code³³ (hereinafter referred to as the Criminal Code), the penal code in force, there are numerous offenses aimed at protecting human rights.

Regarding the right to life guaranteed by Article 2 of the Convention, the Hungarian Criminal Code provides strict protection, penalising crimes such as homicide, aiding and abetting suicide, abortion, and failure to offer aid or assistance. Concerning the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention, the Criminal Code penalises battery, professional misconduct, and duress. The Criminal Code

³³ Act C of 2012 on the Criminal Code. [Online]. Available at: <https://njt.hu/forditasok/-:2012:C/1/10> (Accessed: 12 October 2024).

also provides protection against physical and psychological coercion and unlawful detention, as it criminalises violations of personal freedom. Additionally, the Criminal Code defines offenses such as battery and mistreatment in official proceedings.

The Criminal Code also addresses human trafficking and forced labour, providing protection for the rights enshrined in Article 4 of the Convention.

In relation to the right to liberty and security in Article 5 of the Convention, the Criminal Code again mentions offenses such as violations of personal freedom and unlawful detention.

Concerning the right to a fair trial, guaranteed in Article 6 of the Convention, the Criminal Code, in Chapter XXVII on corruption-related offenses, defines various forms of bribery during official procedures. It also sanctions offenses such as false accusation, misleading authorities, perjury, subornation of perjury, coercion in official procedures, suppressing exculpatory evidence, and legal malpractice. It also provides protection for crimes committed against officials in the course of their official duties.

Regarding the right to respect for private and family life (Article 8 of the Convention), the Criminal Code addresses illegal entry into private property, misuse of personal data, violation of private secrets, and mail fraud.

The Criminal Code supports the protection of freedom of thought, conscience, and religion under Article 9 of the Convention, by criminalising acts that violate these rights. It also guarantees freedom of association and assembly by sanctioning violations of these rights, thereby safeguarding the rights enshrined in Article 11 of the Convention.

In accordance with the prohibition of discrimination under Article 14 of the Convention, the Criminal Code penalises violence against a member of the community and incitement against a community.

Furthermore, the Criminal Code protects the right to property under Article 1 of the First Protocol to the Convention by criminalising theft, robbery, embezzlement, and fraud.

From the above analysis, it is clear that through numerous provisions, the Criminal Code ensures the protection of the rights enshrined in the Convention, both for individuals and the community. It sanctions crimes against life, liberty, bodily and mental integrity, privacy, freedom of expression, and property, and provides special protection against discrimination, hate speech, and inhuman treatment, reflecting compliance

with the Convention in Hungarian criminal law.

5.3. The Criminal Procedure Code and ECHR

Act XC of 2017 on the Code of Criminal Procedure³⁴ (hereinafter referred to as the Criminal Procedure Code) ensures the protection of the rights enshrined in the Convention as follows.

One of the most important principles in criminal proceedings is the guarantee of the right to a fair trial, which is protected in the following manner. The preamble of the Criminal Procedure Code refers to the right to a fair trial and the observance of reasonable deadlines. Furthermore, it stipulates the right to defence, which allows the accused to retain a lawyer and actively exercise their defence during the proceedings. The Criminal Procedure Code defines the presumption of innocence, as well as the rights and obligations of the accused and of the person reasonably suspected of committing an offense, the latter of which is extensively guaranteed by law. The Criminal Procedure Code incorporates a version of the so-called Miranda warning, developed in American law, which appears under the title of “Defendant advice” in Section 185.

The following rule is in effect in connection with Article 5. During the proceedings, the application of any coercive measure must be duly justified. In certain circumstances, the suspect may be held in custody, which can only be imposed based on the conditions specified by law. The Criminal Procedure Code prescribes various procedural guarantees, including the possibility to appeal against coercive measures, as well as a remedy for unlawful detention.

Respect for the prohibition of torture and inhuman treatment (Article 3) is particularly important during criminal proceedings, especially when applying detention and coercive measures.

The provisions of the Criminal Procedure Code ensure respect for the right to privacy, while also stipulating specific procedural guarantees for intercepting private communication. The use of undercover tools is subject to either judicial or prosecutorial authorisation, or it may be conducted without such authorisation. This is especially important for protecting the right to family life and correspondence (Article 8).

³⁴ Act XC of 2017 on the Code of Criminal Procedure. [Online]. Available at: <https://njt.hu/forditasok/-:2017:XC/1/10> (Accessed: 12 October 2024).

5.4. The Hungarian Civil Code, Civil Procedure Code, and ECHR

Act V of 2013 on the Civil Code³⁵ also contains numerous provisions that ensure the enforcement of rights protected by the Convention, particularly in the areas of personality rights, property rights, and the protection of privacy and family life.

In the civil proceedings, Act CXXX of 2016 on the Code of Civil Procedure³⁶ (hereinafter referred to as the Civil Procedure Code) ensures the enforcement of the rights contained in the Convention in the following way.

The protection of the right to private life also receives special attention in civil proceedings, as the law provides for the examination of documents, creation of copies thereof, and related data management. According to the Civil Procedure Code, as a general rule, the court reviews the case in a public hearing and announces its decision publicly; however, in justified cases, the court may decide to exclude the public either on its own initiative or upon a justified request from a party.³⁷

The Civil Procedure Code stipulates that courts are obliged to respect the dignity of the parties in all proceedings. In line with the principles of the ECHR, it also guarantees the right to a fair trial, protection of private life, equal treatment, and the right to legal remedy.

In addition to the provisions of the Constitution, criminal and civil substantive and procedural law, the case law of the Constitutional Court, as well as the binding legal interpretations of the Supreme Court are also relevant for the establishment of domestic regulations in compliance with the Convention, as references to the Court's case law are becoming increasingly common.

6. Major Law-Making Processes in Hungary Based on the ECHR

The primary function of the Court is to establish whether a respondent state has breached the Convention. When a violation is found, the judgment may provide for just satisfaction. Nevertheless, it remains the respondent state's duty to determine and execute suitable measures to remedy the breach and

³⁵ Act V of 2013 on the Civil Code. [Online]. Available at: <https://njt.hu/forditasok/-:2013:V/1/10> (Accessed: 12 October 2024).

³⁶ Act CXXX of 2016 on the Code of Civil Procedure. [Online]. Available at: <https://njt.hu/forditasok/-:2016:CXXX/1/10> (Accessed: 12 October 2024).

³⁷ Act CXXX of 2016 on the Code of Civil Procedure Section 231 [The publicity of a hearing]. [Online]. Available at: <https://njt.hu/forditasok/-:2016:CXXX/1/10> (Accessed: 12 October 2024).

restore the situation. Although the Court has typically avoided specifying exact remedies, it may, in exceptional cases, recommend particular actions to be taken.³⁸

Article 46, Paragraph 1 of the Convention states: ‘*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*’.³⁹ Consequently, the member states are obliged to remedy the violations identified in the Court's judgments by creating a legal environment where similar violations are unlikely to recur. These violations generally arise when a particular legislation contrary to the Convention are applied, or when there is a lack of legislation. However, violations may also be caused by errors in administrative processes, such as those attributable to an authority.

Hungary has undertaken two significant legislative reforms in response to judgments delivered by the Court. These reforms pertain to conditions in detention facilities and the length of proceedings before the domestic courts.

The Court first addressed the issue of detention conditions in Hungary in 2011 in the case *Szél v. Hungary*.⁴⁰ The following year, in the case *István Gábor Kovács v. Hungary*, the Court found violations regarding prison overcrowding, poor conditions in the detention facilities, the lack of effective remedies, and other deficiencies in protecting detainees' rights.⁴¹ Recognising these systemic issues, the Court delivered a pilot judgment in the case *Varga and Others v. Hungary* in 2015, determining that prisoners in Hungarian penal institutions were subjected to inhuman or degrading treatment due to overcrowding.⁴² A significant number of applicants subsequently turned to the Court due to the poor conditions in these institutions. To monitor the execution of these judgments, the Committee of Ministers of the Council of Europe formed a group from these cases under the leading case of *István Gábor Kovács v. Hungary*. This group also

³⁸ Harris, O'Boyle, and Warbrick, 2023, p. 33.

³⁹ 1993. évi XXXI. törvény az emberi jogok és az alapvető szabadságok védelméről szóló, Rómában, 1950. november 4-én kelt Egyezmény és az ahhoz tartozó nyolc kiegészítő jegyzőkönyv kihirdetéséről. [Online]. Available at: <https://net.jogtar.hu/jogszabaly?docid=99300031.tv#lbj41id4a30> (Accessed: 12 October 2024).

⁴⁰ See further: *Case of Szél v. Hungary*, App. No. 30221/06, 07 September 2011.

⁴¹ *Case of István Gábor Kovács v. Hungary*, App. No. 15707/10, 17 April 2012.

⁴² *Case of Varga and Others v. Hungary*, App. Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (2015), 10 June 2015.

includes related issues, such as inadequate living space, insufficient capacity expansion, restrictions on maintaining contact with family members, and the failure to implement alternative coercive measures.

The Committee of Ministers invited the Hungarian Government to submit an action plan addressing the identified problems. In response, and with the aim of preventing abuses related to compensation procedures for prison overcrowding, Hungary introduced domestic remedies targeting conditions that violate fundamental rights. This was achieved through amendments to the Act on the Enforcement of Penalties, Measures, Certain Coercive Measures and Misdemeanour Custody (hereinafter referred to as the Prison Code) and Decree of the Minister of Justice 16/2014 (XII.19.) IM on the detailed rules of the implementation of imprisonment, custodial arrest, pre-trial detention and custodial arrest in lieu of a disciplinary penalty (hereinafter referred to as the IM Decree). Chapter III/A of the Prison Code⁴³ and Article 5/A of the IM Decree⁴⁴ regulate the compensation procedure for placement conditions that violate fundamental rights. The new rules expanded the scope of reintegration custody, introduced the possibility of compensation, and provided remedies for the review of complaints.

According to Section 75/B of the Prison Code, a convicted person is entitled to compensation if there was a lack of living space required by law during their detention or if they were subjected to other conditions that violate the prohibition on torture or inhuman or degrading treatment, such as inadequate ventilation, lighting, heating, or pest control. The compensation claim can also be submitted after release, within the legal deadline.⁴⁵

Following the introduction of domestic remedies addressing the issue, the Court delivered its judgment in *Domján v. Hungary*,⁴⁶ wherein it found that the newly established remedies were, in principle, effective for the purposes of Article 35 § 1 of the Convention.⁴⁷ However, subsequent

⁴³ 2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról. [Online]. Available at: <https://njt.hu/jogszabaly/2013-240-00-00> (Accessed: 12 October 2024).

⁴⁴ 16/2014. (XII. 19.) IM rendelet a szabadságvesztés, az elzárás, az előzetes letartóztatás és a rendbíráság helyébe lépő elzárás végrehajtásának részletes szabályairól. [Online]. Available at: <https://njt.hu/jogszabaly/2014-16-20-06> (Accessed: 12 October 2024).

⁴⁵ 2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról 75/D. [Online]. Available at: <https://njt.hu/jogszabaly/2013-240-00-00> (Accessed: 12 October 2024).

⁴⁶ See further: *Case of Domján v. Hungary*, App. No. 5433/17, 23 November, 2017.

⁴⁷ Sonnevend and Bodnár, 2021, 56. p. 48.

revisions were undertaken owing to the excessive complexity of the original regulatory framework. The effectiveness of the amended system is currently under evaluation by the Committee of Ministers.

Regarding the length of civil proceedings, the Court delivered a pilot judgment in 2015 in the case *Gazsó v. Hungary*.⁴⁸ Given the large number of judgments against Hungary regarding the protracted nature of court proceedings, these cases have also been moved in one group under the leading case of *Gazsó v. Hungary*, at the execution stage of judgments of the Court – similar to the case *István Gábor Kovács v. Hungary*. The group includes complaints about the length of civil, criminal, and administrative proceedings. The Committee of Ministers has invited Hungary to accelerate these proceedings and introduce domestic remedies.

To address the issue, the legislator took into account the structural problem of excessive length of proceedings when drafting the new civil and criminal procedure codes, aiming to reduce the duration of proceedings. While these reforms did not fully resolve the issue, they encouraged the parties involved to refrain from procedural tactics that would deliberately extend the proceeding.

Additionally, the legislator found it expedient to create a remedy procedure to compensate for violations caused by protracted proceedings. Consequently, Act XCIV of 2021 on the enforcement of pecuniary satisfaction relating to the protraction of civil contentious proceedings (hereinafter referred to as the Pecuniary Satisfaction Act) was adopted. This act exclusively addresses claims for pecuniary satisfaction due to delays in civil litigation. In terms of compensating for fundamental rights violations, the law establishes a new legal consequence called pecuniary satisfaction, distinct from compensation, damages, or non-pecuniary damages.

According to the Pecuniary Satisfaction Act, only a party involved in the proceedings can submit a claim for pecuniary satisfaction if the court proceedings were unreasonably prolonged. There are two courts specified by the law to decide on such claims in non-litigation proceedings within a short time. If the claim for pecuniary satisfaction is well-founded, the proceedings are exempt from fees. Non-litigation proceedings can be initiated for both pending and terminated cases, covering the entire duration of the case or just a specific part.

The deadline for submitting such a claim is the same as that for applying to the Court: four months.

⁴⁸ *Case of Gazsó v. Hungary*, App. No. 48322/12, 16 October 2015.

The law also specifies how to calculate the duration of court proceedings and defines what constitutes a reasonable period, generally set at 60 months (five years) from the start of the first-instance proceedings to the delivery of the final decision. The amount of pecuniary satisfaction is adjusted to the duration of the proceedings.

The Pecuniary Satisfaction Act also defines exclusion criteria, including cases where the Court has already ordered the state to pay just satisfaction for the excessive length of court proceedings. If the Court granted just satisfaction for only part of the case, that amount will be deducted from the pecuniary satisfaction awarded under the domestic procedure, and the remaining balance will be paid to the party. Similarly, if the party has already exhausted domestic remedies, the court will determine pecuniary satisfaction only for the period previously not reviewed.

The order for payment procedure is a special case of a pecuniary satisfaction claim. Pecuniary satisfaction claims cannot be pursued for payment procedure. However, if the order for payment procedure turns into a civil proceeding, the date of submission of the order for payment procedure is considered the start of the civil proceeding.

Apart from the Pecuniary Satisfaction Act, a government decree sets out the details for calculating pecuniary satisfaction in relation to civil proceedings. The amount is adjusted according to the duration of the court case.

The Pecuniary Satisfaction Act, which took effect on 1 January 2022, includes transitional provisions to facilitate its phased implementation. Until 31 December 2022, claims for pecuniary satisfaction could only be made in connection with cases that had already been closed with a final decision.⁴⁹

Currently, it appears that the domestic remedy introduced for civil proceedings is functioning effectively.

7. Landmark Cases of Hungary Before the Court

The following Hungarian cases before the Court are significant, as they addressed fundamental legal issues such as police ill-treatment, freedom of expression and freedom of association, the length of detention, ill-treatment

⁴⁹ 2021. évi XCIV. törvény a polgári peres eljárás elhúzódásával kapcsolatos vagyoni elégtétel érvényesítéséről. [Online]. Available at: <https://njt.hu/jogszabaly/2021-94-00-00.2#AC5> (Accessed: 12 October 2024).

on account of the conditions of expulsion, and the right to respect for private and family life.

7.1. *Rekvényi v. Hungary* 25390/94 – *Freedom of Expression and Freedom of Association*

This was the first judgment delivered by the Court concerning Hungary, in 1999.

The applicant was a police officer and Secretary General of the Police Independent Trade Union. The applicant challenged Act CVII of 1993 on certain amendments to the Constitution, which prohibited police officers from engaging in political activities. The amendment was enforced through circulars in 1994, requiring police officers to leave the institution if they wanted to engage politically. The Police Independent Trade Union filed a constitutional complaint, but the Constitutional Court dismissed it, stating it had no competence to annul a constitutional provision.

The Court found that the restriction on the applicant's freedom of association, which prohibited police officers from joining political parties, was lawful under Article 11, as it was clearly established in domestic law and not arbitrary. The interference was justified, and there was no violation of Article 11. Furthermore, the Court held that there was no violation of Article 14 in conjunction with Article 10 or 11, as the special status of police officers had been taken into account, justifying the difference in treatment.⁵⁰

The case of *Rekvényi* affirmed the principle that public servants, particularly those exercising coercive powers, may be subject to special restrictions to protect the political neutrality of state institutions. The Court afforded Hungary a broad margin of appreciation, justifying the restriction on police officers' political activity as a necessary measure in light of the country's ongoing democratic transition and efforts to strengthen institutional neutrality.⁵¹ However, the judgment also reflects a cautious approach by the Court, marked by deference to state discretion in a transitional context. This case remains a pivotal yet debated precedent in the Court's evolving jurisprudence on freedom of association and expression in the public sector.

⁵⁰ *Case of Rekvényi v. Hungary*, App. No. 25390/94, 20 May 1999.

⁵¹ Sonnevend and Bodnár, 2021, 254. p. 23.

7.2. *Gubacsi v. Hungary (44686/07) – Police Ill-Treatment*

The applicant alleged, under Article 3 of the Convention, that he was subjected to severe ill-treatment by police officers in August 2006 after being taken into custody. He claimed that the police officers beat him during the transfers to medical examinations and while in custody, resulting in multiple injuries across his body. Despite an investigation carried out, the authorities found the testimonies inconsistent, especially due to the applicant's intoxicated state. Although his injury was likely caused by police abuse, no specific officer could be identified, and his complaint was dismissed.

The Court noted that the applicant had entered police custody with minor injuries, but after his release, more serious injuries were detected. The Court emphasised that if someone is injured in custody, the State must explain how the injuries occurred. In this case, the Government failed to prove the injuries were caused by anything other than police ill-treatment. The Court ruled that this constituted inhuman and degrading treatment, violating Article 3. However, the Court noted that the investigation into the allegations was considered adequate, despite being unable to identify individual responsibility due to contradictory evidence.⁵²

The judgment reaffirms the State's responsibility to safeguard the safety and dignity of individuals in custody. However, the Court's restrained assessment of the domestic investigation – despite unresolved accountability – reflects a cautious judicial approach in complex cases. This case illustrates the ongoing challenge the Court faces in ensuring not only declaratory justice for victims but also systemic compliance by States with their obligations under the Convention.

7.3. *X.Y. v. Hungary 43888/08 – Length of Detention*

The applicant was arrested in November 2007 for car thefts and was held in pre-trial detention until May 2008, when he was placed under house arrest. All restrictions were lifted in November 2009, but the proceedings remained pending. He alleged that his detention was unlawful due to a clerical error, and the length of his pre-trial detention had been excessive, which the authorities did not consider when making a decision to extend his detention.

⁵² *Case of Gubacsi v. Hungary*, App. No. 44686/07, 28 September 2011.

The Court determined that a clerical error rendered part of the applicant's detention initially unlawful, and that the total duration of his pre-trial detention was excessive.⁵³

The Court's case law affirms that defendants are entitled to trial within a reasonable time or to be released before trial, with one year generally considered a reasonable period for pre-trial detention. Decisions on detention must be well-justified, evidence-based, and tailored to the individual, while authorities must continually assess the suitability of less restrictive alternatives.

Subsequently, the Court delivered a pilot judgment concerning the length of detention, identifying it as a structural problem in Hungary. Consequently, related cases have been processed as one group during the execution phase. This group of cases has become more complex and includes violations such as unlawful detention, excessive pre-trial detention, and inadequate reasoning by domestic courts for continued detention. It also includes infringements of the "equality of arms" principle, as applicants were denied access to relevant investigation materials when contesting their detention, and the excessive length of judicial review of detention.⁵⁴

7.4. Ilias and Ahmed v. Hungary 47287/15 – Ill-Treatment on Account of the Conditions of Expulsion

The applicants are Bangladeshi citizens who entered Hungary from Serbia on 15 September 2015, and immediately submitted asylum applications. Following the rejection of their applications, they proceeded to file an appeal. Until the appeal was decided, they were held in the Röszke transit zone. After their asylum applications were rejected, the applicants were returned to Serbia. They argued that their detention in the transit zone was unlawful, the conditions of detention were inadequate, and their expulsion to Serbia exposed them to a real risk of inhuman and degrading treatment for which they also claimed that there was no effective remedy available.

The Fourth Section of the Court found a violation of Article 3 regarding the applicants' expulsion to Serbia and Article 5, Paragraph 1 concerning their unlawful detention. It also held that there had been a violation of Article 5, Paragraph 4 and Article 13 in conjunction with Article 3. However, it found no violation of Article 3 in relation to the

⁵³ *Case of X.Y. v. Hungary*, App. No. 43888/08, 19 June 2013.

⁵⁴ *X.Y. v. Hungary. Status of Execution*. [Online]. Available at: <https://hudoc.exec.coe.int/eng?i=004-11104> (Accessed: 12 October 2024).

conditions of detention in the transit zone. At the Government's request, the case was referred to the Grand Chamber on 18 September 2017.⁵⁵

The Grand Chamber concluded that the applicants' situation in the transit zone did not constitute deprivation of liberty under Article 5, based on the fact that the applicants had voluntarily entered the transit zone, and their stay was relatively short (23 days), while waiting for their asylum claims to be processed. The Grand Chamber noted that as there were no significant obstacles to returning to Serbia, their stay did not meet the threshold of *de facto* deprivation of liberty. Therefore, Article 5 was deemed inapplicable.

In connection with the expulsion to Serbia, the Grand Chamber found that Hungary failed in its procedural duty under Article 3 when expelling the applicants to Serbia without ensuring if they had access to an adequate asylum procedure. The Hungarian authorities did not assess the risks of refoulement or conditions in Serbia, relying on a presumption of Serbia as a "safe third country". The Grand Chamber found that the expulsion violated Article 3, as it did not consider the risk of denial of asylum or ill-treatment upon return.

The Grand Chamber noted the conditions in the transit zone did not reach the threshold for inhuman treatment under Article 3, as the applicants had access to adequate food, hygiene, medical care, and human contact during their 23-day long stay; therefore, no violation could be established regarding the condition of the transit zone. Furthermore, it concluded that the applicants' complaint concerning the lack of an effective remedy in this context had been submitted out of time.

The Grand Chamber's judgment in *Ilias and Ahmed v. Hungary* reflects a nuanced outcome for human rights protection. The Court reaffirmed the procedural obligations under Article 3, underscoring the importance of a thorough, individualised assessment of the risk of ill-treatment prior to expulsion.

According to the interpretation of the Court, the High Contracting Parties are required not only to determine whether expulsion or return would directly expose an individual to torture, inhuman or degrading treatment, or punishment prohibited by Article 3 of the Convention, but also to evaluate whether there is a genuine risk that owing to the absence of adequate asylum procedures, the individual might be returned to a country where such

⁵⁵ *Case of Ilias and Ahmed v. Hungary*, App. No. 47287/15, 21 November 2019.

treatment could occur or from which further removal to another State with similar risks is possible (i.e. *chain refoulement*).⁵⁶

In the case *Ilias and Ahmed*, the Court accepted Hungary's reliance on a general list of safe third countries to justify the applicants' expulsion. This approach differs from the general requirement of individualised and detailed risk assessments in removal decisions, indicating that presumptive designations may be considered sufficient in certain procedural contexts.

The Court addressed the applicants' requests for urgent protection through interim measures with reference to the specific circumstances, offering limited engagement with the broader implications of potential harm during the proceedings. Similarly, the judgment did not examine in detail the overall functioning of the transit zone system or its effects on asylum seekers in practice.

Overall, while the judgment strengthened certain procedural safeguards, some protection gaps remained unaddressed, potentially limiting its broader impact on state asylum practices.

7.5. *Karsai v. Hungary* 32312/23 – Right to Respect for Private and Family Life

The applicant was diagnosed with amyotrophic lateral sclerosis (ALS). He complained that the prohibition and strict criminal sanctioning of physician-assisted dying (PAD) in Hungary infringed his rights under Articles 8 and 14 of the ECHR, which guarantees the right to respect for private and family life and prohibits discrimination, respectively. While acknowledging that Hungarian law permits terminally ill patients to refuse life-sustaining treatment, he argued that the criminalisation of any form of assistance in ending one's life, including acts taken abroad where assisted dying is lawful, constitutes a disproportionate restriction on his personal autonomy.

The Court found that given the wide margin of appreciation of the state, the fact that physician-assisted dying is not permitted in Hungary, and the assistance in suicide is criminalised with extraterritorial effect, does not violate the applicant's right to self-determination (right to respect for private life) as guaranteed by Article 8. Furthermore, the prohibition of discrimination (Article 14) was not violated particularly when compared with the right to refuse life-sustaining treatments, as the latter is widely recognised in member states and in the Oviedo Convention, which regulates

⁵⁶ Sonnevend and Bodnár, 2021, 58. p. 54.

bioethical issues, whereas the right to physician-assisted dying does not exist in international law.⁵⁷

The judgment aligns with the Court's earlier jurisprudence, reflecting its cautious approach to end-of-life cases: it has upheld restrictions on assisted suicide in *Pretty v UK*, supported protective safeguards such as psychiatric assessments in *Haas v Switzerland*, and allowed withdrawal of life-sustaining treatment against parental wishes in *Gard v UK*, without finding violations of Article 8.⁵⁸ These cases illustrate the Court's cautious approach in interpreting Article 8 in the context of assisted dying, particularly in the absence of European consensus.

Karsai v. Hungary reflects a careful and highly deferential interpretation of state discretion under the Convention. The Court carefully balanced competing interests, reaffirming the wide margin of appreciation afforded to national authorities in ethically sensitive areas where no clear European consensus exists. While consistent with existing case law and reflective of the diversity of moral, cultural, and legal views across Council of Europe member states, the judgment may be viewed by some as offering limited advancement in the protection of personal autonomy in end-of-life contexts. Its real-world effect may be to preserve the legal status quo rather than to challenge or refine state protections concerning self-determined death.

7.6. *Panyik v. Hungary* 12748/06 – *Functioning of Justice*

The applicant argued that the court hearing a case filed against him by his former employer for unpaid fees was not impartial. He claimed that the judge handling his appeal was biased due to their frequent professional collaboration, and noted that this judge had previously recused himself from another case against him for the same reason. He further pointed out that two other judges had also recused themselves from related proceedings, raising broader concerns about the impartiality of the court. On these grounds, the applicant alleged a violation of his right to a fair hearing under Article 6, Paragraph 1 of the Convention.

The Court emphasised the importance of public confidence in the judiciary, which requires impartiality as guaranteed by Article 6. It recalled that impartiality must be assessed both subjectively, considering the personal conviction of the judge, and objectively, by evaluating whether the

⁵⁷ *Case of Dániel Karsai v. Hungary*, App. No. 32312/23, 13 June 2024.

⁵⁸ Harris, O'Boyle, and Warbrick, 2023, p. 531.

circumstances of the case could raise legitimate doubts. While judges are presumed impartial until proven otherwise, establishing subjective bias can be challenging. The Court often focuses on the objective test, which considers facts that might raise doubts about impartiality, including perceptions of bias.

In the present case, the applicant questioned the impartiality of the Regional Court due to a judge's prior declaration of bias in a related case and the withdrawal of two judges from previous proceedings due to personal prejudice. Although the judge had not shown personal bias in this instance, the Court noted that he previously recused himself because of a work relationship with the applicant, which still existed. This ongoing connection raised legitimate doubts about the judge's impartiality, which in turn affected the perceived neutrality of the entire panel. The Court found the applicant's concerns objectively justified and therefore concluded that there had been a violation of Article 6, Paragraph 1.⁵⁹

This judgment emphasises the importance of judicial impartiality for fair trials. While affirming the applicant's right to an impartial tribunal under Article 6, Paragraph 1, it highlights gaps in domestic procedures for addressing judicial bias. The case underscores the need for strong mechanisms to maintain public confidence and prevent conflicts of interest in the judiciary.

As a result of the *Panyik* case, Act CXXX of 2016 on the Code of Civil Procedure introduced the possibility of reopening civil law cases.⁶⁰

8. Conclusion

The evolution of human rights protection in Hungary is deeply intertwined with its engagement in the European human rights framework, particularly through its membership in the Council of Europe. Hungary's domestic legal system has undergone significant adaptation to incorporate the obligations arising from the ECHR, as evidenced in its constitutional framework and core areas of criminal, civil, and procedural law. Moreover, the nation's law-making processes and judicial practices reflect ongoing efforts to harmonise domestic norms with European human rights standards. Landmark decisions by the Court concerning Hungary illustrate both areas of compliance and

⁵⁹ *Case of Panyik v. Hungary*, App. No.12748/06, 12 October 2011.

⁶⁰ *Panyik v. Hungary*. Status of Execution. [Online]. Available at: <https://hudoc.exec.coe.int/eng?i=004-10975> (Accessed: 12 October 2024).

instances where further improvements remain necessary, particularly regarding conditions of detention and law enforcement practices.

In conclusion, while Hungary has established a robust legal and institutional foundation for human rights protection, the dynamic nature of European human rights law and evolving societal challenges require continuous vigilance and commitment. Future developments will be shaped by Hungary's continued dialogue with international human rights bodies, the adaptive capacity of its legislative and judicial institutions, and the collective commitment within society to uphold and promote human dignity and fundamental rights.

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HAJNALKA SZINEK CSÜTÖRTÖKI*

Overview of Human Rights Protection in Slovakia: Impact of the European Convention on Human Rights**

ABSTRACT: The protection of human rights has become a cornerstone of modern society, shaping both national and international legal frameworks. In Europe, the European Convention on Human Rights (ECHR) serves as a crucial instrument for safeguarding fundamental rights and freedoms. Since gaining independence in 1993, Slovakia has undergone significant transformations in its legal and political systems, gradually integrating international human rights standards. This country report aims to provide a contextual introduction to the historical development of human rights in Slovakia and the implementation of the ECHR, while also addressing key law-making processes. Furthermore, it explores human rights protection at the national level and the relationship of Slovakia with the Council of Europe. By analysing key legal developments and landmark cases, this study evaluates Slovakia's achievements and continuing challenges in protecting fundamental rights, providing insights into the future direction of human rights within the broader context of its obligations under the ECHR.

KEYWORDS: Slovakia, human rights, protection of human rights, European Convention on Human Rights, European Court of Human Rights.

1. Introduction

The protection of human rights has become a cornerstone of modern society, shaping both national and international legal frameworks. In Europe, the European Convention on Human Rights (hereinafter referred to as the ECHR or Convention) represents one of the most significant instruments for safeguarding fundamental rights and freedoms; its influence

* dr. jur., JUDr., LL.M., PhD Candidate, Ferenc Deák Doctoral School of Law, Faculty of Law, University of Miskolc; Senior Researcher, Central European Academy, Budapest, Hungary.
<https://orcid.org/0000-0002-1535-6750>,
[hajnkla.szinek.csutortoki@centraleuropeanacademy.hu](mailto:hajnalka.szinek.csutortoki@centraleuropeanacademy.hu).

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has extended across all member states of the Council of Europe (hereinafter referred to as the CoE), including Slovakia.

Since gaining independence in 1993,¹ Slovakia has undergone a remarkable transformation, transitioning from a totalitarian regime to a democratic state and aligning its legal and political structures with international human rights standards while managing the complexities of its post-communist legacy.²

Upon its accession to the CoE,³ Slovakia became part of a broader European human rights framework that significantly influenced its domestic legal and political structures. It should be highlighted that the ratification of the ECHR by Slovakia,⁴ just before its formal membership in the CoE, marked a significant milestone in the nation's legal history. This ratification not only signalled Slovakia's commitment to uphold civil, political, and social rights but also initiated a shift in the national discourse on human rights. The obligations imposed by the ECHR have necessitated extensive reforms within Slovakia's legal system, prompting legislative changes, constitutional amendments, and a re-evaluation of judicial practices to ensure compliance with the provisions of the Convention. The journey to successfully implementing these rights has been complex and multi-dimensional. The relationship between national legislation and international human rights standards has posed considerable challenges, especially concerning legislative consistency, institutional capacity, and public awareness of human rights issues. Additionally, the European Court of Human Rights (hereinafter referred to as the ECtHR or Court) has been instrumental in influencing Slovakia's human rights landscape through its judgments, highlighting various deficiencies and opportunities for enhancement within the national legal framework.

This country report explores the evolution of human rights protection in Slovakia, particularly focusing on the impact of the ECHR. It begins by offering a contextual introduction to the historical development of human

¹ That is, following the peaceful dissolution of Czechoslovakia.

² Slovakia, as part of Czechoslovakia, was under communist rule until the Velvet Revolution of 1989. After the peaceful dissolution of Czechoslovakia in 1993, Slovakia emerged as an independent democratic state.

³ Slovakia became the 31st member of the CoE on 30 June 1993.

⁴ Slovakia, as part of Czechoslovakia, ratified the ECHR on 19 May 1992. After gaining independence, Slovakia reaffirmed its commitment by ratifying the ECHR again on 28 May 1993. This reaffirmation occurred just before Slovakia officially joined the CoE on 30 June 1993.

rights in Slovakia. Next, the study delves into the process of implementing the ECHR and describes the key law-making processes involved. Special attention is given to the national implementation of the ECHR, highlighting key legislative reforms and institutional changes designed to align with the provisions of the Convention. Furthermore, the Constitution of the Slovak Republic⁵ (hereinafter referred to as the Slovak Constitution)⁶ and other major legal acts concerning human rights are mentioned, illustrating how these domestic legal acts have been shaped by both the ECHR and Slovakia's broader international commitments. The study also describes Slovakia's relationship with the CoE and discusses several landmark cases that have played a critical role in the development of human rights law in Slovakia, particularly through judgments delivered by the ECtHR. These cases provide a lens through which to examine the practical application of human rights principles and the ongoing challenges Slovakia faces in meeting its international obligations.

Through this comprehensive analysis, the study assesses the overall impact of the ECHR on Slovakia's human rights landscape, identifying key successes, persistent challenges, and potential future directions for the protection of fundamental rights in the country.

2. Historical Development of Human Rights in Slovakia: A Contextual Introduction

The development of human rights in Slovakia⁷ is closely linked to its complex political and historical journey. From its time as part of the Austro-Hungarian Empire, through the formation of Czechoslovakia after World War I, and later under communist rule, the human rights framework of Slovakia has evolved alongside the nation's shifting political landscape. Following the fall of communism in 1989⁸ and the peaceful dissolution of

⁵ *Ústava Slovenskej republiky*.

⁶ However, also the Czech one.

⁷ Hodás, 2016.

⁸ At this point, the Velvet Revolution should be mentioned, which did not aim to create a new society or type of individual but sought a return to the values that existed before communism. It unfolded during a deep crisis in communism, a period marked by its decline and the growing agony over the loss of freedom, human rights, and human dignity. Unlike revolutions driven by economic hardship or focused on establishing a market economy or privatising property, the Velvet Revolution was centred on a vision of freedom and the restoration of human dignity; Erdősová, 2022, p. 156.

Czechoslovakia in 1993,⁹ Slovakia embarked on a new chapter as an independent state, with human rights and freedoms becoming a central element of its legal and constitutional identity.¹⁰

In the early years of independence, Slovakia's commitment to human rights and freedoms was framed largely by its desire to integrate into the European Union (hereinafter referred to as the EU) and the broader international community. Key to this process was Slovakia's accession to the CoE and its ratification of the ECHR in 1993. It should be highlighted that Slovakia ratified the ECHR on 19 May 1992, while still part of Czechoslovakia. After gaining independence, it renewed its commitment by ratifying the ECHR again on 28 May 1993, shortly before officially joining the CoE on 30 June 1993. These developments marked a turning point in the country's approach to human rights, embedding international standards within its domestic legal framework.

The Slovak Constitution initially incorporated provisions from the Federal Charter of Fundamental Rights and Freedoms,¹¹ inherited from Czechoslovakia, which laid out a foundation for human rights protection.¹² However, the practical application of international treaties, particularly the ECHR, encountered limitations. Initially, the ECHR was not fully recognised as part of Slovakia's constitutional order, applying only in cases where it conflicted with domestic statutes. Moreover, individual constitutional complaints based solely on the ECHR were dismissed, requiring claimants to invoke Slovak constitutional provisions alongside their ECHR-based arguments.¹³ Over time, Slovakia's legal system has evolved, and the ECHR has gained a more prominent role in the judicial process. The Constitutional Court of the Slovak Republic¹⁴ (hereinafter referred to as the Slovak Constitutional Court) has increasingly referenced the ECHR and its rulings in its decisions, improving the effectiveness of human rights protections based on the Convention.

Significant changes occurred with the adoption of the so-called Euro-amendments, which aimed to harmonise Slovakia's legal system with EU standards. These amendments enhanced the status of international human

⁹ For more, see Skaloš, 2012, pp. 483–498.

¹⁰ For more, see Erdősová, 2022, pp. 149–172.

¹¹ Adopted by the former Czechoslovak Federal Assembly in January 1991.

¹² Drgonec, 2007, pp. 1148–1150.

¹³ Bobek and Kosař, 2010, p. 14.

¹⁴ *Ústavný súd Slovenskej republiky*.

rights treaties, such as the ECHR, within the Slovak legal order.¹⁵ The former Article 11 was replaced by Articles 7(5) and 154c, which affirmed that ratified international human rights treaties take precedence over national law when they provide greater protection for constitutional rights.¹⁶ Article 7(5) also emphasised that various international treaties, including human rights treaties and those that do not require domestic legislation for their implementation, have primacy over domestic laws. This creates a situation where the status of international human rights treaties depends on the timing of their ratification, leading to different hierarchical positions within Slovak law.¹⁷

Despite these advancements, the role of the ECHR in Slovakia has been marked by ongoing legal and judicial challenges. The Slovak Constitutional Court has affirmed that the ECHR takes precedence over statutes, though not over the Slovak Constitution itself. However, the “Euro”-amendments also revised Article 127 of the Constitution, enabling individuals to submit constitutional complaints based on violations of rights protected by international treaties ratified by Slovakia, including the ECHR. Consequently, these complaints can now be lodged independently of Slovak constitutional provisions.¹⁸

While the judgments of the ECtHR are not officially considered sources of law in Slovakia, the Slovak courts generally acknowledge that these rulings are binding in the same case. Moreover, Slovak courts occasionally resist revising their previous decisions following ECtHR judgments. The question of whether judges feel bound by ECtHR decisions about other states is more complex; sometimes, courts state that these judgments are binding only for the parties involved and do not engage in detailed discussions regarding their application. In other instances, they may apply ECtHR case law without explicitly addressing its implications.¹⁹

Overall, while there is a readiness among Slovak courts to utilise ECtHR decisions, there is a noticeable hesitance to articulate the extent of their obligation to adhere to these rulings. As for the influence of Strasbourg jurisprudence on national legislation, there has been no significant constitutional amendment or change in judicial practices as a result of

¹⁵ Ibid.

¹⁶ See also Drgonec, 2007, pp. 1148–1150.

¹⁷ Krzyzanowska-Mierzevska, 2008, p. 541.

¹⁸ Procházka, 2002, pp. 215–216.

¹⁹ Bobek and Kosař, 2010, pp. 17–18.

ECtHR case law. Slovakia amended its statutory laws in response to ECtHR rulings against the country, but not in reaction to cases concerning other contracting states to the ECHR.²⁰

3. The ECHR in Action: Implementation and Legislative Framework in Slovakia

The incorporation of the ECHR²¹ in Slovakia's legal framework involves a complex interaction of constitutional amendments, legislative reforms, and judicial practices, all aimed at strengthening the country's human rights protections. Since achieving independence and joining the CoE in 1993, Slovakia has focused on aligning its national laws with the ECHR,²² representing a substantial evolution in its legal system.

Initially, the Slovak Constitution provided for the precedence of international treaties concerning human rights only if they offered broader protections than domestic laws. This condition was modified by Constitutional Act no. 90/2001 Coll.,²³ which established that all international treaties on human rights, including the ECHR, would take precedence over conflicting national legislation. It can be stated that this amendment was crucial in facilitating a more direct application of ECHR provisions in domestic courts, allowing individuals to invoke these rights without necessarily linking them to corresponding constitutional provisions.

Furthermore, the role of the Slovak Constitutional Court has been crucial in interpreting and applying the ECHR within the national legal context. With the constitutional amendments, the Court has increasingly referenced ECHR jurisprudence, which has led to a more nuanced understanding of human rights protections. This judicial engagement is vital, as it not only enhances the enforcement of individual rights but also contributes to the development of legal norms that resonate with international human rights standards.

Legislative reforms have accompanied these constitutional changes, with Slovakia enacting laws designed to strengthen human rights

²⁰ Ibid.

²¹ For more on this topic, see Šikuta and Svák, 2008, pp. 80–87.

²² See A Schabas, 2015.

²³ *Ústavný zákon č. 90/2001 Z. Z., ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.*

protections. For instance, the Antidiscrimination Act²⁴ emerged as a critical instrument in combating discrimination and ensuring equal treatment across various sectors, including employment and education. This Act, along with other legislative measures, underscores Slovakia's commitment to align its domestic laws with the ECHR and other international human rights instruments.²⁵

Moreover, Slovakia's human rights practices are subjected to scrutiny by international bodies, including the ECtHR and United Nations (hereinafter referred to as the UN) treaty mechanisms. The ECtHR has ruled on several cases against Slovakia, often highlighting systemic issues such as police violence and discrimination against marginalised groups. The rulings of the ECtHR necessitate that Slovakia address these deficiencies, prompting legislative and administrative reforms aimed at enhancing accountability and protecting individual rights.

In its engagement with UN mechanisms, Slovakia has been proactive in submitting periodic reports to various treaty bodies, thereby facilitating international oversight of its human rights obligations. This process not only enhances accountability but also allows for an ongoing dialogue between Slovakia and the international community regarding human rights practices. Slovakia's acceptance of optional protocols empowers individuals to file complaints regarding human rights violations, further reinforcing mechanisms for accountability and redress.²⁶

Despite these advancements, challenges remain in the effective implementation of the ECHR. Issues such as discrimination,²⁷ persistent inefficiencies in the judicial system, and limited access to legal remedies for vulnerable groups continue to pose significant hurdles. Civil society organisations play an essential role in advocating for reforms, emphasising the need for ongoing engagement with both the CoE and the UN to address these issues comprehensively.

Looking ahead, the future of human rights implementation in Slovakia hinges on the government's commitment to tackle the systemic challenges highlighted by both domestic and international entities. Continuous reform

²⁴ *Zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov.*

²⁵ Cf. the National Strategy for Human Rights Protection and Promotion in Slovakia. [Online]. Available at: <https://coe.int/t/commissioner/source/NAP/Slovakia-National-Action-Plan-on-Human-Rights.pdf> (Accessed: 14 August 2024).

²⁶ Ibid.

²⁷ Cf. Poláková, 2007, pp. 662–670.

efforts, grounded in the principles of accountability and transparency, will be crucial for ensuring that Slovakia not only meets its ECHR obligations but also fosters a culture of respect for human rights among its institutions and society at large. The ongoing dialogue with the CoE and engagement with UN mechanisms will be vital in shaping Slovakia's human rights landscape, enabling the country to fulfil its role as an active participant in the global human rights community.²⁸

4. Protection of Human Rights at the National Level

Announcement no. 209/1992 Coll.²⁹ by the Federal Ministry of Foreign Affairs of the Czech and Slovak Federal Republic³⁰ (hereinafter referred to as the ČSFR) reported that the ECHR, along with Protocols 3, 5, and 8, was signed in Madrid on 21 May 1991, on behalf of the ČSFR. Slovakia's Ministry of Foreign Affairs later confirmed through Announcement no. 79/1994 Coll. that on 30 June 1993, the CoE Committee of Ministers retroactively acknowledged Slovakia's succession to multilateral treaties, including the ECHR. Recently, an anniversary marking the applicability of the ECHR in Slovakia and its predecessor states was celebrated.³¹

On 2 May 2002, a roundtable held at Masaryk University, Faculty of Law in Brno examined the application of the ECHR within the constitutional frameworks of the Czech Republic and Slovakia, focusing on the role of legal institutions in interpreting the Convention. The foundation for applying the ECHR in Slovakia stems from its Constitution.

According to the Slovak Constitution, the country is a sovereign, democratic, and rule-of-law state that operates independently of any specific ideology or religion.³² Its political framework is based on a classical separation of powers among the legislative, executive, and judicial branches. As outlined in the Constitution, state authority originates from the citizens, who shall exercise it either through elected representatives or

²⁸ See also Mokrá, 2021.

²⁹ Published on 18 March 1992.

³⁰ *Česká a Slovenská federatívna republika*.

³¹ See the text Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) on the CoE Portal. [Online]. Available at: <https://www.coe.int/en/web/Conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=2&codePays=SLK> (Accessed: 20 October 2024).

³² The Slovak Constitution, Article 1(1).

directly.³³ The Constitution also guarantees that individuals are free to act unless prohibited by law, and no one can be compelled to take actions that the law does not mandate.³⁴

The National Council of the Slovak Republic (*Národná rada Slovenskej republiky*) serves as the sole constitutional and legislative body in the country.³⁵ As an elected assembly,³⁶ it represents the sovereignty of both the state and its people and is responsible for discussing and passing legislation related to the Constitution, constitutional laws, and other statutory regulations, while also monitoring their implementation. Furthermore, legislative initiatives can originate from parliamentary committees, individual members, or the government. The legislative process consists of three readings within the parliament.

Following the shift to democracy and the establishment of an independent state in 1993, the legal framework for the protection of human rights and fundamental freedoms became firmly embedded in the Constitution. This integration brought in norms that ensure legality and protect human rights and freedoms.³⁷ Moreover, the constitutional framework of the Slovak Republic, alongside the constitutional act that incorporates the Charter of Fundamental Rights and Freedoms,³⁸ serves as the cornerstone of human rights legislation within Slovakia's legal system. It is derived from key international documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, among others. This framework is supplemented by various international treaties to which Slovakia is a signatory, reflecting its commitment to global human rights standards.³⁹ It should also be

³³ Ibid., Article 2(1).

³⁴ Ibid., Article 2(3).

³⁵ Ibid., Article 72.

³⁶ The parliament comprises 150 members, elected through secret ballot during general, equal, and direct elections for a term of four years.

³⁷ See the situation report on the protection of human rights in the Slovak Republic for the UN Universal Periodic Review, prepared by the Ministry of Foreign and European Affairs of the Slovak Republic, p. 1. [Online]. Available at: https://www.mzv.sk/documents/10182/11690/140228_situacna_sprava_o_ochrane_LP_v_S_R.pdf (Accessed: 19 August 2024).

³⁸ *Ústavný zákon č. 23/1991 Z. z., ktorým sa uvádza Listina základných práv a slobôd ako ústavný zákon Federálneho zhromaždenia Českej a Slovenskej Federatívnej republiky.*

³⁹ See the National Strategy for Human Rights Protection and Promotion in Slovakia, p. 6. [Online]. Available at: <https://coe.int/t/commissioner/source/NAP/Slovakia-National-Action-Plan-on-Human-Rights.pdf> (Accessed: 19 August 2024).

highlighted that the Constitution does not specifically mention the EU Charter or the ECHR, but it refers to the law of the EU, stating that it takes precedence over Slovak law.^{40,41}

The Constitution delineates the general safeguarding of fundamental rights and freedoms, which encompass political, civil, economic, social, and cultural rights. It also includes the right to a healthy environment and cultural heritage, the right to judicial protection, and the rights of national minorities and ethnic groups. Article 12 explicitly guarantees these fundamental rights and freedoms to all individuals, irrespective of their sex, race, colour, language, religion, political beliefs, national or social origin, or any other status.⁴² Discrimination on these grounds is strictly prohibited.⁴³

Article 12(1) of the Constitution establishes the notion of equality in dignity and rights, asserting that these rights are inherent, inalienable, imprescriptible, and irreversible. Additionally, the Constitution includes provisions that protect personal freedoms, freedom of movement, and freedom of expression, among others.

Concerning the research topic, the Antidiscrimination Act⁴⁴ should be highlighted as it plays a critical role in enforcing non-discrimination principles, outlining equal treatment standards and providing legal recourse for those whose rights have been infringed. The act defines various forms of discrimination and allows individuals to seek legal protection through the courts. By transposing EU directives into Slovak law, the

⁴⁰ The Slovak Constitution, Article 7(2). See also Erdősová, 2022, p. 160.

⁴¹ Before the amendments introduced by Constitutional Act no. 90/2001 Coll., Article 11 stated that international human rights treaties ratified by Slovakia took precedence over national laws if they provided broader rights. Since 1 July 2001, Article 7 governs the status of international treaties, granting precedence to human rights treaties without the need for broader rights, except for the ECHR, which retains this requirement under Article 154c for treaties ratified before the amendment. The constitutional amendment also changed how the ECHR is applied in legal proceedings. Previously, the ECHR could only be invoked in constitutional reviews if linked to a corresponding constitutional provision. Individual complaints alleging solely ECHR violations were dismissed, as the Constitutional Court ruled that international human rights treaties were not part of Slovakia's constitutional order. Under the amended Constitution, violations of fundamental rights or freedoms arising from international treaties can now be asserted independently. In practice, the Constitutional Court predominantly shapes ECHR application, aligning its rulings with ECtHR jurisprudence.

⁴² Ibid., Article 12(2).

⁴³ Ibid.

⁴⁴ *Zákon č. 365/2004 Z. z., Antidiskriminačný zákon.*

Antidiscrimination Act reinforces the commitment to prohibit discrimination based on identity characteristics. Article 12(2) of the Constitution and Section 2(1) of the Antidiscrimination Act outline specific characteristics that cannot serve as grounds for discrimination. Despite these legal protections, formal equality is often deemed insufficient for achieving substantive equality. The Constitution's emphasis on equality and the prohibition of harm indicates a broader understanding of equality that transcends mere formalities.⁴⁵

In addition, many other specific laws guarantee and further regulate the exercise of certain human rights or the rights of specific groups of the population. For example, the rights of the children are guaranteed and regulated by the Family Act,⁴⁶ the Education Act,⁴⁷ and the Children's Commissioner Act.⁴⁸ There are other laws that are not directly human rights instruments but regulate and protect various aspects of human rights. For example, the Code of Criminal Procedure contains certain provisions that guarantee human rights in criminal proceedings. The Press Law and Broadcasting and Retransmission Law regulate certain aspects of freedom of expression and the right to information.⁴⁹

In 2013, the Slovak government initiated a legislative intent to revamp civil procedure rules, aiming to enhance the efficiency of the judicial system and reduce delays in legal proceedings. This initiative underscores the government's recognition of existing weaknesses within the legal framework and its commitment to improving public trust in the judiciary.

In cases of human rights violations, individuals can seek redress from independent and impartial courts in Slovakia, including the Constitutional Court. The Constitutional Court plays a significant role in safeguarding equality, particularly through proceedings on constitutional complaints under Article 127 of the Slovak Constitution and in reviewing the compatibility of legal provisions under Article 125.

⁴⁵ See the National Strategy for Human Rights Protection and Promotion in Slovakia, p. 6. [Online]. Available at: <https://coe.int/t/commissioner/source/NAP/Slovakia-National-Action-Plan-on-Human-Rights.pdf> (Accessed: 14 October 2024).

⁴⁶ Act no. 36/2005 Coll. (*Zákon č. 36/2005 Z. z. o rodine*).

⁴⁷ Act no. 245/2008 Coll. (*Zákon č. 245/2008 Z. z. o výchove a vzdelávaní*).

⁴⁸ Act no. 176/2015 Coll. (*Zákon č. 176/2015 Z. z. o komisárovi pre deti*).

⁴⁹ See the National Strategy for Human Rights Protection and Promotion in Slovakia, p. 6. [Online]. Available at: <https://coe.int/t/commissioner/source/NAP/Slovakia-National-Action-Plan-on-Human-Rights.pdf> (Accessed: 14 October 2024).

In addition to the above-mentioned frameworks, Slovakia's legal framework incorporates non-discrimination principles into various laws. Following the adoption of the Antidiscrimination Act, which broadly governs anti-discrimination standards, numerous sector-specific laws were amended to align with these principles. Consequently, the prohibition of discrimination is now embedded in several pieces of legislation, including the Act on Health Insurance,⁵⁰ Education Act,⁵¹ Labor Code,⁵² and Social Services Act,⁵³ among others.⁵⁴

In 2011, the Slovak Government Council for Human Rights, National Minorities, and Gender Equality (hereinafter referred to as the Council) initiated a plan to develop a comprehensive strategy for the protection and promotion of human rights in Slovakia.⁵⁵ This move was a key step in advancing the country's human rights agenda. Later that year,⁵⁶ the Slovak government formally approved the Plan to Prepare a National Strategy for Protecting and Promoting Human Rights in Slovakia,⁵⁷ assigning the deputy prime minister for human rights and national minorities to present the strategy by 2012. As the process progressed, the government extended the deadline to ensure thorough preparation. To manage strategy development, a working group called the Coordination Group was established,⁵⁸ along with a steering committee. An expert drafting team was also formed to compile the text of the strategy, based on input gathered during public consultations in key cities across the country. Further steps included a recommendation to extend the deadline again to mid-2014. The Council encouraged collaboration among public authorities, non-governmental organisations, human rights experts, and public officials to ensure a participatory approach in shaping the strategy. By 2014, the drafting team⁵⁹ was finalising the strategy, drawing on insights from expert meetings and consultations. Two

⁵⁰ Act no. 580/2004 Coll. (*Zákon č. 580/2004 Z. z. o zdravotnom poistení a o zmene a doplnení zákona č. 95/2002 Z. z. o poisťovníctve a o zmene a doplnení niektorých zákonov*).

⁵¹ Act no. 245/2008 Coll. (*Zákon č. 245/2008 Z. z., školský zákon*).

⁵² Act no. 311/2001 Coll. (*Zákon č. 311/2001 Z. z., Zákonník práce*).

⁵³ Act no. 448/2008 Coll. (*Zákon č. 448/2008 Z. z. o sociálnych službách a o zmene a doplnení zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov*).

⁵⁴ Ibid., p. 7.

⁵⁵ Adopted on 27 June 2011.

⁵⁶ 16 November 2011.

⁵⁷ Government resolution no. 717.

⁵⁸ Resolution no. 67 of 15 April 2013.

⁵⁹ Resolution no. 101 of 9 April 2014.

major discussions were held to address key aspects of human rights protection, led by the Council's chair and the deputy prime minister. Throughout this process, both the Coordination Group and the steering committee played essential roles in shaping a comprehensive and inclusive human rights strategy for Slovakia.⁶⁰

This extensive preparation yielded valuable outcomes, highlighting the importance of inclusive collaboration between government institutions, civil society, and various stakeholders in shaping Slovakia's human rights policy. The unprecedented level of public and expert engagement not only reinforced democratic principles but also ensured the strategy reflected a broad spectrum of perspectives and expertise. This process has yielded several key insights, particularly the importance of meaningful cooperation between the government, civil society, and the general public. The high level of participation in the creation of this critical human rights document was unprecedented, underscoring the effectiveness of democratic principles in public administration.⁶¹

5. Looking Beyond the National Level – Slovakia and the CoE

The relationship of Slovakia with the CoE is deeply rooted in its commitment to uphold human rights and fundamental freedoms, as delineated in various international agreements, notably the ECHR. Since it acceded to the CoE in 1993, Slovakia has actively participated in promoting and safeguarding human rights within its jurisdiction, subjecting itself to oversight and evaluation by various CoE bodies. This engagement underscores Slovakia's dedication to aligning its national policies with the regional human rights framework established by the CoE.

The Slovak Republic, as a member of both the CoE and the UN, bears significant human rights responsibilities at both regional and global levels. Within the framework of the CoE, Slovakia has ratified the ECHR, thereby accepting the jurisdiction of the ECtHR. This relationship imposes on Slovakia a duty to uphold the rights enshrined in the Convention and comply with the decisions made by the Court. While Slovakia has also ratified the Revised European Social Charter, it has opted not to grant the

⁶⁰ See the National Strategy for Human Rights Protection and Promotion in Slovakia, p. 2. [Online]. Available at: <https://coe.int/t/commissioner/source/NAP/Slovakia-National-Action-Plan-on-Human-Rights.pdf> (Accessed: 16 October 2024).

⁶¹ Kollár, 2014.

European Committee of Social Rights the authority to adjudicate collective complaints against it. This situation highlights a potential gap in accountability for human rights standards within the nation.⁶²

The oversight of human rights practices in Slovakia is further facilitated by the CoE Commissioner for Human Rights. This official engages in-country assessments to identify deficiencies in the protection of human rights, conducts visits, fosters dialogue with state authorities, and produces thematic reports that provide recommendations for improvement. Notably, individuals and groups have brought various complaints of human rights violations against Slovakia to the ECtHR. One significant case involved a Roma man who was fatally shot during police interrogation regarding an alleged bicycle theft.⁶³ The Court ruled that Slovakia had violated the right to life and failed to conduct a thorough investigation into the incident, underscoring the state's obligation to protect individuals from harm and ensure accountability for law enforcement actions.

As part of its commitment to the Revised European Social Charter, Slovakia is required to submit annual reports to the European Committee of Social Rights, outlining its efforts to implement the provisions contained within the Charter. This obligation reflects Slovakia's engagement with regional human rights standards and its responsibility to demonstrate progress in safeguarding the rights of its citizens.⁶⁴

In addition to its commitments under regional frameworks, Slovakia is an active participant in various international human rights treaties as a UN member state. Its adherence to these treaties places it under the scrutiny of multiple UN human rights mechanisms, including the Human Rights Council, which conducts the Universal Periodic Review and oversees thematic special procedures. Slovakia's policies and practices are assessed by UN treaty bodies, having accepted the complaints procedure established by eight of these entities, which allows for individual complaints regarding alleged human rights violations.⁶⁵

⁶² See the website of the International Justice Resource Center. – Slovakia Factsheet. [Online]. Available at: <https://ijrcenter.org/country-factsheets/country-factsheets-europe/slovakia-factsheet/> (Accessed: 3 September 2024).

⁶³ See *Case of Mižigárová v. Slovakia*, App. no. 74832/01, Judgment of 14 March 2011.

⁶⁴ See the website of the International Justice Resource Center. – Slovakia Factsheet. [Online]. Available at: <https://ijrcenter.org/country-factsheets/country-factsheets-europe/slovakia-factsheet/> (Accessed: 3 September 2024).

⁶⁵ Ibid.

Following are among the key international treaties ratified by Slovakia:⁶⁶ the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), among others. Notably, Slovakia has entered a reservation that modifies its obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, Slovakia has also ratified the Second Optional Protocol to the ICCPR, aimed at abolishing the death penalty, along with several optional protocols to the Convention on the Rights of the Child (CRC), addressing issues such as the involvement of children in armed conflict and prohibition of child trafficking and exploitation.⁶⁷

Slovakia is also obliged to submit regular state reports to the corresponding UN treaty bodies, detailing the measures it has undertaken to implement the provisions of these treaties. This process not only serves to enhance accountability but also facilitates international scrutiny of Slovakia's human rights record. Additionally, Slovakia has accepted optional protocols that empower individuals to file complaints against the state concerning violations of their rights under various human rights treaties, including the ICCPR, ICESCR, CAT, CEDAW, CRPD, CRC, and International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Some UN treaties include inquiry procedures that enable treaty bodies to investigate allegations of severe or systemic human rights violations, and Slovakia has endorsed these mechanisms under the CAT, CEDAW, CRPD, and CRC.⁶⁸

In a notable move towards transparency and cooperation with international human rights mechanisms, Slovakia issued a standing invitation to UN special procedures in March 2001. This invitation allows UN mandate holders to conduct visits to Slovakia, fostering direct engagement with local human rights issues. For instance, the Special Rapporteur on the independence of judges and lawyers visited Slovakia in

⁶⁶ See the website of the Ministry of Foreign and European Affairs of the Slovak Republic. [Online]. Available at: <https://mzv.sk/web/en/diplomacy/human-rights/important-documents-and-human-rights-institutions> (Accessed: 3 September 2024).

⁶⁷ See the website of the International Justice Resource Center. – Slovakia Factsheet. [Online]. Available at: <https://ijrcenter.org/country-factsheets/country-factsheets-europe/slovakia-factsheet/> (Accessed: 3 September 2024).

⁶⁸ Ibid.

2000, resulting in a report⁶⁹ that provided critical insights into the state of judicial independence and accountability within the country.⁷⁰

In summary, Slovakia's relationship with the CoE, viewed through the lens of human rights, is characterised by a robust commitment to international standards, active participation in relevant treaties, and persistent challenges in implementation. The CoE remains an essential partner for Slovakia in its ongoing efforts to advance human rights and fundamental freedoms, with the nation's responses to the recommendations of the CoE being pivotal in shaping the future of its human rights landscape. By engaging with both the CoE and the UN, Slovakia has affirmed its role as a proactive member of the international community, dedicated to the protection and promotion of human rights.

6. Landmark Cases and Human Rights Evolution

Slovakia, as a member of the CoE and a signatory to ECHR, has been subject to the jurisdiction of the ECtHR since its establishment as an independent state. Over the years, the country has been involved in numerous cases brought before the ECtHR, many of which have significantly shaped its human rights landscape. It can be stated that these cases reflect Slovakia's evolving democratic and legal institutions⁷¹ as it transitioned from a post-communist state to a member of the EU.

First of all, it should be highlighted that the cases brought against Slovakia in the ECtHR⁷² have addressed diverse human rights issues, including the right to a fair trial, prohibition of torture and inhuman or degrading treatment, prohibition of discrimination, and property rights. Several of the landmark cases involve the treatment of marginalised communities, especially the Roma population, who have historically faced systemic discrimination and exclusion in various domains of Slovak society, such as education, healthcare, and access to justice. Other important cases

⁶⁹ The report is available here:

<https://www.undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2F2001%2F65%2FAdd.3&Language=E&DeviceType=Desktop&LangRequested=False> (Accessed: 15 October 2024).

⁷⁰ See the website of the International Justice Resource Center. – Slovakia Factsheet. [Online]. Available at: <https://ijrcenter.org/country-factsheets/country-factsheets-europe/slovakia-factsheet/> (Accessed: 15 October 2024).

⁷¹ For more information, see Csudai, 2020, pp. 38–53.

⁷² See, for example, Kupcová, 1995, pp. 58–63; Repík, 1993, pp. 6–17.

have dealt with the protection of private and family life,⁷³ the right to a fair trial,⁷⁴ and the right of access to a court.⁷⁵

Through these cases, the ECtHR has played a crucial role in holding Slovakia accountable to its human rights obligations, while also providing individuals with a platform to seek justice when their rights have been violated. The Court's rulings have had far-reaching implications, prompting legislative and policy changes in areas such as education and healthcare and the legal system itself, as well as the treatment of minority groups. These cases are not only important for the individuals involved but have also contributed to the broader development of human rights norms in Slovakia.

According to official sources (last updated July 2024), the Court handled 342 applications concerning Slovakia in 2023. Of these, 323 were deemed inadmissible or were struck out. The Court issued 18 judgments (of 19 applications), with 17 of them identifying at least one violation of the ECHR.⁷⁶

Owing to space limitations in this study, below, I provide an overview of the most important cases related to the subject matter.

6.1. Cases Related to the Right to Life (Article 2)

6.1.1. P.H. v. Slovakia

The case *P.H. v. Slovakia*⁷⁷ is notable as the 11th instance before the Court involving mysterious circumstances surrounding an individual's fall from a police station window. It is the seventh case related to discrimination in such incidents and the fourth specifically addressing alleged discrimination based on the victim's Roma ethnicity. This case also contributes to the six judgments issued against Slovakia regarding police violence targeting Roma individuals.⁷⁸

⁷³ See, for example, cases *Plechlo v. Slovakia*, *Haščák v. Slovakia*, *M.L. v. Slovakia*, *López Guió v. Slovakia*, *Hajduová v. Slovakia*, *Kvasnica v. Slovakia*.

⁷⁴ See, for example, *Erik Adamčo v. Slovakia*, *Vasaráb and Paulus v. Slovakia*, *AI Alo v. Slovakia*.

⁷⁵ See, for example, *Paluda v. Slovakia*, *Lawyer Partners, A.S. v. Slovakia*.

⁷⁶ ECtHR, Press country profile – SLOVAKIA, 2024, p. 1. See also Máčaj, 2023, pp. 23–34.

⁷⁷ App. No. 37574/19.

⁷⁸ Várnagy, 2022.

The applicant, a 16-year-old girl, was apprehended for petty theft in a shopping mall.⁷⁹ During her transport to a police station, she alleged that two officers slapped her and made derogatory comments about her ethnicity.⁸⁰ Her brother witnessed her arrival in tears and heard shouting from the room where she was taken.⁸¹ Shortly after, he saw officers rush down the stairs, claiming she had jumped out of a window.⁸² According to police, she was compliant, and her release had been ordered just before she requested to use the restroom. A male officer escorted her to the bathroom but turned his back while she was inside. The window through which she fell was 7.7 m above the ground and could be opened by tilting. Initially, the officer stated that he saw her fall out from the corner of his eye but later changed his account, stating that he found her on the ground after hearing a noise.⁸³

The applicant survived but was placed in a medically induced coma⁸⁴ and has no memory of the events. Criminal investigations were launched against unidentified officers for failing to prevent her escape, but she was only interviewed a month and a half later.⁸⁵ The prosecutor ultimately determined that criminal prosecution was unnecessary and recommended addressing the failure to prevent her fall as a disciplinary matter.⁸⁶

The applicant's attorney sought clarification on whether the alleged mistreatment and her fall were connected and requested interviews with her mother and brother. However, the investigator rejected these requests, stating they were unwarranted. The proceedings were closed for several reasons, including the prosecutor deeming the alleged mistreatment "improbable" and finding it dubious that the applicant could remember only the mistreatment during transport.⁸⁷

⁷⁹ App. No. 37574/19, para. 5.

⁸⁰ Ibid., para. 9.

⁸¹ Ibid., para. 5.

⁸² Ibid., para. 17.

⁸³ Ibid., paras. 10–17.

⁸⁴ Ibid., paras. 19 and 20.

⁸⁵ Ibid., para. 24.

⁸⁶ See Ibid., paras. 23–34.

⁸⁷ Ibid., paras. 31., 32., 42. and 45. See also the press release on the website of the Ministry of Justice of Slovakia titled *The ECtHR has ruled in the case P. H. v. Slovak Republic*. Available at: <https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-3737/> (Accessed: 15 September 2024).

In her application to the ECtHR,⁸⁸ invoking Articles 2, 3, 6, 13, and 14 of the ECHR, the applicant argued she faced ill-treatment by the police, that the state failed to safeguard her well-being in custody, that the investigation was ineffective, and that these issues were compounded by discrimination due to her ethnicity and mental disability. The Court stressed the need for a comprehensive approach to evaluate her complaints, particularly regarding the connection between the incidents.

Regarding Article 3, the Court found insufficient evidence to substantiate the applicant's claims of ill-treatment during transport. As she had no memory of other details, her assertion that mistreatment continued at the police station could not be corroborated. Consequently, the Court dismissed these claims as insufficiently credible to trigger procedural obligations under Article 3.

Under Article 2, the Court identified procedural failings, noting that investigations into her fall and the alleged ill-treatment were conducted separately, without considering their possible link. It criticised the lack of efforts to resolve inconsistencies in police statements and the failure to explore procedural avenues to grant the applicant victim status. These shortcomings led to a procedural violation of Article 2. The Court found a substantive violation as well, noting that the officer's omission in supervising the applicant breached the state's duty to protect individuals in custody.⁸⁹

The Court briefly dismissed the discrimination claim under Article 14, concluding that as no ill-treatment had been proven, there was no basis for a discriminatory motive.⁹⁰

A key issue in this judgment, as in much of the Court's case law on anti-Roma police violence, is its reliance on a strict standard of proof beyond a reasonable doubt and its reluctance to shift the burden of proof from the applicant to the state. This tendency favours respondent governments, apparent in the Court's rigorous scrutiny of the applicant's evidence compared with that of the state, particularly regarding the claim of being slapped, and its acceptance of the state's assertion that the applicant's fall was "inexplicable".⁹¹

⁸⁸ Cf. Dembour, 2022.

⁸⁹ Várnagy, 2022.

⁹⁰ App. No. 37574/19, part C point 6.

⁹¹ Várnagy, 2022.

6.1.2. Kontrová v. Slovakia

Another significant case is *Kontrová v. Slovakia*⁹² – recognised as one of the first cases in which the ECtHR acknowledged the violation of rights due to a state's failure to protect individuals from domestic violence. This case, akin to *Opuz v. Turkey*,⁹³ established a standard for when governments are required to intervene in private matters.⁹⁴

The applicant, a married mother of two, filed a criminal complaint against her husband for assaulting her with an electric cable, accompanied by a medical report indicating that her injuries would incapacitate her for up to seven days. She also detailed a history of physical and psychological abuse. A few weeks later, while attempting to withdraw her complaint, a police officer informed her that she needed to provide a medical report proving that her incapacity did not exceed six days. After submitting the necessary documentation, the officer decided to handle the case under the Minor Offences Act and chose not to pursue further action, which set the stage for a tragic turn of events.⁹⁵

In late December, the applicant's husband threatened to harm himself and their children while armed with a shotgun. After police responded and found the applicant, her husband fled the scene. The following day, she returned to the police station to discuss the incidents but tragically, on the last day of the year, her husband killed their two children before taking his own life. This devastating incident highlighted the severe consequences of the authorities' inadequate response to the applicant's earlier complaints of domestic violence.⁹⁶

The ECHR found that the police failed to fulfil their obligations, including neglecting to register the applicant's complaint, initiating an immediate investigation, and adequately recording emergency calls and failing to act on allegations regarding her husband's possession of a shotgun. The Court concluded that the tragic shooting was a direct result of police inaction.⁹⁷

⁹² App. No. 7510/04.

⁹³ App. No. 33401/02.

⁹⁴ Abdel-Monem, 2009.

⁹⁵ For more, see the circumstances of the case – App. No. 7510/04, part A paras. 1–4.

⁹⁶ Ibid.

⁹⁷ App. No. 7510/04, part A para. 2

The Supreme Court of Slovakia (*Najvyšší súd Slovenskej republiky*) had previously annulled lower court decisions that dismissed the case, establishing that the officers neglected their responsibilities and confirming a causal relationship between their unlawful conduct and the fatal outcome. Ultimately, the District Court found the responsible officers guilty (three of them) and imposed sentences of imprisonment (of six months for one and four months for two).⁹⁸

The ECHR ruled that the applicant lacked an effective national remedy to claim compensation for non-pecuniary damages resulting from her children's deaths, linked directly to the government's failure to fulfil its positive obligations under Article 2 of the Convention. The government argued that the applicant should have pursued actions for personal integrity protection, citing previous cases. However, the Court dismissed this argument, noting the lack of consistent case law supporting the effectiveness of such a remedy at the time of the events.⁹⁹

In summary, this case illustrates the tragic consequences of domestic violence and the crucial obligation of the state to protect individuals in such situations. The ECHR ruling reinforced the principle that authorities have a positive obligation to intervene when there is a clear and immediate danger to individuals.¹⁰⁰

6.1.3. Other Important Cases

In the case *Dvořáček and Dvořáčková v. Slovakia*,¹⁰¹ in addition to the traditional recognition of a violation of Article 6 of the Convention, the Court also found a violation of Article 2 of the Convention in its procedural aspect. This is formally the same but substantively a different provision compared with the abovementioned judgment in the case *Kontrová v. Slovakia*. The procedural aspect of the relevant article in connection with this case does not impose a positive obligation on the state to prevent an event that could result in the loss of a person's life, but rather the requirement for the state to promptly and adequately investigate the circumstances surrounding the death of the couple's daughter, who suffered from Down syndrome and heart and lung damage, and died at the age of 23

⁹⁸ Ibid.

⁹⁹ App. No. 7510/04.

¹⁰⁰ Abdel-Monem, 2009, p. 30.

¹⁰¹ App. No. 30754/04.

years. The investigation had been ongoing since 1987, and although the Convention has been applicable since 1993, the Court deemed it unreasonably lengthy. The couple had approached the relevant authority – in this case, the district office – in 1987, complaining that inadequate healthcare had harmed their daughter's health. The Court acknowledged the couple's grievances and ruled that there had been a violation of Article 2 of the Convention in its procedural aspect.¹⁰²

In the case *Mižigárová v. Slovakia*,¹⁰³ the applicant claimed a violation of her right to life under Article 2 of the Convention, asserting that her husband's death was a result of a serious injury sustained while in police custody. She argued that the Slovak authorities failed to conduct a comprehensive and factual investigation into the circumstances surrounding his death. Additionally, the applicant alleged a violation of Article 3, contending that her husband experienced ill-treatment while in police custody and that the authorities did not perform an adequate investigation into this mistreatment. Furthermore, she asserted that she lacked an effective remedy for her complaints under Articles 2 and 3, as required by Article 13 of the Convention. The applicant maintained that her rights, as well as those of her deceased husband, were violated under Articles 2, 3, and 13, in conjunction with Article 14, based on ethnic origin.¹⁰⁴

6.2. Cases Related to Inhuman or Degrading Treatment

The case *Labsi v. Slovakia*¹⁰⁵ concerned the expulsion of Yassine Labsi, an Algerian national convicted in France for preparing a terrorist act, who sought asylum in Slovakia. This landmark judgment by the ECtHR had significant implications for the prohibition of torture and inhuman or degrading treatment under Article 3 of the ECHR, as well as violations of Article 13 (right to an effective remedy) and Article 34 (right of individual petition).

Labsi fled to Slovakia after his conviction in France, fearing persecution and ill-treatment if he returned to Algeria. He argued that his status as a terrorist suspect would likely result in torture by Algerian

¹⁰² For more information, see the facts of the case (App. No. 30754/04).

¹⁰³ App. No. 74832/01.

¹⁰⁴ See the press release on the website of the Ministry of Justice of the Slovak Republic. [Online]. Available at: <https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-1319/> (Accessed: 16 September 2024).

¹⁰⁵ App. No. 33809/08.

authorities. However, Slovak authorities denied his asylum application and ordered his expulsion, deporting him to Algeria in 2010 before the ECtHR could adjudicate his claims.¹⁰⁶

The ECtHR found that Slovakia violated Article 3 by exposing Labsi to a real risk of torture and ill-treatment upon his return to Algeria. The Court emphasised that the prohibition against torture is absolute and cannot be overridden by national security concerns or terrorism allegations. The deportation of Labsi represented a clear violation of this fundamental right.¹⁰⁷ Additionally, the Court addressed Slovakia's failure to provide Labsi with an effective remedy under Article 13, noting that the Slovak legal system did not allow him to effectively challenge his deportation given the serious risks he faced in Algeria. The absence of a real remedy highlighted deficiencies in Slovakia's legal framework for individuals facing expulsion to countries with substantial risks of torture or persecution.¹⁰⁸

A further violation of Article 34 occurred when Slovakia proceeded with Labsi's expulsion while his case was still pending before the ECtHR, undermining his right to individual petition. By deporting Labsi, Slovakia interfered with the Court's ability to protect him from potential harm, rendering any subsequent judgment ineffective in preventing his ill-treatment.¹⁰⁹

The present case affirms crucial principles of human rights law. It solidified the absolute nature of Article 3 protections, clarifying that states cannot justify violations based on terrorism or public safety concerns. In my view, the ruling underscored the necessity for effective legal remedies for individuals facing serious rights violations, particularly asylum seekers. Moreover, it emphasised the importance of respecting the right of individual petition, reminding states not to interfere with access to the ECtHR.

Moreover, this case has significant legal and political ramifications, highlighting Slovakia's need to align its asylum system with international human rights standards, especially concerning deportations to countries where individuals face torture. The judgment serves as a critical reminder to

¹⁰⁶ See the details of the case.

¹⁰⁷ See the press release on the website of the Ministry of Justice of the Slovak Republic. [Online]. Available at: <https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-1592/> (Accessed: 16 September 2024).

¹⁰⁸ Ibid.

¹⁰⁹ App. No. 33809/08, point IV.

all member states of the CoE about their obligations under the Convention, reinforcing that human rights must be upheld even under challenging circumstances.

It can be stated that the case presented is a key case in ECtHR jurisprudence, particularly regarding the absolute prohibition of torture under Article 3 and the right to an effective remedy under Article 13. It reaffirms that states cannot compromise human rights protections for national security reasons and highlights the need for effective legal safeguards for individuals facing deportation.

6.3. Cases Related to the Right to Liberty and Security

The case *Shiksaitov v. Slovakia*¹¹⁰ focuses on the arrest and detention of Mr. Shamil Shiksaitov, a Chechen national facing extradition proceedings in Slovakia, despite holding refugee status in Sweden. This case raises significant issues related to international human rights law, particularly the protection of refugees, the legality of detention, and the extradition process. He was granted refugee status in Sweden, which recognised his need for protection from persecution if he returned to Russia. Nevertheless, Slovakia arrested him with the intent to extradite him to Russia, where he faced potential threats to his life and security. The circumstances surrounding his arrest and subsequent detention prompted legal proceedings before the ECtHR.¹¹¹

At the heart of the case is Slovakia's decision to act on an extradition request from Russia despite Shiksaitov's refugee status under Swedish law. This action raised questions about Slovakia's adherence to international legal obligations, particularly the non-refoulement principle, which prohibits returning refugees to countries where they could face persecution. This principle is fundamental to international refugee law, ensuring that individuals such as Shiksaitov are not forcibly returned to places where their basic rights, including the right to life and freedom from torture, may be compromised.¹¹²

Shiksaitov's detention was scrutinised under Article 5, para. 1 of the ECHR, which safeguards the right to liberty and security. This provision allows detention only under strict legal frameworks, ensuring lawful and proper procedures are followed. The Court determined that Slovakia had

¹¹⁰ App. Nos. 56751/16 and 33762/17.

¹¹¹ See the details of the case.

¹¹² Cf. App. Nos. 56751/16 and 33762/17, part II. para 27.

unlawfully detained Shiksaitov in the extradition context, violating his right to liberty. The detention lacked sufficient legal justification, especially given his refugee status, which should have been a crucial factor before any arrest.

Additionally, the Court addressed Article 5, para. 5, which guarantees the right to compensation for unlawful detention. The judgment confirmed Slovakia's failure to provide Shiksaitov with an enforceable right to seek compensation for his unlawful detention, revealing significant flaws in Slovakia's handling of the extradition process and highlighting broader compliance issues with international legal standards.¹¹³

In my view, this case is particularly significant as it reflects the tensions between state security concerns and obligations under international human rights law, especially regarding individuals labelled as threats by their home countries. Shiksaitov faced accusations of involvement in criminal activities tied to his Chechen origin, but his refugee status indicated that these claims may have stemmed from political persecution. Slovakia's decision to detain and potentially extradite him, without fully considering this context, questioned its commitment to the protections afforded under the Convention.

The ECtHR ruled that Slovakia violated both paras. 1 and 5 of Article 5, underscoring the state's duty to comply with human rights standards when dealing with individuals under international protection. I think that the case serves as a reminder that the legal status of refugees and asylum seekers must be respected, particularly concerning extradition and international criminal allegations.

The judgment presented reinforces the necessity for states to thoroughly consider the legal and human rights status of individuals facing extradition. It emphasises the absolute protection granted by refugee status, requiring states to adhere to international human rights obligations rather than succumbing to external political or security pressures that could jeopardise the individual's life or well-being. Ultimately, the case highlights the importance of safeguarding fundamental rights, even amid complex geopolitical challenges.

¹¹³ App. Nos. 56751/16 and 33762/17, part III.

6.4. Cases Related to Freedom of Expression

The case *Ringier Axel Springer Slovakia, a.s. v. Slovakia (no. 4)*¹¹⁴ focused on freedom of expression under Article 10 of the ECHR. It arose from a television program where a well-known Slovak singer allegedly supported marijuana legalisation. The journalist hosting the show did not oppose this view, prompting Slovak regulatory authorities to fine the broadcaster, claiming the program implicitly endorsed drug legalisation contrary to national law and social policies. The fine was justified by the assertion that media should promote responsible social messages, and the broadcast was seen as a violation of this responsibility. In response, Ringier Axel Springer Slovakia argued that the fine violated its freedom of expression, asserting that the role of journalism is to inform and stimulate debate on public interest issues without adopting a specific stance. The ECtHR reviewed the case, affirming that freedom of expression includes not only favourable information but also ideas that may offend or disturb. The Court ruled that the fine constituted disproportionate interference with the broadcaster's rights, concluding that the journalist's comments were not harmful enough to warrant such a severe penalty. The mere airing of a controversial opinion, particularly in a public debate, does not equate to promoting illegal behaviour. The Court emphasised that the regulatory authority's actions were overly restrictive and lacked justification for imposing financial penalties instead of less intrusive measures. Consequently, the ECtHR found a violation of Article 10, highlighting the importance of protecting media freedom in discussions of public concern. This ruling reinforced the role of journalists in fostering debate on controversial topics while balancing state interests with the fundamental right to freedom of expression.¹¹⁵

The cases *Ringier Axel Springer Slovakia, A.S. v. Slovakia (no. 2)*¹¹⁶ and *Ringier Axel Springer Slovakia, A.S. v. Slovakia (no. 3)*¹¹⁷ addressed critical issues regarding media liability and freedom of expression under Article 10 of the ECHR. Both cases involved the Slovak media company, which faced legal repercussions for articles published in its widely circulated newspaper, *Nový Čas*.

In the first case, the company was liable for publishing an article that revealed the identities of a car accident victim and his father without

¹¹⁴ App. No. 26826/16.

¹¹⁵ Gönczi, 2024.

¹¹⁶ App. No. 21666/09.

¹¹⁷ App. No. 37986/09.

consent, violating their right to privacy. Slovak courts imposed sanctions for this intrusion. The company challenged these sanctions, arguing they infringed upon its freedom of expression. In the second case, the company was found liable for alleging that a contestant on *Who Wants to Be a Millionaire?* had cheated, leading to a defamation ruling due to insufficient factual basis. The ECtHR determined that the Slovak courts failed to balance competing rights adequately and found the penalties against Ringier Axel Springer Slovakia excessive, identifying violations of Article 10 of the ECHR.¹¹⁸

These judgments underscored the need for domestic courts to evaluate the role of journalism in democratic societies and the appropriate limits on press freedom, affirming the protection afforded to the media in public debates on topics of legitimate interest.

6.5. Other Relevant Cases and Decisions

This section of the country report focuses on a few significant cases adjudicated by the ECtHR that address various violations of rights protected under the ECHR.

In *Lakatošová and Lakatoš v. Slovakia*,¹¹⁹ the Court dealt with a grave incident that occurred in 2012 involving a shooting spree by an off-duty police officer targeting a Roma family. The two applicants, who were a married couple, suffered serious injuries during this tragic event, which also resulted in the deaths of three family members. The Court found a violation of Article 14 in conjunction with Article 2, highlighting the systemic failure of Slovak authorities to protect the applicants from racially motivated violence. This case underscores the importance of state obligations in safeguarding vulnerable communities against discrimination and hate crimes.¹²⁰

Another pivotal case is *Urbárska obec Trenčianske Biskupice and Ján Krátky v. Slovakia*.¹²¹ In this case, the Court examined the compulsory leasing of land owned by the applicant association and its subsequent

¹¹⁸ See the details of the cases mentioned.

¹¹⁹ App. No. 655/16.

¹²⁰ See the press release issued by the Registrar of the Court ECHR 429 (2018) titled *Slovakian authorities failed to investigate possible racist motive in shooting by off-duty police officer at Roma family's home*. [Online]. Available at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-6276502-8178452%22%5D%7D> (Accessed: 10 October 2024).

¹²¹ App. No. 74258/01.

transfer to tenants, raising significant concerns regarding property rights. The Court ultimately concluded that the state's actions constituted a violation of Article 1 of Protocol No. 1, which protects the right to property. This ruling emphasised the need for states to respect and protect individuals' property rights against arbitrary state actions.¹²²

The Court also addressed issues related to the collective expulsion of aliens in *Asady and Others v. Slovakia*.¹²³ This case revolved around the expulsion of the applicants to Ukraine by Slovak police. The Court found no violation of Article 4 of Protocol No. 4, indicating that the procedures employed by the authorities complied with the Convention's stipulations concerning the collective expulsion of aliens. This decision illustrates the balance that the Court seeks to maintain between state sovereignty and the protection of individuals' rights under international law.

In a series of cases involving the sterilisation of Roma women without informed consent, the Court issued several judgments that highlighted grave violations of human rights. In *I.G., M.K. and R.H. v. Slovakia*,¹²⁴ the Court identified violations of Article 3 concerning treatment and investigation for the first two applicants, who claimed they were sterilised without their consent. Additionally, the Court found violations of Article 8, which protects the right to respect for private and family life. However, the Court found no violation of Article 13 regarding the right to an effective remedy for the same applicants. As for the third applicant, the Court decided to strike her case from the list, indicating that the claims did not warrant further examination.

In the case *N.B. v. Slovakia*,¹²⁵ the Court established a violation of Article 3 concerning the treatment of the applicant while finding no violation related to the investigation. Furthermore, the Court recognised a violation of Article 8 concerning respect for private and family life. Similarly, *V. C. v. Slovakia*¹²⁶ revealed violations of Article 3 concerning inhuman or degrading treatment and Article 8 regarding the right to private

¹²² See also Máčaj, 2019, p. 84.

¹²³ See the press release issued by the Registrar of the Court ECHR 099 (2020) titled Slovakian police did not subject Afghani nationals to collective expulsion when they returned them to Ukraine. [Online]. Available at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-6669602-8870570%22%5D%7D> (Accessed: 10 October 2024).

¹²⁴ App. No. 15966/04.

¹²⁵ App. No. 29518/10.

¹²⁶ App. No. 18968/07.

and family life. These cases reflect the Court's commitment to upholding the dignity and autonomy of individuals, particularly marginalised groups such as the Roma community.¹²⁷

Another notable judgment, *K.H. and Others v. Slovakia*,¹²⁸ addressed violations of Article 6, para. 1 related to access to a court and Article 8 regarding respect for private and family life. In this instance, the Court found no violation of Article 13 concerning the right to an effective remedy in conjunction with Article 8. This decision further illustrates the complex interplay between various rights under the Convention and the obligations of states to uphold them.

In terms of noteworthy decisions delivered, the Court rejected a *request for an advisory opinion under Protocol No. 16 to the Convention* on 19 November 2020. The request,¹²⁹ submitted by the Supreme Court of Slovakia, was deemed inadmissible because it did not pertain to an issue requiring guidance from the Court to ensure compliance with Convention rights in a pending case.¹³⁰

Additionally, the case *Ali Nurdinovich Ibragimov v. Slovakia* and *Anzor Chentiev v. Slovakia*¹³¹ addressed extradition orders concerning two Russian nationals of Chechen origin. The Court found the complaints regarding Articles 2, 3, and 6, para. 1 to be manifestly ill-founded and declared them inadmissible, emphasising the rigorous standards required for claims under the Convention.

Furthermore, the case *Cviková v. Slovakia*¹³² was communicated to the Government of the Slovak Republic (*Vláda Slovenskej republiky*) on 2 November 2021. This case highlights the continuing scrutiny of Slovakia's adherence to its obligations under the Convention and the importance of accountability in safeguarding human rights.¹³³ The ECHR in Strasbourg

¹²⁷ See also Curran, 2016, p. 148.

¹²⁸ App. No. 32881/04.

¹²⁹ No. P16-2020-001.

¹³⁰ See the press release issued by the Registrar of the Court ECHR 072 (2021) titled A request by the Supreme Court of the Slovakia for an advisory opinion under Protocol No. 16 has not been accepted. [Online]. Available at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-6951760-9351452%22%5D%7D> (Accessed: 10 October 2024).

¹³¹ App. No. 65916/10.

¹³² App. Nos. 615/21, 9427/21 and 36765/21.

¹³³ ECtHR, Press country profile, Slovakia, p. 5.

ruled¹³⁴ on 13 June 2024 in favour of Slovak judge Denisa Cviková, determining that her rights to personal freedom had been violated due to the prolonged duration of her police custody.¹³⁵ In March 2020, the Specialized Criminal Court (*Špecializovaný trestný súd*) ordered the detention of Judge Cviková and several other judges from Bratislava, who faced charges of corruption, obstructing justice, and interfering with judicial independence. Although the court released Cviková from custody in August of the same year, this decision was reversed by the Supreme Court in October. Cviková's appeal to the Constitutional Court was also rejected. Subsequently, she sought relief from the ECHR, arguing that her detention was arbitrary and violated her rights. She also filed for damages. The Justice Ministry indicated that while the ECHR found the initial decision to detain her to be relevant and justified – without signs of arbitrariness – this changed once the Supreme Court denied her appeal. As the corruption charges were brought against her during Operation Storm in 2020, Cviková's position as a judge has been suspended.¹³⁶

In summary, these significant cases demonstrate the critical role that the ECtHR plays in addressing and rectifying violations of fundamental rights in Slovakia. Through its judgments, the Court has reinforced the principle that states must uphold their obligations under the Convention, ensuring that all individuals are afforded the protection of their rights, regardless of their background or circumstances.

7. Conclusions

The evolution of human rights in Slovakia is deeply intertwined with the country's complex political and historical path. From its period within the Austro-Hungarian Empire, through the creation of Czechoslovakia after World War I, and later under communist rule, Slovakia's human rights framework developed in parallel with its changing political landscape. After the fall of communism in 1989 and the peaceful dissolution of Czechoslovakia in 1993, Slovakia entered a new era as an independent state,

¹³⁴ The ECtHR found her initial detention lawful and only ruled against the extended detention after August 2020.

¹³⁵ Kmet', 2024.

¹³⁶ See the press release of the News Agency of the Slovak Republic (*Tlačová agentúra Slovenskej republiky*) titled Strasbourg Court Found Judge Cviková's Rules Violated, Awards Compensation. [Online]. Available at: <https://etasr.sk/article/20803378> (Accessed: 14 October 2024).

with human rights and freedoms becoming central to its legal and constitutional identity.

Slovakia's integration of the ECHR into its legal system follows a dualistic model, where international treaties, once ratified and published, become an integral part of the national legal framework. The Slovak Constitution grants these international human rights treaties a form of superlegislative authority, meaning that they take precedence over ordinary domestic laws but remain subordinate to constitutional norms.

Slovakia has been a party to the ECHR since 1993, along with its additional protocols, and the ECHR plays a significant role in shaping Slovakia's human rights framework. The ECtHR has adjudicated numerous cases against Slovakia, dealing with violations under various articles of the ECHR. Common issues in these cases include the right to liberty, security, and private life, and the right to a fair trial. Notable cases include decisions on unlawful detention, unfair trial procedures, and violations of private and family life, among others.

One notable challenge for Slovakia is its high number of cases being heard at the ECtHR, which has sometimes led to reforms in procedural and legal standards, particularly regarding the right to fair trial and due process and protection against unlawful detention. Despite reforms, systemic issues such as excessive length of judicial proceedings and prison overcrowding continue to bring Slovakia before the ECtHR. Additionally, the country has faced several cases related to racial discrimination, which has drawn international scrutiny.

Domestically, the implementation of ECtHR judgments is overseen by the Slovak judiciary and relevant government ministries. Legislative reforms have been implemented over the years to address the Court's rulings. However, some rulings indicate ongoing challenges in fully aligning national practices with ECHR standards.

Overall, the ECHR remains a critical instrument in ensuring Slovakia's compliance with European human rights standards, but its effective implementation at the national level is an ongoing process, influenced by both legal reforms and societal developments.¹³⁷

¹³⁷ Blaško and Kučera, 2016, pp. 401–424.

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ROBERT TABASZEWSKI*

**The Protection of Human Rights under the ECHR and Central Europe:
Poland** ,*****

ABSTRACT: This article elucidates the process of Poland's integration with the Council of Europe, and its commitment to the fuller implementation of the Council's body of law, particularly the provisions of the European Convention on Human Rights. Notably, the Council of Europe was the first Western organization to open its doors to Poland – the largest country in the region. The article focuses on the conditions underlying Poland's accession to European structures and evaluates its progress in establishing dialogue and partnership with the other members of the organization. Furthermore, it examines whether aligning with European standards has been a linear process or encumbered with difficulties in the formulation and enforcement of legal norms. Additionally, the Poles' participated in the democratization process and the extent to which they cooperated with other members of the Council of Europe in developing solutions beneficial to the statutory objectives of the organization are analysed. This article verifies whether the current political system of the Republic of Poland is fully compliant with the statutory requirements of the Council of Europe. Moreover, it examines the Polish decision-making process within the various decision-making bodies of the Council of Europe, Poland's participation in the most important human rights conventions of the Council of Europe, and the implementation of obligations arising from the European Convention on Human Rights to domestic law. The article further illustrates how these obligations have been integrated into the Constitution of the Republic of Poland of 1997 and other legal acts, highlighting the role of Polish courts in applying the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms.

* Attorney-at-law, LL.M., Assistant Professor, Department of Human Rights and Humanitarian Law, Institute of Legal Sciences, Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin, Poland. <https://orcid.org/0000-0002-7737-0056>, robert.tabaszewski@gmail.com.

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Key cases brought by Polish citizens to the Polish legal system are examined. Lastly, the article describes significant legal reforms in Poland over the last thirty years, the impact of Strasbourg rulings on Polish domestic law, and the challenges related to aligning the Polish legal system with European standards.

KEYWORDS: Poland, European Convention on Human Rights, Council of Europe, European Court of Human Rights, Polish Legislation.

1. Introduction: Historical context

Among the former communist bloc countries, Poland was the second state – after Hungary – to join the Council of Europe (CoE),¹ on 26 November 1991.² Poland's accession to the CoE was facilitated by the political transformations in the country during the 1980s, initiated by the activities of “Solidarity” and the diplomatic efforts of Pope John Paul II.³ Under communist rule, Poland was unable to meet the standards of democracy and the rule of law required by the CoE. After the installation of the communist government in 1944⁴ and the introduction of the Stalinist Constitution in 1952,⁵ despite formal guarantees of rights and freedoms, human rights in Poland remained merely theoretical. Effective mechanisms for monitoring their observance were absent, as were procedures enabling individuals to seek redress for violations of their rights.⁶ Non-governmental organisations

¹ Tarschys, 2002, p. 15; Roszkowski, 1992, p. 410; Wrońska, 2011, p. 72.

² Schwimmer, 2002, p. 9; Lalumière, 2002, p. 13; Daranowski, 2015, p. 425; Antonowicz, 2003, p. 171; Jaskiernia, 2011, p. 3; Izdebski, 1996, p. 5.

³ Makowski, 2017, p. 113; Rybicki, 2002, p. 79.

⁴ Czubiński, 2003, p. 493; Roszkowski, 1992, pp. 208-211.

⁵ Dz. U. 1952, No. 33, pos. 232.; Machowicz, 2009, p. 27; Grzybowski, 2003, p. 97.

⁶ The situation in Poland – and other countries of the region – was the subject of several analyses by the CoE in the 1950s and 1960s; these emphasised the need to establish and maintain contact with intellectual groups in Poland. See: PACE, Committee on Relations with European Non-Member Countries, 10th Session – First part, Karl K. Wistrand (Sweden), Karl Bøgholm (Denmark), Peter Kirk (UK), Report, Present situation (A) in Poland, (B) in Rumania, Bulgaria and Albania, (C) in Estonia, Latvia and Lithuania, 23 April 1958, Doc. 812; Parliamentary Assembly, Ronald Russell (UK), Report, Conditions in Poland and the establishment of cultural links with the Polish people and with Polish refugees, 20 September 1961, Doc. 1354, Committee on Relations with European Non-Member Countries, 13th Session – Second part.; Parliamentary Assembly, Ronald Russell

that could provide assistance to the victims of communist repression were also lacking.⁷ A pivotal moment in communist Poland was the country's accession to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights.⁸ The ICCPR, in particular, paved the way for a limited debate on human rights, granting such rights as the right to life, the prohibition of torture, the right to humane conditions of detention, and political rights such as the right to freedom of association.⁹ The few obligations implemented by Poland allowed for the emergence of the first organisations assisting the aggrieved, including the "Solidarity" movement that was supported by volunteers from the West and the CoE after 1981.¹⁰

Nevertheless, formal adoption of United Nations instruments – including both Covenants and the non-binding Universal Declaration of Human Rights – without the provision of effective judicial and non-judicial mechanisms to guarantee the realisation of human rights was insufficient.¹¹ The failure to ensure basic standards led to growing social resistance, resulting in protests across Poland. The immediate catalyst for opposing the communist regime and the desire to realise the nation's right to self-determination was Pope John Paul II's visit to Poland in 1979, wherein he called for respect for fundamental human rights. Nationwide protests led to the formation of the nationwide workers' trade union "Solidarity", which was officially registered by the communist authorities on 10 November 1980¹² under social pressure. The workers demanded, among other things, freedom of speech, access to the media, an end to repression for expressing political views, and social support for families and working parents.¹³ However, the communist authorities broke this agreement by imposing martial law on 13 December 1981,¹⁴ triggering widespread crimes and

(UK), Written question, No. 112 - Establishment of cultural links with intellectuals from Poland and other Eastern European countries, 28 February 1964, Doc. 1724.

⁷ Roszkowski, 1992, p. 360.

⁸ United Nations, 1966, Dz.U. 1977, No. 38 pos. 167 and Dz.U. 1977, No. 38 pos. 169.

⁹ The ICCPR, adopted by the United Nations General Assembly on 19 December 1966, was ratified by the authorities of the People's Republic of Poland on 3 March 1977 and came into force on 18 June of the same year.

¹⁰ Czubiński, p. 658.

¹¹ Mamoń, 2020, p. 169.

¹² Roszkowski, 1992, p. 362.

¹³ Trembicka and Bachrynowski, 2020, pp. 119-121.

¹⁴ Czubiński, 2003, p. 659.

human rights violations. “Solidarity” was forced underground, and its activists were interned.¹⁵ The CoE strongly condemned the actions of the communist authorities, calling for an end to the repression and the restoration of the democratisation process.¹⁶

Only in the second half of the 1980s, when it became clear that communist dominance in Central and Eastern Europe was coming to an end, did the need for an agreement with the opposition arise.¹⁷ In communist Poland, legal changes began to take place that favoured the process of democratisation and alignment with Western standards. Institutions typical of a democratic state governed by the rule of law – previously unknown under the communist regime – were introduced: the Constitutional Tribunal¹⁸ and the Office of the Ombudsman.¹⁹ In 1982, the State Tribunal was also established.²⁰ The Constitutional Tribunal, which began its operations in 1986, was established to judicially review the compliance of laws with the constitution. Meanwhile, the Ombudsman, appointed in 1987, was tasked with intervening in cases where public authorities violated civil liberties.²¹ These institutions, while drawing on pre-war and ancient Polish law, were also based on modern Western models of liberal democracy.²²

Despite these changes and the formal opening of the CoE to Central and Eastern European countries, no one at the end of the 1980s anticipated that Poland would so quickly become a full member of an organisation that promotes democracy, the rule of law, and human rights.²³ This article aims to analyse how and to what extent Poland has implemented the CoE standards following its political transformation. The thesis put forward is that these changes were made possible by mutual openness and deepened

¹⁵ PACE, Jacques Baumel (France), Report, General policy of the CoE - Situation in Poland, 19 January 1982, Doc. 4834, Political Affairs Committee/Committee on General Affairs, 33rd Session – Third part.

¹⁶ PACE, Resolution 763, Situation in Poland (General Policy of the CoE), 27 January 1982, Res. 763, 33rd Session – Third part; Parliamentary Assembly, Resolution 775 (1982), Situation in Poland and East-West relations (general policy of the Council of Europe), Assembly debate on 30 April 1982 (8th Sitting), text adopted on 30 April 1982, Doc. 4880, report of the Political Affairs Committee.

¹⁷ Czubiński, 2003, p. 660.

¹⁸ Dz.U. 1985, No. 22 pos. 98.

¹⁹ Dz.U. 1987 No. 21 pos. 123.

²⁰ Dz.U. 1982 No. 9 pos. 61.

²¹ Tabaszewski, 2013, 170.

²² Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 225.

²³ Tarschys, 2002, p. 15.

dialogue between the existing members of the CoE and Poland. To prove this hypothesis, the following research methods were employed: the dogmatic method, the comparative method, and an analysis of the Polish legal system and the CoE standards. Additionally, the historical method was used as an auxiliary tool. The article examines whether the process of adapting to European standards proceeded in a linear manner or if certain difficulties were encountered in the process of law-making and enforcement, typical for young democracies.²⁴ Furthermore, it investigates whether, and in what manner, Polish politicians participated in the democratisation process, and to what extent they collaborated within the framework of the CoE to develop solutions beneficial to the organisation's statutory objectives. Moreover, the analysis will assess whether, and to what degree, Poland currently fulfils its obligations under the CoE's conventions – particularly the European Convention on Human Rights (ECHR)²⁵ – and its case law, and the broader body of Strasbourg jurisprudence.

2. The Council of Europe Standards and Poland's Political Transformation

Poland's accession to the CoE was preceded by a series of preparatory measures. Prior to the formal transition to a democratic system, the Secretary General, Marcelino Oreja Aguirre, visited Poland in March 1988, followed by a visit to the Polish Sejm in November 1988 by Luis Jung, the President of the Parliamentary Assembly of the Council of Europe (PACE).²⁶ Shortly after Poland submitted its application for CoE membership, the process of consideration commenced within the PACE committees. However, the Round Table Agreement of 5 April 1989 between the government and the extra-parliamentary opposition truly paved the way for democratic changes in Poland.²⁷ In June 1989, within the communist framework, the first partially free parliamentary elections were held, wherein the opposition achieved a significant victory, securing the maximum number of seats in the Sejm (35%) and all the seats in the Senate. These events paved the way for the formation of the first non-communist

²⁴ Matyasik, 2009b, pp. 85–99.

²⁵ E.T.S. No. 5.

²⁶ Rybicki, 2002, p. 80.

²⁷ Roszkowski, 1992, pp. 404–405; Izdebski, 1996, p. 22.

government in Central and Eastern Europe²⁸ in September 1989. Shortly after the election results were recognised, PACE granted Poland “special guest” status and an invitation to participate in its activities. Thus, Poland attained the status of an “honorary guest”.²⁹ On 30 January 1990, following the systemic changes and the restoration of national symbols, Prime Minister Tadeusz Mazowiecki submitted an official application for Poland’s accession to the CoE,³⁰ thereby opening Poland’s path to the organisation.

From the very beginning, Polish politicians were strongly committed to securing Poland’s accession to the organisation, believing that it would mark the country’s return to the community of states that value democracy and human rights. At the meeting of the Committee on Legal Affairs and Human Rights, held on 10 September 1990 in Warsaw, the Committee heard from the Presidents of the Sejm and Senate, as well as Poland’s Prime Minister, Tadeusz Mazowiecki, and the Minister of Foreign Affairs, Krzysztof Skubiszewski. During the meeting, the Committee also considered the report by Sir Geoffrey Finsberg that outlined the actions Poland needed to undertake in the near future to align with the objectives of the organisation.³¹ The report invoked the statutory principle that, to become and remain a member of the CoE, a country must, above all, respect human rights and the rule of law, and be a parliamentary democracy.³² First and foremost, Poland had to meet the requirement of respecting human rights, one of the three core pillars of the CoE. Consequently, Poland swiftly enacted numerous laws aimed at improving the functioning of the justice system, including ensuring judicial independence, abolishing undemocratic powers of the prosecutor, disbanding the citizens’ militia, and introducing guarantees for freedom of the press, expression, and religion³³.

Regarding democratic standards, the elections held for the Sejm and Senate on 4 June 1989 were deemed insufficient for Poland’s accession to the CoE in 1990. PACE concluded that the elections had been conducted under communist control, and thus could not be considered fully free

²⁸ Czubiński, 2003, pp. 712-713; Izdebski, 1996, p. 5.

²⁹ Kaczmarek, 2002, p. 92.

³⁰ Roszkowski, 1992, p. 410; Rybicki, 2002, p. 80.

³¹ Jaskiernia, 2011, p. 8.

³² PACE, Committee on Legal Affairs and Human Rights, Committee Opinion, Poland’s application for membership of the Council of Europe, 28 September 1990, Doc. 6307.

³³ Rybicki, 2002, pp. 81-83; Jaskiernia, 2011, pp. 8-10.

according to the Convention standards.³⁴ Consequently, all communist ministers were removed from Prime Minister Tadeusz Mazowiecki's government.³⁵ The CoE also deemed it necessary for Poland to adopt a new electoral law, and to resolve various issues such as whether voting in general elections would follow a proportional or majority-based system. PACE further expressed disapproval of Wojciech Jaruzelski continuing to serve as President of Poland, as he was the same leader who imposed martial law in 1981. PACE called for new presidential elections, which were held in November 1990, resulting in Lech Wałęsa defeating Stanisław Tymiński.³⁶ In the meantime, the local government elections were held in Poland, supported by the Congress of Local and Regional Authorities of the Council of Europe, were deemed to meet all the Convention's criteria.³⁷

Notably, the 1990 report highlighted the need for constitutional reform as essential in the area of the rule of law. The previous constitution, despite numerous amendments, dated back to the Stalinist era.³⁸ Despite the adoption of the so-called "Small Constitution" in 1992, which regulated the mutual relations between the legislative and executive branches, as well as the powers of local governments, the constitutional provisions did not adequately address the protection of human rights. Furthermore, President Lech Wałęsa's proposal of a separate "Bill of Rights" that would comprehensively regulate human rights and freedoms was not enacted, leaving this task to Parliament until the adoption of a new constitution.³⁹

All these efforts resulted in highly favourable opinions in the report of the Political Affairs Committee of PACE, which concluded that Poland should be invited to join the CoE without undue delay.⁴⁰ The invitation was extended shortly after the parliamentary elections of 27 October 1991, when the Committee on Legal Affairs and Human Rights, followed by PACE, recognised that Poland had fulfilled the requirement of holding fully free parliamentary elections. Consequently, PACE recommended that the Committee of Ministers immediately admit Poland into membership.⁴¹ On

³⁴ PACE, Committee Opinion, Poland's application for membership of the Council of Europe, Doc. 6307.

³⁵ Roszkowski, 1992, p. 410-412; Izdebski, 1996, p. 5.

³⁶ Czubiński, 2003, p. 712; Roszkowski, 1992, p. 413.

³⁷ Kamiński, 2012, pp. 40-41; Izdebski, 1996, p. 22; Tabaszewski, 2020, p. 1-9,

³⁸ Machowicz, 2009, p. 27.

³⁹ Garlicki, 2006, p. 24; Grzybowski, 2003, p. 98.

⁴⁰ Rybicki, 2002, p. 81.

⁴¹ Jaskiernia, 2011, p. 9.

26 November 1991, Krzysztof Skubiszewski, Minister of Foreign Affairs submitted Poland's accession document to the Secretary General and signed the European Convention on Human Rights and Fundamental Freedoms.⁴² In this way, Poland became the 32nd member of the CoE.

Poland's accession to the CoE by no means concluded its political transformation but rather accelerated it. The Constitution of the Republic of Poland, adopted on 2 April 1997, laid the foundation for its continued membership in the CoE, and paved the way for its accession to the European Union in 2004.⁴³ The first draft of the Constitution was developed as early as October 1990, and in consultation with numerous prominent experts from the CoE, working closely with the European Commission for Democracy through Law, commonly known as the Venice Commission.⁴⁴ Consequently, in terms of the political system, Poland's governance was to be based on a parliamentary-cabinet model with presidential elements.⁴⁵ An important innovation was the adoption of the principle in the Constitution that the foundation of solutions would be the inherent dignity of the human person, with the principle of personalism at its core.⁴⁶ Therefore, Poland currently regards human rights not merely as a binding international legal obligation, but as an integral part of its domestic law. This is reflected in the principle expressed in Article 9 and Chapter II of the Constitution of the Republic of Poland, titled "Freedoms, Rights, and Obligations of Man and Citizen".⁴⁷

To safeguard rights and freedoms, the Polish system provides for institutions closely linked to the protection of individual rights⁴⁸ such as the Office of the Ombudsman and the Office of the Commissioner for Children's Rights.⁴⁹ The Ombudsman, safeguards the freedoms and rights of individuals and citizens as defined in the Constitution and other legal acts. They operate independently, without being subject to other state bodies, and are accountable only to the Sejm, in accordance with the principles set out in law. As the guardian of human and civil rights and freedoms, the Ombudsman monitors and takes appropriate action when the principles of

⁴² Rybicki, 2002, p. 81; Góralczyk, Karski and Sawicki, 2024, p. 378.

⁴³ Garlicki, 2006, pp. 425-430; Kaczmarek, 2002, p. 93; Izdebski, 1996, p. 5.

⁴⁴ Zieliński, 2010, p. 163; Izdebski, 1996, p. 39.

⁴⁵ Garlicki, 2006, p. 53; Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 107.

⁴⁶ Orzeszyna, 2013, p. 17.

⁴⁷ Garlicki, 2006, pp. 89-96; Machowicz, 2009, p. 27; Tabaszewski, 2017b, p. 192.

⁴⁸ Banaszak, 2011, pp. 157-158; Tabaszewski, 2013, p. 170.

⁴⁹ Garlicki, 2006, pp. 395-404.

social coexistence and social justice have been violated in the exercise of civil rights and freedoms due to deliberate actions or omissions by authorities, organisations, or institutions.⁵⁰ On the other hand, the Commissioner for Children's Rights was established within the Polish human rights protection system in 2000.⁵¹ The Commissioner for Children's Rights, in accordance with the law, takes steps to ensure the full and harmonious development of children, respectful of their dignity and individuality.⁵² The Commissioner may request information and access to documents from public authorities, organisations, or institutions, and demand that these bodies take action in the interests of children.⁵³ The scope and procedure of work for both the Ombudsman and the Commissioner for Children's Rights are defined by law.⁵⁴ In addition to the constitutional ombudsmen, the Polish system also includes specialised commissioners such as the Financial Ombudsman, the Patient Ombudsman, the Ombudsman for Psychiatric Hospital Patients, the Ombudsman for Small and Medium-Sized Enterprises, the Consumer Ombudsman, and others who focus on protecting the rights and interests of specific groups.⁵⁵

The current constitutional system of the Republic of Poland is now fully aligned with the statutory requirements of the CoE. Article 2 of the Polish Constitution enshrines the fundamental principle that "the Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice." This means that public authorities must act on the basis, and within the limits, of the law, while citizens are guaranteed rights and freedoms that are protected by courts and other institutions. The rule of law encompasses the following principles: legality, which entails a transparent, accountable, democratic, and pluralistic process of law-making; legal certainty; the prohibition of arbitrary action by the executive authorities; the independence and impartiality of the judiciary; effective judicial oversight, including the protection of human rights; and equality before the law.⁵⁶ Consequently, in accordance with the 1997 Constitution, the judiciary, regarded as part of the human rights protection system, is exercised by the Supreme Court, common courts, administrative

⁵⁰ Tabaszewski, 2013, p. 170.

⁵¹ Dz.U. 2000, No. 6, pos. 69.

⁵² Zieliński, 1995/96, pp. 7-26.

⁵³ Pawlik, 1995, pp. 31-45; Tabaszewski, 2013, p. 170.

⁵⁴ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 225.

⁵⁵ Tabaszewski, 2017a, pp. 57-71.

⁵⁶ Closa, Kochenov and Weiler, 2014, pp. 866-872.

courts, and military courts.⁵⁷ To ensure maximum compliance with the *acquis conventionnel*, between 1997 and 2004, the Polish Parliament enacted a series of laws detailing the judiciary's functioning. In 2001, the Act on Common Courts was passed,⁵⁸ and in 2002, a new Act on the Supreme Court was established.⁵⁹ Both laws were enacted based on the guidelines of the CoE and Strasbourg jurisprudence. This established system remained in place until the so-called constitutional crisis of 2015–2023. Following the 2015 elections, a new government came into power and passed new laws that modified the existing *status quo* in the Constitutional Tribunal, the Supreme Court, and the common courts.⁶⁰ The change in the composition of judicial panels became a point of contention between the government and the opposition, which ultimately led to protests by judges and paralysed the functioning of the courts.⁶¹ Following numerous rulings by the European Court of Human Rights (ECtHR) and recommendations from the Venice Commission, some of the changes were reversed in 2024. However, the dispute over the rule of law in Poland has not been fully resolved.

3. Poland's representation in the institutions of the Council of Europe

Poland, as a full member of the CoE since 1991, has played an active role in its work from the outset, participating in the key bodies of the organisation.⁶² After Poland's accession, the country has been represented in the Committee of Ministers, the CoE's main decision-making body, by the Polish Minister of Foreign Affairs. This important role was first undertaken by Krzysztof Skubiszewski from 1991 to 1993.⁶³ Thereafter, the role of

⁵⁷ Tabaszewski, 2013, pp. 170–174.

⁵⁸ Dz.U. 2001 No. 98 pos. 1070.

⁵⁹ Dz.U. 2002 No. 240 pos. 2052; Tabaszewski, 2013, p. 172.

⁶⁰ The legal changes particularly focused on modifying the judiciary, prosecution system, and state control mechanisms, including Dz.U. 2015, pos. 2217 (Amendment to the Act on the Constitutional Tribunal), Dz.U. 2018, pos. 5 (Act of 12 July 2017 on the Supreme Court), Dz.U. 2017, pos. 1452 (Act on the National Council of the Judiciary), Dz.U. 2017, pos. 1452 (Amendments to the Act on Ordinary Courts), and Dz.U. 2018, pos. 1045 (Amendments to the Act on the Supreme Court). These acts altered the independence and functioning of key judicial bodies and introduced new mechanisms for government oversight of the courts. See: Florczak-Wątor, M., 2023.

⁶¹ Orzeszyna, Skwarzyński and Tabaszewski, 2023, pp. 231–234.

⁶² Wrońska, 2011, p. 72.

⁶³ Rybicki, 2002, p. 81; Roszkowski, 1992, p. 410.

Poland's representative in the Committee of Ministers has been held by several Foreign Ministers. When the Minister of Foreign Affairs is not present in Strasbourg, the position is filled by the Permanent Representative of Poland to the Council of Europe, typically holding the rank of ambassador. The Permanent Representative assumes day-to-day responsibilities and represents the country during meetings and negotiations.⁶⁴ Poland has had several notable Permanent Representatives,⁶⁵ each of whom made a significant contribution to strengthening Poland's position within the CoE, bringing the Polish perspective to key debates on human rights and the rule of law in Europe.

The most important statutory representative body of the CoE is PACE.⁶⁶ Poland was invited to this body as a special guest in 1989, two years before its official accession to the organisation. Currently, following Russia's exclusion, PACE has 612 members and an equivalent number of substitutes. However, at the time of Poland's accession to the CoE, it had only 170 members. This significant increase reflects the rapid enlargement of the organisation in the post-Cold War era, as more Central and Eastern European countries embraced democratic reforms and sought integration with Western institutions.⁶⁷ Within PACE, Poland has a 12-member delegation, with half serving as full members and the other half as substitutes. Polish representatives come from various political groups and represent both the Sejm and the Senate, ensuring a diversity of opinions and interests in debates concerning the protection of human rights, democracy, and the rule of law. The Polish delegation plays an active role in PACE, participating in work related to the protection of human rights, democracy, and the rule of law. From 1991 to 2024, across seven PACE terms, more than a hundred Polish politicians have participated, including many future prime ministers and deputy prime ministers.⁶⁸ Some of the active

⁶⁴ Kaczmarek, 2002, p. 92.

⁶⁵ The first was Jerzy Regulski, who held the position from 4 May 1992 to 31 January 1997. From 24 February 1997 to 15 August 2001, Poland was represented by Marcin Rybicki. The subsequent ambassadors were: Krzysztof Kocel (10 September 2001 – 10 October 2005), Piotr Świtalski (24 October 2005 – 31 August 2010), Urszula Gacek (3 February 2011 – 30 November 2014), and Janusz Stańczyk (July 2015 – 31 July 2020). Most recently, Jerzy Bauriski held the position from August 2020 to July 2024. After the end of his term, in July 2024, Iwona Marczyk-Stępniewska took over as *chargé d'affaires a.i.*

⁶⁶ Jaskiernia, 2003; Kaczmarek, 2002, p. 92.

⁶⁷ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 180.

⁶⁸ Rybicki, 2002, p. 88.

individuals who made significant contributions to PACE's work in the early phase of Poland's participation in the CoE include Hanna Suchocka, Alicja Grześkowiak, Włodzimierz Cimoszewicz, and Jerzy Jaskiernia. Tadeusz Iwiński was particularly active in the field of parliamentary diplomacy.⁶⁹ The group of parliamentarians holding leadership positions in PACE committees and political groups also includes Arkadiusz Mularczyk, Marek Borowski, Bogdan Klich, Ewa Tomaszewska, and Aleksander Pociąg. Additionally, Krzysztof Kwiatkowski, Danuta Jałowiecka, Jan Olbrycht, and Róża Thun, as well as Witold Waszczykowski and Dominik Tarczyński, should also be mentioned for their active involvement in PACE, representing Poland and participating in key debates and committee work.⁷⁰

On the PACE forum, Polish presidents have publicly addressed the Assembly on several occasions, representing Poland and discussing key issues related to democracy, human rights, and European integration. Their visits highlight the importance of parliamentary relations between Poland and the CoE. The first Polish president to deliver a speech at PACE was Lech Wałęsa⁷¹ on 4 February 1992, shortly after his victory in the first free presidential elections in Poland since the Second World War. Aleksander Kwaśniewski addressed PACE on several occasions, beginning in 1996, when he discussed legal and constitutional reforms in the context of Poland's planned accession to the European Union.⁷² Human rights and freedoms were the focus of Bronisław Komorowski's address in 2012, followed by Andrzej Duda in 2022, who emphasised the importance of CoE members' support for Ukraine. Since 1988, PACE Presidents have regularly visited Poland. After Poland's accession to the EU, some of the most significant visits were those by René van der Linden in 2006, Mevlüt Çavuşoğlu in 2011, and Anne Brasseur in 2015. Subsequently, PACE

⁶⁹ Jaskiernia, 2011, p. 14; Kaczmarek, 2002, p. 92.

⁷⁰ In 2024, the Polish delegation to PACE included: Agnieszka Pomaska (Chair, KO), Wanda Nowicka (Lewica), Mirosław Adam Orliński (Polskie Stronnictwo Ludowe), Ryszard Petru (Polska 2050), Włodzimierz Bernacki (PiS), Magdalena Biejat (Lewica), Marek Borowski (KO), Paweł Jabłoński (PiS), Danuta Jazłowiecka (KO), Katarzyna Sójka (PiS), and Krzysztof Truskolaski (KO). The substitutes were: Bogdan Klich (KO), Iwona Arent (PiS), Anna Bogucka (PiS), Krzysztof Bosak (Konfederacja), Konrad Fryszak (KO), Kamila Gasiuk-Pihowicz (KO), Jan Filip Libicki (Trzecia Droga), Daniel Milewski (PiS), Barbara Oliwiecka (Polska 2050), Kacper Maciej Płażyński (PiS), Jakub Rutnicki (KO), and Marcin Romanowski (PiS).

⁷¹ Klebes, 2002, p. 28.

⁷² Kaczmarek, 2002, p. 95.

Presidents visited Poland several more times, with their visits primarily concerning key issues related to the rule of law and the protection of human rights.⁷³ In 2016, Pedro Agramunt visited Poland, followed by Liliane Maury in 2019. In the context of the migration crisis at the Polish–Belarusian border, the visit of Rik Daems in October 2021 was of great significance. During his visit, he met with the Speakers of the Sejm and the Senate, and the Minister of Foreign Affairs, discussing key issues related to supporting democracy in Belarus, which is still not a CoE member.

The Secretary General plays a pivotal role in the CoE, responsible for leading the organisation, strategic planning, and overseeing the implementation of its action programme.⁷⁴ Poland has made several attempts to secure the position of Secretary General of the CoE. In 1999, the candidate for this role was Hanna Suchocka, former Prime Minister of Poland. However, the position was ultimately assumed by Austrian, Walter Schwimmer.⁷⁵ Another attempt to nominate a Polish candidate for the position of Secretary General took place in 2009, when Włodzimierz Cimoszewicz, former Prime Minister of Poland, competed against Norwegian candidate Thorbjørn Jagland, who ultimately won. The most recent attempt was in 2019, when Poland considered nominating Jacek Czaputowicz; however, the final candidates came from Belgium and Croatia, with Marija Pejčinović Burić from Croatia eventually securing the position. Nevertheless, Poland has actively cooperated with the CoE Secretariat on many fronts, benefiting from numerous programs, particularly in the early years of its membership. This close cooperation is evidenced by official working visits to Poland. In 2016, Thorbjørn Jagland met with President Andrzej Duda and other government representatives to discuss Poland's relations with the CoE, matters related to democratic security, and the migration crisis. Subsequently, on 4 June 2019, during the 30th anniversary of the semi-free elections to the Sejm, Marija Pejčinović Burić visited Poland shortly before assuming the role of Secretary General, emphasizing the importance of the right to free and fair elections.⁷⁶

⁷³ Council of Europe, 2015. Visits of the Presidents of the Parliamentary Assembly of the Council of Europe to Poland [Online]. Available at: <https://www.coe.int/pl/web/portal> (Accessed 24 September 2024).

⁷⁴ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 114.

⁷⁵ Jaskiernia, 2011, p. 15; Czubiński, 2003, p. 713.

⁷⁶ Permanent Representative of Poland met with the Secretary General of the Council of Europe [Online]. Available at: <https://www.gov.pl/web/coe/permanent-representative-of->

Poles have also not held the position of Commissioner for Human Rights of the Council of Europe – a key role in the organisation responsible for monitoring the observance of human rights in the member states.⁷⁷ Poland remains in regular contact with the Commissioner, with the most recent visit taking place in September 2024. This visit, conducted by Michael O’Flaherty, focused on the Polish–Belarusian border, across which migrants are being sent into the Schengen zone.⁷⁸ Similarly, Poles have not held any positions in the European Committee of Social Rights, as Poland has not signed the additional protocols to the 1961 original version, nor has it acceded to the Revised European Social Charter of 1961.⁷⁹ However, Poles have actively participated in various efforts related to human rights protection within the CoE, including as members of the European Committee for the Prevention of Torture (CPT). One such member was Zbigniew Hołda, who actively engaged in inspections and visitations of detention facilities, assessed their conditions, and prepared reports and recommendations for improving them. Under the auspices of the CoE, on 8 February 1996, Adam Zieliński was appointed to the Human Rights Chamber for Bosnia and Herzegovina, and on 11 July 2000, Marek Antoni Nowicki assumed the role of Ombudsman in Kosovo.⁸⁰

In addition, the Congress of Local and Regional Authorities of the CoE played a significant role, particularly in the reform of Poland’s local governance. This body includes a Polish delegation consisting of 6 full members and 6 substitutes.⁸¹ Over the years, the Congress has represented the authorities of Polish voivodeships, counties, and municipalities, supporting them in promoting good governance practices, protecting human rights at the local level, and fostering local development. Some of the most active Polish representatives included Leon Kieres, Andrzej Porawski, Władysław Ortyl, and Rafał Dutkiewicz, all of whom contributed to the

poland-met-with-the-secretary-general-of-the-council-of-europe (Accessed: 24 September 2024).

⁷⁷ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 195.

⁷⁸ Mission to Poland: Poland needs to respect its international human rights obligations on the Belarusian border, says Commissioner O’Flaherty [Online]. Available at: <https://www.coe.int/en/web/commissioner/-/poland-needs-to-respect-its-international-human-rights-obligations-on-the-belarusian-border-says-commissioner-o-flaherty> (Accessed: 24 September 2024).

⁷⁹ Zwolan, 2014, p. 42.

⁸⁰ Rybicki, 2002, p. 89; Kaczmarek, 2002, p. 90.

⁸¹ Kamiński, 2012, pp. 36-37; Kaczmarek, 2002, p. 92.

promotion of democratic solutions.⁸² On the other hand, members of the Venice Commission, which has been operating since 10 May 1990, included notable figures such as Hanna Suchocka, Krzysztof Drzewicki, Lech Garlicki, and Wojciech Sadurski. As evidenced by the active participation of its delegates in the CoE, Poland has solidified its position on the international stage, particularly in the areas of regional cooperation and strengthening relations among member states.

4. Poland's contribution to the achievements of the Council of Europe

Upon its accession to the CoE, Poland ranked among the leading countries in terms of the number of CoE conventions adopted and ratified.⁸³ This resulted not only from the desire to eliminate the backlog and delays caused by the absence of participation in the European legal space, but also from the wish to simultaneously adopt national solutions and ensure their compliance (harmonisation) with already proven Conventions. Consequently, many of the regulations adopted by the Polish Sejm and Senate in the 1990s demonstrate significant alignment not only with the Conventions but also with the non-binding recommendations proposed by the CoE's steering bodies and committees.⁸⁴ Even before formally joining the CoE, on 16 November 1989, Poland acceded to the European Cultural Convention,⁸⁵ which aims to promote cooperation in the fields of culture, education, science, and sport across Europe.⁸⁶ The next two conventions adopted by Poland were the European Convention on Information on Foreign Law,⁸⁷ ratified on 29 May 1990, and the European Convention on the Equivalence of Diplomas Leading to Admission to Universities,⁸⁸ ratified on 5 January 1990. A necessary condition for Poland's accession to the CoE was the signing and subsequent ratification of the ECHR. Poland, along with the Additional Protocols ratified by that time, made the ECHR not only a guiding principle but a binding imperative for the entire Polish human rights system as part of the *acquis conventionnel*.⁸⁹

⁸² Jaskiernia, 2011, p. 14.

⁸³ Rybicki, 2002, p. 83; Kaczmarek, 2002, p. 92.

⁸⁴ Grzelak-Bach and Karski, 2020, p. 20.

⁸⁵ ETS No. 024; Kaczmarek, 2002, p. 92; Izdebski, 1996, p. 37.

⁸⁶ Kaczmarek, 2002, p. 92.

⁸⁷ ETS No. 062.

⁸⁸ ETS No. 138.

⁸⁹ Jaskiernia, 2011, p. 9.

Poland has ratified 91 CoE conventions to date, meaning that all codes and laws relating to human rights and freedoms are aligned with this body of work. Thus, Poland has emerged as a leader among Central and Eastern European countries in terms of the number of commitments undertaken.⁹⁰ The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁹¹ dated 26 November 1987, is functionally linked to Article 3 of the ECHR. Poland ratified this convention on 1 February 1995, becoming one of the most active members of the CPT. In addition, one of Poland's most significant challenges during the initial phase of its membership was the ratification of the European Social Charter,⁹² drafted on 18 October 1961 in Turin, which Poland ratified on 25 June 1997. Poland also ratified the Amending Protocol of 21 October 1991.⁹³ Poland committed to fully adhering to the provisions of Part II of the European Social Charter, which includes Article 1 (the right to work), Article 3 (the right to safe and healthy working conditions), Article 5 (the right of workers and employers to organise), Article 9 (the right to vocational guidance), Article 11 (the right to protection of health), Article 12 (the right to social security), Article 15 (the right of persons with disabilities to training, rehabilitation, and social and occupational reintegration), Article 16 (the right of the family to social, legal, and economic protection), Article 17 (the right of mothers and children to social and economic protection), and Article 19 (the right of migrant workers and their families to protection and assistance). However, Poland opted not to ratify the Additional Protocol to the European Social Charter of 5 May 1988,⁹⁴ or the Protocol introducing a system of collective complaints,⁹⁵ which came into force in 1998. This means that complaints provided for under Article 5 of the Additional Protocol to the European Social Charter of 1995, concerning the system of collective complaints, cannot be filed against Poland. These complaints are reviewed by the European Committee of Social Rights.⁹⁶

⁹⁰ Jaskiernia, 2011, p. 12.

⁹¹ ETS No. 126.

⁹² ETS No. 035.

⁹³ ETS No. 142; Izdebski, 1996, p. 37.

⁹⁴ ETS No. 128.

⁹⁵ ETS No. 158.

⁹⁶ Tabaszewski, 2025; Izdebski, 1996, p. 37.

Poland has essentially adopted all the important CoE Conventions related to criminal law.⁹⁷ These instruments include the European Convention on Extradition,⁹⁸ Criminal Law Convention on Corruption,⁹⁹ Convention on Cybercrime,¹⁰⁰ European Convention on the Suppression of Terrorism,¹⁰¹ and CoE Convention on the Prevention of Terrorism.¹⁰² Other important conventions include those related to migration and refugees, such as the European Agreement on Transfer of Responsibility for Refugees,¹⁰³ European Agreement on the Abolition of Visas for Refugees,¹⁰⁴ and European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.¹⁰⁵

The accession to and ratification of the Framework Convention for the Protection of National Minorities of 1 February 1995¹⁰⁶ had significant importance in Polish domestic law. This convention imposes an obligation on states to protect the rights and culture of national minorities. Similarly, the ratification of the European Charter for Regional or Minority Languages of 5 November 1992¹⁰⁷ also obliges states to protect the rights and culture of national minorities. A direct result of the implementation of these conventions is Poland's Act on National and Ethnic Minorities and on the Regional Language, adopted on 6 January 2005.¹⁰⁸ This law serves as an example of the introduction of one of the most effective mechanisms for the protection of minorities in Europe. Despite controversies and numerous declarations by Polish politicians proposing withdrawal from the Convention, Poland remains a party to the Istanbul Convention, also known

⁹⁷ Izdebski, 1996, p. 38.

⁹⁸ ETS No. 024.

⁹⁹ ETS No. 173.

¹⁰⁰ ETS No. 185.

¹⁰¹ ETS No. 90.

¹⁰² ETS No. 196.

¹⁰³ ETS No. 107.

¹⁰⁴ ETS No. 31.

¹⁰⁵ ETS No. 112.

¹⁰⁶ ETS No. 157.

¹⁰⁷ ETS No. 148.

¹⁰⁸ Dz.U. 2005 No. 17 pos. 141.

as the Convention on Preventing and Combating Violence Against Women and Domestic Violence, adopted on 11 May 2011.¹⁰⁹

The large number of conventions adopted, particularly during the early stages of Poland's membership in the organisation, resulted from several key factors related to both domestic policy and international obligations. The ratification process for each convention requires a detailed analysis of its compliance with the Polish legal system, including the 1997 Constitution and lower-ranking regulations, particularly laws. It is also an expression of political will, connected to decision-making processes, parliamentary debates, and public consultations. The slowing down of ratification efforts that occurred after Poland's accession to the European Union was linked to Poland's commitment to the European Union's extensive and detailed body of law. Additionally, the strong functional and axiological connection between the legal frameworks of the CoE and the European Union is noteworthy.¹¹⁰ An important factor limiting the ratification of a greater number of conventions is the financial obligations arising from some international documents. For this reason, Poland has not yet adopted the Revised European Social Charter or even the additional protocols to the original version of the Social Charter, as the rights contained within – particularly those concerning health protection, social security, and workers' rights – would entail significant financial expenditures.¹¹¹ Additionally, some conventions, particularly those signed in the 1960s and 1970s relating to social security law, and even those adopted in the last decade of the 20th century, are considered outdated and obsolete. One such example is the still unratified Oviedo Convention of 1997.¹¹² Although Poland signed the Oviedo Convention on 7 May 1999, the ratification process has been prolonged. The issue of implementing the Convention and its four additional protocols into the Polish legal system has been raised multiple times, most recently in 2008, when a special government commission was appointed. Ultimately the ratification process has stalled in the European Convention for the Protection of Animals during International Transport, with neither the original version¹¹³ nor the revised

¹⁰⁹ ETS No. 210. On the Polish side, since 2022, the expert in GREVIO, the executive committee of this Convention, is Dr. Grzegorz Wrona, a specialist in the field of domestic violence prevention law.

¹¹⁰ Machińska, 2002, p. 204, pp. 210-214.

¹¹¹ Izdebski, 1996, p. 38.

¹¹² ETS No. 164.

¹¹³ ETS No. 065.

version ratified.¹¹⁴ This state of affairs hinders the alignment of Polish medical law, patient rights, social security law, and animal protection law with European legal standards.¹¹⁵

Among the most recent commitments undertaken by Poland are those arising from ratified conventions such as the CoE Convention against Trafficking in Human Organs,¹¹⁶ CoE Convention on Cinematographic Co-Production (Revised)¹¹⁷ ratified by Poland on 18 April 2019, and the Convention on Cybercrime¹¹⁸ ratified by Poland on 12 May 2022. The one most recently signed by Poland is the CoE Framework Convention on the Value of Cultural Heritage for Society,¹¹⁹ which Poland signed on 10 May 2021, becoming its 28th signatory. This convention emphasises the importance of cultural heritage in the context of respect for human rights and democracy, while also promoting its protection and sustainable use.¹²⁰ Further harmonization of national law with the CoE's body of work, which includes not only conventions but also documents developed by various Council bodies such as the Venice Commission, depends on the political will to fulfil the commitments made under the principle of the rule of law.¹²¹

The most important category of conventions that has had, and continues to have, a fundamental impact on shaping the Polish legal system are the conventions related to human rights, including the frequently mentioned ECHR. The standards introduced by the Convention – along with the body of case law developed by the ECtHR, and previously by the Human Rights Commission – have had a profound influence on the entire Polish legal system.¹²² Poland ratified and accepted the obligations arising from the Convention drafted in Rome on 4 November 1950, as subsequently amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No.

¹¹⁴ ETS No. 193.

¹¹⁵ Izdebski, 1996, p. 37.

¹¹⁶ ETS No. 216.

¹¹⁷ ETS No. 120.

¹¹⁸ ETS No. 185.

¹¹⁹ ETS No. 199.

¹²⁰ See: Orzeszyna and Tabaszewski, 2021, pp. 1049–1050.

¹²¹ Venice Commission, Opinion on European Standards Regulating the Status of Judges (No. 1206/2024), Opinion on the Draft Amendments to the Law on the Public Prosecutor's Office (No. 1204/2024), Opinion on the Draft Constitutional Amendments Concerning the Constitutional Tribunal and Two Draft Laws on the Constitutional Tribunal (No. 1203/2024), 2024.

¹²² Izdebski, 1996, p. 5; Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 107.

2.¹²³ With the ratification process, the provisions of the Convention came into effect in Poland, and since 1 May 1993, Polish citizens have been able to submit individual complaints to the ECtHR if their rights and freedoms guaranteed by the Convention have been violated. Given that the Convention is a living instrument and subject to reforms, Poland has successively adopted additional protocols; Protocol No. 9 of 6 November 1990,¹²⁴ and subsequently, Protocol No. 10 of 11 May 1994, concerning the transformation of the supervisory mechanism established by the Convention, were both ratified by Poland on 10 October 1994. In connection with the public debate on the use of the death penalty, Protocol No. 13 of 3 May 2002,¹²⁵ concerning the abolition of the death penalty in all circumstances, was ratified by Poland only on 23 May 2014, during the presidency of Bronisław Komorowski, despite having come into force on 1 July 2003.¹²⁶

In Poland, the death penalty was formally abolished in 1997; however, debates regarding its reinstatement have resurfaced multiple times, especially in the context of brutal crimes. Notably, after 2004, Poland ratified two additional Protocols to the Convention: Protocol No. 14 of 13 May 2004,¹²⁷ which amended the Convention's control system, was ratified by Poland on 12 October 2006,¹²⁸ and entered into force on 1 June 2010; and Protocol No. 15 of 24 June 2013,¹²⁹ was ratified by Poland on 10 September 2015 and came into force on 1 August 2021. Poland has not ratified Protocol No. 16 of 2 October 2013, which allows the highest courts and tribunals to request advisory opinions from the ECtHR on fundamental questions concerning the interpretation or application of the rights and freedoms defined in the Convention and its protocols.¹³⁰ Importantly, Poland has still not signed or ratified Protocol No. 12 of 4 November 2000,¹³¹ which introduces a general prohibition of discrimination by any public authority. Changes and the ratification of both Protocols are anticipated.

¹²³ Dz.U. 1993 No. 61 pos. 284; Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 108.

¹²⁴ ETS No. 140.

¹²⁵ ETS No. 187.

¹²⁶ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 109.

¹²⁷ ETS No. 194.

¹²⁸ Dz.U. z 2010 r. Nr 90, poz. 587.

¹²⁹ ETS No. 213.

¹³⁰ ETS No. 214.

¹³¹ ETS No. 177.

5. Impact of Strasbourg case law on the evolution of Polish legislation

Poland's accession to the ECHR system signified its agreement to submit to the oversight mechanisms of the ECtHR in Strasbourg. Since 1 May 1993, when Polish citizens gained the right to file complaints, this influence has become significant.¹³² Until 1998, oversight of the Convention was based on two bodies: the European Commission of Human Rights and the ECtHR.¹³³ The Commission examined complaints at the preliminary stage, while the Court considered those that were referred to it. Currently, judges bear the responsibility for maintaining and strengthening the authority of the ECtHR. Since 1992, this task has rested on judges from Poland. In 1992, in accordance with the requirements of the Convention, Poland submitted three candidates for the position of judge at the ECtHR: Jerzy Makarczyk, Bogusław Nizieński, and Hanna Waśkiewicz.¹³⁴ Ultimately, Jerzy Makarczyk, a distinguished lawyer and professor of international law, was selected and served as a judge at ECtHR from 1992 to 2002.¹³⁵ The second Polish judge at the ECtHR, appointed in 2002, was Professor Lech Garlicki. As an experienced lawyer and professor of constitutional law, he played a significant role in shaping the interpretation of key provisions of the ECHR, including co-authoring a highly regarded commentary on the Convention.¹³⁶ After the conclusion of Lech Garlicki's 9-year term, Professor Krzysztof Wojtyczek was elected as the next Polish judge at ECtHR.¹³⁷ Krzysztof

¹³² Kropiwnicki, 2014, p. 301; Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 108; Dembour and Krzyżanowska-Mierzevska, 2004, p. 402.

¹³³ The only Polish representative in the European Commission of Human Rights since March 1993 was Marek A. Nowicki.

¹³⁴ Tabaszewski, 2022, pp. 289-307.

¹³⁵ Professor Makarczyk was also a member of the Court of Justice of the European Union and a judge at the Constitutional Tribunal in Poland. During his term, the Strasbourg mechanism underwent reform following the entry into force of Protocol No. 11, and the first judgments against Poland were issued.

¹³⁶ In addition to Lech Garlicki, Poland nominated Ireneusz Kondak, a law professor at the University of Warsaw, and Wiesław Wasilewski, a lawyer and former judge of the Supreme Court.

¹³⁷ In 2012, Poland presented three new candidates: Professor Krzysztof Wojtyczek, a specialist in constitutional and international law, Professor Elżbieta Karska, and Dr. Agnieszka Szklanna. Professor Karska, a law professor and member of the Permanent Court of Arbitration in The Hague, also served as an ad hoc judge at the European Court of Human Rights. Dr. Szklanna, on the other hand, had worked at the CoE for many years.

Wojtyczek's term was the longest among Polish judges at the ECtHR, as he continued to serve beyond the standard 9-year term which expired in 2021. However, his stint ended with the recent appointment of Agnieszka Adamska-Gallant, the first Polish woman to hold this position.¹³⁸

Poles readily use the individual complaint mechanism, which is generally filed with the ECtHR against their own state. This is different from inter-state cases, wherein, to date, neither has Poland initiated, nor has any complaint been initiated against Poland.¹³⁹ In my opinion, analysing the popularity of individual complaints in Poland reveals four stages: 1) From 1993 to 2004, when the number of complaints gradually increased; 2) From 2005 to 2014, with the number of complaints remaining steady at around 580–680 per year; 3) From 2015 to 2020, when the number of complaints gradually decreased to approximately 450 per year; 4) After 2020, with a renewed increase in the number of complaints. As the number of submitted complaints increased, the number of cases reviewed by the Court also grew. By June 2001, 32 judgments had been issued in Polish cases, most of which concerned the excessive length of court proceedings, especially in civil cases. Other issues primarily related to the lack of equality of arms in criminal proceedings, prolonged judicial review of the grounds for pretrial detention, the conduct of judicial review of detention, and the handling of proceedings in the absence of the detainee and their defence counsel.¹⁴⁰

Starting with the case of *Podbielski*,¹⁴¹ Poland, stands out from other CoE member states for having a relatively low number of cases based on allegations of violations of absolute rights, such as the right to life (Article 2) or the prohibition of torture (Article 3). However, allegations based on Article 6 or 13 of the ECHR are overrepresented. Over the years, there has been a noticeable increase in interest in cases filed by applicants seeking just compensation.¹⁴² As of 1 January 2024, ECtHR has adjudicated 4,183

¹³⁸ To select Wojtyczek's successor, Poland submitted candidates thrice; however, PACE rejected the proposals twice, largely due to the ongoing rule of law dispute in Poland. The list of Polish candidates included Agnieszka Szklanna, Elżbieta Karska, and Aleksander Stępkowski, with Kamil Strzępek later replacing Aleksander Stępkowski in subsequent attempts. It was not until the list of candidates submitted in July 2024, which included Anna Adamska-Gallant, Małgorzata Wąsek-Wiaderek, and Adam Wiśniewski, that PACE considered the proposal, opening the way for the selection of Judge Wojtyczek's successor.

¹³⁹ Machowicz and Tabaszewski, 2023, p. 192.

¹⁴⁰ Nowicki, 2002, p. 174.

¹⁴¹ *Case of Podbielski v. Poland*, App. No. 27916/95, 30 October 1998.

¹⁴² Machowicz and Tabaszewski, 2023, p. 197.

Polish cases. However, the actual number of cases brought against Poland is significantly higher.¹⁴³ On the one hand, that Poles are aware of the Strasbourg mechanism is encouraging. This trend may indicate systemic issues within domestic legal frameworks rather than a mere reluctance or distrust on the part of individuals. This is evident from the fact that in 2023 alone, ECtHR issued 81 rulings against the Polish government (in relation to 261 complaints) and only 38 favourable rulings (in relation to 991 complaints), while 421 new complaints were communicated to Poland.¹⁴⁴ At the same time, many complaints are so-called repetitive cases. An example of such repetitive litigation is the case of *Przybyszewska and Others v. Poland*,¹⁴⁵ which concerned the excessive length of judicial proceedings and illustrated persistent systemic issues within the Polish justice system. In recent years, the majority of complaints has been related to the lack of effective oversight of the judiciary and broadly understood rule of law. The next two large categories of complaints concern the protection of minorities and foreigners. Since the first case was adjudicated against Poland, the impact of Strasbourg case law on the transformations of the Polish legal system has been immense and cannot be overstated.¹⁴⁶ The most significant changes in this regard concern the provisions of criminal and civil procedure related to the excessive length of proceedings, fairness of trials, and the principle of judicial independence, all of which contribute to the broadly understood concept of the rule of law. These changes also addressed the rules governing deprivation of liberty, arbitrary arrests and detentions, and their judicial review.¹⁴⁷

To a lesser extent, Strasbourg case law has influenced the shaping of substantive law, where changes have focused on issues related to the right to privacy, property rights, and personal security.¹⁴⁸ In addition to systemic issues relating to the judiciary, the European Court of Human Rights has also issued several landmark rulings concerning reproductive rights in Poland, including *Tysi c v. Poland*, *R.R. v. Poland*, and *P. and S. v. Poland*. These judgments revealed serious deficiencies in access to lawful abortion, prenatal testing, and healthcare information, particularly for vulnerable

¹⁴³ Jaskiernia, 2011, p. 11.

¹⁴⁴ Ministerstwo Spraw Zagranicznych, 2024, p. 4.

¹⁴⁵ *Case of Przybyszewska and Others v. Poland*, App. No. 11454/17, 6 October 2022.

¹⁴⁶ Matysiak, 2009b, p. 129.

¹⁴⁷ *Case of Ladent v. Poland*, App. No. 11036/03, 18 March 2008.

¹⁴⁸ See: *Case of Musia  v. Poland*, App. No. 24557/94, 25 March 1999; *Case of B czkowski and Others v. Poland*, No. 1543/06, 3 May 2007.

groups such as minors and women with high-risk pregnancies.¹⁴⁹ All three judgments remain under enhanced supervision by the Committee of Ministers of the CoE, due to incomplete implementation by Polish authorities. The Court also found Poland in violation of the Convention in two high-profile cases involving secret detention: *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*.¹⁵⁰ Despite their significance, Poland has yet to adopt a comprehensive law on the execution of ECtHR judgments, which creates practical difficulties for citizens seeking enforcement of their rights, and delays the systemic reforms required by the Court.

Among the cases concerning the protection of property, particular attention is drawn to the case of *Broniowski v. Poland*, wherein the first pilot judgment was issued.¹⁵¹ The applicant, Andrzej Broniowski, lost his property as a result of the westward shift of Poland's borders after the Second World War. Despite several years of pursuit, he neither recovered his property nor any form of compensation, although there was legislation in place guaranteeing such restitution. The issue of compensation for former property owners remained unresolved even under the new democratic regime.¹⁵² In considering the complaint, the Court found that Poland had violated the right to the peaceful enjoyment of possessions (Article 1 of Protocol No. 1), and the case revealed the existence of a structural problem within the Polish legal system that prevented a large number of individuals (80,000 people) from peacefully enjoying their property rights. Consequently, the Court ordered that appropriate legal and administrative measures be implemented to ensure that other claimants could either exercise their property rights in the "Eastern Borderlands" or receive equivalent compensation. Thus, in July 2005, Poland enacted new legislation providing financial compensation in exchange for the abandoned Eastern Borderlands property.¹⁵³

From the outset, the majority of cases brought by Polish citizens concerned complaints regarding the ineffective justice system and excessively lengthy court proceedings, which Poland had inherited from the

¹⁴⁹ *Case of Tysiąc v. Poland*, App. No. 5410/03, 20 March 2007; *Case of R.R. v. Poland*, App. No. 27617/04, 26 May 2011; *Case of P. and S. v. Poland*, App. No. 57375/08, 30 October 2012.

¹⁵⁰ *Case of Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, App. Nos. 28761/11 and 7511/13, 24 July 2014.

¹⁵¹ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 199.

¹⁵² See: *Case of Hutten-Czapska v. Poland*, App. No. 35014/97, 19 June 2006.

¹⁵³ Dz.U. 2005 No. 169 pos. 1418

previous regime.¹⁵⁴ In the Proszak case, which was decided on 16 December 1997, with facts dating back to the communist era, the primary complaint of the applicant was the excessive length of civil proceedings. The complaint filed by Bronisława Proszak concerned prolonged civil proceedings surrounding a lawsuit for damages brought by Ms. Proszak against her neighbour, which she argued constituted a violation of Article 6§1 of the Convention.¹⁵⁵ The Court found that, while the proceedings had been lengthy, the delays were largely caused by the claimant's own litigious behaviour. In fact, the Polish judicial authorities had made every effort to expedite the proceedings. Consequently, the Court concluded that, in light of the circumstances, there had been no violation of Article 6§1 of the Convention, marking one of the few cases wherein the Court sided with the government. However, in subsequent cases brought against Poland, the Court extensively addressed the issue of excessive delays in both criminal, civil, and administrative proceedings.

A significant case for the reform of criminal law in Poland was that of Andrzej Kudła, who was accused of fraud and spent a substantial portion of the proceedings in pre-trial detention.¹⁵⁶ The applicant claimed that the criminal proceedings against him were excessively prolonged, lasting over 10 years, which violated his right to a fair trial as guaranteed by Article 6§1 of the Convention. Additionally, given that Kudła suffered from numerous health issues, he argued that the healthcare provided during his pre-trial detention was inadequate, thereby also violating Article 3 of the Convention (prohibition of inhuman and degrading treatment). In addressing these complaints, the Court found that the excessive delays in Kudła's criminal proceedings were incompatible with the Convention's requirement for cases to be heard within a reasonable time. The Court emphasised that states have an obligation to provide an effective remedy to address and prevent the excessive length of proceedings.¹⁵⁷ However, the Court did not find a violation of Article 3, despite the unsatisfactory conditions of medical care provided, as they did not reach a level that could be considered inhuman or

¹⁵⁴ Nowicki, 2002, p. 174; Ministerstwo Spraw Zagranicznych, 2022, p. 50.

¹⁵⁵ *Case of Proszak v. Poland*, App. No. 25086/94, 16 December 1997.

¹⁵⁶ *Case of Kudła v. Poland*, App. No. 30210/96, 26 October 2000.

¹⁵⁷ Because of the lack of an effective measure in national law to combat the lengthiness of criminal proceedings within the meaning of Article 13 of the ECHR, the ECtHR found a violation of the Convention. Consequently, a provision allowing complaints regarding the lengthiness of court proceedings was introduced into the Polish legal order. Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 358.

degrading treatment. For the Polish authorities, the judgment in Kudła was of significant importance, as it was the first time the Court had so clearly recognised the necessity of an effective domestic remedy in relation to Poland.¹⁵⁸

The impetus for introducing changes in administrative procedure came from the case of *Fuchs v. Poland*.¹⁵⁹ The applicant, Maria Fuchs, claimed that the administrative proceedings concerning the restitution of her property were excessively long and drawn-out, lasting over 10 years. The proceedings significantly exceeded the reasonable time required by the Convention, as they prevented the swift and fair resolution of her case. The Court, agreeing with the applicant, held that the length of the proceedings was excessive and disproportionate to the complexity of the case, and consequently, Poland had violated Article 6§1 of the Convention. Similarly, in the case of *Majewski v. Poland*, the Court found that the delays in the proceedings concerning the restitution of the applicant's property were excessive and unjustified.¹⁶⁰ The applicant sought the restitution of property nationalised after the Second World War; however, the administrative proceedings lasted many years without a resolution. These judgments were part of a series addressing the issue of excessively lengthy proceedings in Poland, highlighting a systemic problem in the efficiency of public administration. The Court emphasised the state's obligation to ensure that administrative proceedings are conducted efficiently, and citizens have access to prompt and effective protection of their rights.¹⁶¹

Similar judgments were issued in cases concerning excessively lengthy civil proceedings such as that of *Howiecki v. Poland*,¹⁶² wherein the Court emphasised that the excessive length of the proceedings not only

¹⁵⁸ *Case of Howiecki v. Poland*, App. No. 27504/95, 4 October 2001. Similarly, in the case of the complainant Bąk, ECHR found that Poland violated Article 6(1) of the European Convention on Human Rights (ECHR), as the proceedings were not concluded within a reasonable time. The Court further emphasised that the right to a prompt resolution of a case is a crucial element of procedural justice, and the excessive length of proceedings represents a systemic issue in Poland. See: *Case of Bąk v. Poland*, App. No. 7870/04, 16 January 2007.

¹⁵⁹ *Case of Fuchs v. Poland*, App. No. 33870/96, 11 February 2003.

¹⁶⁰ *Case of Majewski v. Poland*, App. No. 52690/99, 11 October 2005.

¹⁶¹ Por. Similarly, the Court ruled in the case of *Beller v. Poland*, App. No. 51837/99, 1 February 2006.

¹⁶² In this case, Andrzej Howiecki participated in a civil proceeding concerning a property dispute that lasted for over 7 years, starting in 1990. According to the Court, this constituted an excessive length of the proceedings.

violated the applicant's right to a fair trial but also pointed to a systemic problem with the excessive duration of judicial proceedings in Poland. However, it was the case of *Rutkowski and Others v. Poland* that became pivotal for legislative changes in Poland.¹⁶³ This case also concerned the excessive length of judicial proceedings, resulting from three complaints submitted to the ECtHR in 2011 and 2012. The applicants alleged that civil proceedings in Poland – lasting from several years to more than a dozen without a final resolution – were excessively prolonged. Despite the existence of a legal remedy in Polish law, the applicants claimed it was ineffective as it neither accelerated the proceedings nor provided adequate compensation for the delays. The ECtHR found this to be a violation by Poland not only of Article 6§1 but also of Article 13, which relates to the lack of an effective domestic remedy in civil proceedings. Additionally, in 2015, the ECtHR applied a pilot judgment procedure against Poland due to the widespread violations of the right to a trial within a reasonable time. In its judgment of 7 July 2015, the ECtHR held that Poland had violated Article 13 of the ECHR, as the national courts failed to follow the Court's jurisprudence regarding the assessment of reasonable time, particularly in considering the entire duration of domestic proceedings rather than just individual stages. The Court also provided guidance to the Polish authorities on how to address the problem of fragmented proceedings, where delays were assessed only at specific stages rather than as a whole. This judgment led to the amendment of Article 2(2) of the 2004 Act on Complaints for Violation of a Party's Right to Have a Case Examined in Preparatory Proceedings Conducted or Supervised by a Prosecutor and in Judicial Proceedings Without Unjustified Delay.¹⁶⁴ The amendment required that, when assessing whether a delay had occurred, the total duration of the proceedings was to be considered, from the initiation of the case until the resolution of the complaint, regardless of the stage at which the complaint was filed.¹⁶⁵ Ultimately, Poland introduced amendments to the Code of

¹⁶³ *Case of Rutkowski and Others v. Poland*, App. Nos. 72287/10, 13927/11, 46187/11, 7 July 2015.

¹⁶⁴ Orzeszyna, Skwarzyński and Tabaszewski, 2023, pp. 357-358.

¹⁶⁵ The amendment to Article 2 of the 2004 Act aimed to take into account the total duration of the proceedings – from their initiation to the consideration of the complaint – regardless of the stage at which the complaint was filed. Before the amendment, the regulations allowed for an assessment of delays only for a portion of the proceedings, which led to ineffective protection of the parties' rights. After the changes, the regulations

Civil Procedure and the Code of Criminal Procedure in 2019, aimed at addressing the issue of poor organization of hearings, which had been identified as one of the causes of the excessive length of proceedings.¹⁶⁶

In addition to cases concerning the excessive length of proceedings, the Court also addressed cases brought against Poland related to fair trial rights before the ECtHR, including on the lack of access to a court,¹⁶⁷ limited right to defence,¹⁶⁸ lack of public hearings,¹⁶⁹ lack of judicial independence and impartiality,¹⁷⁰ refusal to enforce final judgments,¹⁷¹ and inadequate reasoning in court decisions.¹⁷²

In these cases, the Court's judgments and recommendations were generally used by the legislature in subsequent judicial reforms.¹⁷³ With regard to changes in the general judiciary, the case of *Iwańczuk v. Poland* deserves particular attention,¹⁷⁴ wherein the ECtHR examined the issue of the applicant's right to a defence and fair trial. The applicant, Andrzej Iwańczuk, was charged with robbery and sentenced to imprisonment. However, throughout the trial, he was not granted access to legal counsel, nor was he afforded an effective defence. Moreover, during sentencing, the court passed judgment in the absence of a defence lawyer, which the Court found to be a violation of Article 6§1 and Article 6§3(c) of the Convention. Similarly, in the case of *Dzieciak v. Poland*, the Court held that Poland had violated the provisions of the ECHR, as the applicant, Andrzej Dzieciak, who had been charged with a criminal offense, was not given adequate opportunities to consult with his lawyer at crucial stages of the proceedings.¹⁷⁵ This impacted his ability to defend himself throughout the

consider the cumulative duration of the proceedings, better fulfilling the right to have a case heard within a reasonable time.

¹⁶⁶ Orzeszyna, Skwarzyński and Tabaszewski, 2023, pp. 357-358; Ministerstwo Spraw Zagranicznych, 2017, pp. 168-175.

¹⁶⁷ *Case of Kreuz v. Poland*, App. No. 28249/95, 19 June 2001.

¹⁶⁸ *Case of Siałkowska v. Poland*, App. No. 8932/05, 22 March 2007; *Case of Staroszczyk v. Poland*, App. No. 59519/00, 22 March 2007.

¹⁶⁹ *Case of Wizeraniuk v. Poland*, App. No. 18990/05, 5 July 2011.

¹⁷⁰ *Case of Reczkiewicz v. Poland*, App. No. 43447/19, 22 July 2021; *Case of Dolińska-Ficek and Ozimek v. Poland*, App. Nos. 49868/19, 57511/19, 8 November 2021.

¹⁷¹ *Case of Broniowski v. Poland*, App. No. 31443/96, 22 June 2004.

¹⁷² *Case of Piętka v. Poland*, App. No. 34216/07, 3 November 2009.

¹⁷³ Ministerstwo Spraw Zagranicznych, 2024, p. 4.

¹⁷⁴ *Case of Iwańczuk v. Poland*, App. No. 25196/94, 15 November 2001.

¹⁷⁵ *Case of Dzieciak v. Poland*, App. No. 77766/01, 9 December 2008.

trial, which constituted a violation of his fundamental right to a defence, protected under Article 6§3(c) of the ECHR.¹⁷⁶

The ECtHR also examined the right of access to the Supreme Court and the Constitutional Tribunal as institutions responsible for ensuring the legality of judicial decisions and the protection of constitutional rights. This right is considered a key element of the right to a fair trial.¹⁷⁷ In the case of journalist Jan Wizeniaruk, who claimed that he had been deprived of the opportunity to appeal a conviction for defamation in criminal proceedings, the Court found that there had been a violation of Article 6 (right to a court). The refusal to hear his cassation appeal was deemed to have infringed upon his right to a fair trial.¹⁷⁸ In particular, in the cases of *Siałkowska v. Poland* (no. 8932/05) and *Staroszczyk v. Poland* (no. 59519/00), the applicants alleged a violation of their right of access to the Supreme Court.¹⁷⁹ The applicant was not informed that court-appointed lawyers refused to file cassation complaints, which limited their right to a court.. Consequently, the applicants claimed their right to a fair trial was breached. Specifically, the court-appointed lawyers declined to submit cassation complaints but failed to inform their clients of this decision in a timely manner, which, according to the applicants, prevented them from independently attempting to file a cassation appeal. Thus, the applicants were denied the opportunity to effectively file a cassation appeal with the Supreme Court, restricting their right to a fair trial under Article 6§1 of the Convention. In both cases, the Court held that the lack of proper notification regarding the refusal to file a cassation appeal by the court-appointed lawyers constituted a violation of Article 6§1 of the ECHR, as it deprived the applicants of a real opportunity to use this legal remedy. These judgments provided a pretext for the Polish government to undertake broader reforms of the Constitutional Court and the Supreme Court. However, these reforms did not gain widespread approval. The outcome of these reforms led to two prominent rulings in the cases of *Xero Flor*¹⁸⁰ and *Wałęsa*,¹⁸¹ which confirmed the existence of a systemic problem related to the improper composition of courts and the flawed functioning of extraordinary remedies. These cases highlighted

¹⁷⁶ *Case of Por. R.D. v. Poland*, App. Nos. 29692/96 and 34612/97, 18 December 2001.

¹⁷⁷ *Case of Wizeraniuk v. Poland*, App. No. 18990/05, 5 July 2011.

¹⁷⁸ Orzeszyna, Skwarzyński and Tabaszewski, 2023, p. 228.

¹⁷⁹ *Case of Siałkowska v. Poland*, App. No. 8932/05, 22 March 2007; *Case of Staroszczyk v. Poland*, App. No. 59519/00, 22 March 2007.

¹⁸⁰ *Case of Xero Flor w Polsce sp. z o.o. v. Poland*, App. No. 4907/18, 7 May 2021.

¹⁸¹ *Case of Wałęsa v. Poland*, App. No. 50849/21, 23 November 2023.

deeper issues within the judiciary, particularly regarding judicial appointments and the effective operation of mechanisms intended to ensure justice and legal oversight.

In the Xero Flor case, the applicant was an agricultural company that, after exhausting remedies in the general courts, filed a constitutional complaint with the Constitutional Tribunal. However, on 5 July 2017, the Tribunal, by a majority of three votes to two, issued a decision to discontinue the proceedings, a decision with which Xero Flor disagreed. The company, as the applicant, challenged the legality of the Constitutional Tribunal's composition, arguing that one of the judges had been appointed in a manner inconsistent with the Constitution. The ECtHR found that the participation of a judge whose appointment raised constitutional concerns violated Article 6§1 of the Convention. Consequently, the Court held that the composition of the Constitutional Tribunal compromised its independence and impartiality, leading to a violation of the company's right to a fair trial.¹⁸² Similarly, the issue of proper judicial appointments, as a condition for a fair trial, arose in the Wałęsa case. The applicant alleged that the ruling in his case – within the framework of the new extraordinary appeal procedure submitted to the Supreme Court – was delivered by unlawfully appointed judges. In his view, this violated his right to a fair trial and the principle of legal certainty, and negatively impacted his reputation. Responding to the applicant's arguments, the ECtHR found a violation of Article 6§1 of the ECHR concerning the right to an independent and impartial tribunal, and the principle of legal certainty. Additionally, the Court found a violation of Article 8 of the ECHR, which relates to the respect for the applicant's private and family life. The Court held that the current structure of the extraordinary appeal in the Polish legal system was flawed. As part of its pilot judgment, the ECtHR ordered the Polish authorities to address the systemic problems within the judiciary, including reforms to Poland's judicial appointment process and the institution of extraordinary appeals.¹⁸³ The judgment was finalised on 23 February 2024 and is currently awaiting a response from the Polish authorities.

¹⁸² Notably, the Polish government contested this ruling, arguing that the ECtHR does not have the competence to assess the validity of the appointment of Constitutional Tribunal judges, considering it a domestic matter of a member state and a violation of the principle of sovereignty. See: Florczak-Wątor, 2023, pp. 115-135.

¹⁸³ See: *case of Grzęda v. Poland*, App. No. 43572/18, 15 March 2022.

6. Conclusion

Poland's accession to the CoE has altered the political conditions, the country's economic situation, and the legal framework within which Polish society operates. After 1991, the social transformation affected the standard of living and quality of life of citizens, which in turn influenced their views on shared European values. The approach to the protection of human rights and democratic standards also evolved, with Poland beginning to actively participate in the bodies and committees of the CoE at all levels. Integration with the structures of the CoE also strengthened the Polish legal system, enabling better monitoring of compliance with European standards of rule of law and democracy. However, this was not a linear process, as the political dynamics, which have undergone significant evolution in recent years, affected mutual dialogue and understanding.

In analysing the processes of Poland's constitutional transformation after its accession to the CoE, one must affirm the thesis of the undeniable influence of this organisation's body of work, including the impact of Strasbourg case law, on Polish legislation. The multidirectional dialogue contributed to Poland's swift adaptation to the democratic and legal requirements promoted by the CoE. Even in the early years of its membership, Poland became a promoter of these values, particularly in Central and Eastern Europe and across the post-Soviet space. The rapid implementation of CoE standards, particularly the ECHR, was made possible by close political and legal cooperation, and by the involvement of institutions such as the CoE's Information Office in Warsaw, established on 1 November 1991.

Today, Poland and the CoE face common challenges related to the migration and humanitarian crisis¹⁸⁴, dynamic social and demographic changes in Europe, and unforeseeable crises such as the COVID-19 pandemic, which impact the current model of human rights protection. As an active member of the CoE, Poland should continue to cooperate in strengthening the rule of law, democratic institutions, and further enhancing the protection of human rights.

¹⁸⁴ Orzeszyna, 2013, pp. 237-252

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SIMONI TAKASHVILI *

Protection of Human Rights in Georgia under the European Convention on Human Rights**

ABSTRACT: The present study analyses the stages of human rights development in Georgia. The introductory part of the work focuses on the legal environment after Georgia gained independence in the early 20th century, a period that was short-lived as Georgia soon lost its independence and became part of the Soviet Union.

After the Soviet Union established its regime in Georgia, the protection of human rights was virtually non-existent for nearly 70 years. The next component of the study involves a comprehensive analysis of the relationship between Georgia and the Council of Europe (CoE) from a human rights perspective. Additionally, it examines Georgia's participation as a state party to CoE human rights conventions and the impact of the European Convention on Human Rights (ECHR) on Georgia, based on legal literature.

The study also analyses the process and timeline of Georgia's accession, succession, and ratification of the ECHR, as well as the human rights protection obligations arising from the ECHR and their effect on the Constitution of Georgia. Furthermore, a significant portion of the work is dedicated to the major legislative developments in Georgia influenced by the ECHR, along with an examination of the most important cases in which Georgia was the respondent and that were adjudicated by the ECHR.

KEYWORDS: Human Rights, Constitution, Human Rights Convention, Protection of Human Rights, Georgia as a State Party to the Convention, European Convention on Human Rights, Case Law.

* Associate Professor of Sulkhani-Saba Orbeliani University, Georgia.
<https://orcid.org/0000-0001-8608-170X>, s.takashvili@sabauni.edu.ge.

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1. Introduction

The preservation of human rights is the most pressing concern in modern law and the rule of law in general. Georgia's Constitution confirms fundamental human rights and freedoms. Individual laws and subordinate normative actions are tangible expressions of the rights and freedoms of the Constitution.

With respect to human rights and freedoms, the most important legal document, together with the Georgian Constitution, is the European Convention on Human Rights (ECHR), which went into effect in Georgia on 20 May 1999. The Convention, as one of the first actions to give binding effect to the rights enshrined in the Universal Declaration of Human Rights, is Georgia's most significant legal document for human rights protection.

This study examines the stages of development of human rights and freedoms in Georgia, the effect and implementation of the revised treaties of the Council of Europe (CoE) in Georgia, and the influence and impact of the ECHR on the development of Georgian law and the legal system. From this perspective, certain well-known and significant court rulings are examined, including critical concerns and issues concerning Georgia.

2. Historical Development of Human Rights in Georgia

2.1. Role of Georgia's First Constitution in the Protection of Human Rights

The recognition and development of human rights in Georgia over the last century can be conditionally divided into four parts or periods. The first part covers the Constitution of 1921 and the rights enshrined in the Constitution. The second part encompasses the period of Sovietisation of Georgia, during which it was futile to discuss human rights and freedoms. The third part covers the period after the independence of Georgia, when a new constitution was adopted in 1995 and basic human rights and freedoms were established. The fourth part covers the period from the amendments made to the Constitution related to the large-scale constitutional reform of 2018 to the present day.

Of these four conditional periods, the issue of rights established by the first constitution is of particular interest. For Georgia, in the early 20th

century, global and local political-economic events were developing interestingly on the one hand and dramatically on the other.

The first constitution of independent Georgia was adopted in 1921, but the constitution was not in force for a single day.¹ It was based on the principles of the Act of Independence of Georgia adopted on 26 May 1918. Owing to the Soviet occupation, the constitution could not actually come into force, as it was adopted under the conditions of war; in this war, Georgia was defeated, which led to total occupation of the territory of the Democratic Republic of Georgia.² Thus, it can be said that the first constitution was a highly significant and progressive legal document for the Georgian state at that time, which had, in addition to a legal effect, an ideological impact. The idea was freedom and independence of the country, but unfortunately, it could not be realised, because for the next 70 years, Georgia became part of the Soviet Union.

The Constitution of Georgia of 1921 reflects the most progressive legal and political views and trends, newly formed in Western Europe of that period, although still existing in theory: therein, the parliamentary system provided for the constitutional prohibition of the death penalty, freedom of speech, universal suffrage (including, at that time, the rare electoral equality of men and women), the constitutional legalisation of the jury institution, the so-called Corpus Hebea, and many other rights, which stood out for their progressiveness not only among the existing legal systems of the time but also among Western European countries.³

Importantly, the list of rights defined in the Constitution is not exhaustive and it is stated that the guarantees and rights enumerated in the Constitution do not override other guarantees and rights that are not mentioned there, but derive in themselves from the principles recognised by the Constitution.⁴ Accordingly, as recognised in the legal literature, it can be said that the text of the Constitution of Georgia of 1921 and its general structure meet the requirements of a modern liberal-democratic constitution.⁵

¹ Kublashvili, 2019, p. 32.

² Matsaberidze, 2021, p. 75.

³ Public Defender (Ombudsman) of Georgia, 2021.

⁴ Article 45 of the 1921 Constitution of Georgia; Vardosanidze, 2021, p. 62.

⁵ Arnold, 2021, p. 61.

2.2. *The Constitution of Georgia of 1995 and Human Rights*

Following the collapse of the Soviet Union and the restoration of Georgia's independence, Georgia adopted a constitution on 24 August 1995. For the second time in Georgia's history, fundamental rights were recognised and enacted by the 1995 constitution.⁶ In the preamble, the 1995 Constitution of Georgia states that the Constitution was adopted on the basis of centuries-old traditions of statehood of the Georgian people and the historical and legal heritage of the 1921 Constitution of Georgia.

In 2018, the primary edition of the Constitution underwent a fundamental change. The second chapter of the old and current edition is a catalogue of fundamental rights.⁷ According to the Constitution of Georgia, there are no grounds for restricting certain fundamental rights. Such a right is considered absolutely guaranteed and the state has no right to limit it in any case, even in cases established by law.⁸ However, most fundamental rights can be limited by the state, and this limitation is embedded in the articles of the constitution itself.⁹

2.3. *The 2018 Constitutional Reform in Georgia and the New Regulation of Human Rights*

Constitutional reform, which took place in Georgia during 2017–2018, aimed to modify the whole concept of regulation of human rights in the basic law.¹⁰ This reform renewed even the structure of the basic law, automatically changing the second chapter of the constitution related to human rights.¹¹ Several articles and human rights were displaced to other chapters and some new rights were added to the new text of the constitution.¹²

The order of rights in the second chapter of the Constitution does not suggest their hierarchy, although it is worth noting that after the constitutional reform of 2018, the chapter begins with the inviolability of human dignity, which once again emphasises the value system of the state.

⁶ Kublashvili, 2019, p. 32.

⁷ Ibid. pp. 32-33.

⁸ Ibid. pp. 36-37.

⁹ Ibid. p. 37.

¹⁰ Gegenava, 2013, p. 113.

¹¹ Ibid.

¹² Ibid. p. 112.

Human dignity has become the starting point for the development of modern human rights and the main basis for the legitimacy of rights.¹³

The Constitution of Georgia provides for two general principles of ensuring fundamental human rights: 1. The exercise of fundamental human rights must not violate the rights of others and 2. The restriction of a fundamental human right must be consistent with the importance of the legitimate aim it serves to achieve.¹⁴

3. Relationship between Georgia and the CoE from a Human Rights Perspective (National Reports, Scholarly Discussions etc.)

Georgia is a signatory to numerous United Nations and CoE human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁵

Georgia joined the CoE as its 41st member on 27 April 1999. Consequently, it accepted and committed to meet certain obligations outlined in the Parliamentary Assembly of the CoE's opinion 209 (1999). Georgia has accepted the responsibility imposed by Article 3 of the Charter on all member states: to preserve the ideals of pluralistic democracy and the rule of law, as well as to safeguard the rights and fundamental freedoms of all individuals within its authority.¹⁶ In one of its rulings, the European Court of Human Rights declared that incorporating the European Convention into national legislation is a particularly effective method of carrying out the requirements of the Convention.¹⁷ Similar to the majority of other nations that have signed the ECHR, Georgia, has recognised the Convention as part of its legislation. In Georgia, the European Convention may establish obligations and rights for persons and legal entities. Any natural or legal person may use the provisions of the European Convention before a court or administrative authority to claim a violation of human rights.¹⁸

¹³ Vardosanidze, 2021, p. 63.

¹⁴ Ibid.

¹⁵ Congress of Local and Regional Authorities of the CoE, 2021, p. 12.

¹⁶ CoE, 2023, p. 6.

¹⁷ *Case of Ireland v. the United Kingdom*, App. No. 5310/71, 18 January 1978.

¹⁸ Korkelia, 2007, p. 26.

All member states bear primary responsibility for the successful execution of the ECHR and the case law of the European Court of Human Rights (ECtHR) on a national level. To be able to apply and monitor the Convention and other human rights standards in practice, stakeholders in the justice system, relevant state institutions (including law training institutions), and civil society must further improve their access and knowledge of the leading principles and standards of the Convention. Following the publication of a European Commission report on Georgia's application to join the European Union, which urged the country to 'adopt a law whereby Georgian courts proactively take into account the decisions of the European Court of Human Rights', the CoE backed the authorities in amending 11 national legislative acts. As a result of these developments, European Court case law was made obligatory and essential to court official training in state educational institutions (Higher School of Justice, Georgian Bar Association, and so on). This included modifications to Georgia's Criminal Procedure Code, which allowed for the re-opening of cases at the domestic level based on European Court of Justice decisions and rulings.¹⁹

At the meeting held on 13 June 2022, through the Democracy Reporting Group (GR-DEM), the Committee of Ministers discussed the report on the implementation of the CoE Action Plan 2020–2023 in Georgia (covering the period from January 2020 to March 2022). It welcomed the progress made in this direction in the country and encouraged the achievement of all tasks set out in the plan.²⁰

The judgments of the ECtHR, which the Committee of Ministers reviews under the strengthened supervision procedure, concern several areas, including:²¹

- Inadequate investigation of allegations of violation of the right to life and mistreatment, mainly by state agents;
- Unlawful detention and use of restrictions on rights for unlawful purposes;
- Lack of state mechanisms to protect members of religious communities from attacks and ineffective investigation of such cases;
- Inadequate protection from attacks based on homophobic prejudice and ineffective investigation of such facts; failure to ensure freedom of assembly for LGBTI activists;

¹⁹ CoE, 2023, p. 16.

²⁰ Ibid. p. 11.

²¹ CoE, 2029.

- Failure to take preventive measures to protect victims from domestic violence and investigate law enforcement inaction on such complaints;
- Failure to ensure adequate procedures for legal gender recognition.

In February 2022, the Commissioner for Human Rights at the CoE paid a visit to Georgia with the aim of addressing discrimination against LGBTIQ individuals and religious minorities, as well as advancing labour rights, environmental human rights, and tolerance. The Commissioner highlighted the necessity of imposing criminal penalties on people or groups that encourage violence or promote hatred towards minorities. The Commissioner emphasised the necessity of adequate environmental protection measures as well as the significance of a safe environment for the enjoyment of human rights. Reactions to the creation of the Department of Human Rights Protection and Investigation Quality Monitoring of the Ministry of Internal Affairs (MIA) have been favourable. Nonetheless, there are suggestions for a dedicated police division to look into hate crimes.²²

In March 2023, the Parliament of Georgia adopted the National Strategy for the Protection of Human Rights for 2022–2030. This is the second strategy for the protection of human rights in Georgia, which aims to improve the legislation regulating human rights and create suitable conditions for its implementation and realisation. The CoE continues to support Georgia in strengthening its national capacity to initiate and implement reforms in the field of human rights protection, including in the following ways: more effective implementation of the ECHR at the national level, environmental protection in the context of human rights protection, business and human rights, human rights in the field of biomedicine, promotion of freedom of expression and media freedom, gender equality, combating violence against women and domestic violence, children's rights, non-discrimination in the field of human rights, the protection of human rights, and the promotion of human rights and fundamental freedoms. These actions will help Georgia achieve the Sustainable Development Goals.²³

In Georgia, local human rights advocacy and protection are greatly aided by the CoE's Congress of Local and Regional Authorities. It collaborates with different parties to evaluate the state of human rights and raise standards in local government. The legislative and institutional framework of human rights in Georgian local governance is subject to a rigorous evaluation by the Congress to ensure compliance with global

²² CoE, 2023, Report of the CoE Commissioner for Human Rights, pp. 7; 10; 15; 27.

²³ CoE, 2023, p. 15.

obligations. It examines how civil society organisations (CSOs), municipalities, the Public Defender (Ombudsperson) of Georgia, and local and federal authorities collaborate to promote human rights. Furthermore, the National Association of Local Authorities of Georgia (NALAG) and local authorities' actions to raise local human rights standards are recognised by Congress.²⁴

The evaluation emphasises fundamental values such as equality; non-discrimination; and safeguarding vulnerable populations including minorities, victims of violence, people with disabilities, older individuals, young people, children, and the homeless. A collaborative approach comprising stakeholders such as the Public Defender's Office of Georgia, NALAG, CSOs, and local government representatives serves as the foundation for the complete review. This cooperative strategy guarantees a comprehensive assessment of human rights activities. Furthermore, the Congress provides targeted recommendations and insights to bolster multilevel cooperation for sustainable human rights protection at the local level in Georgia. The assessment underscores various human rights principles, including equality, non-discrimination, gender equality, children's rights, and the rights of persons with disabilities, reflecting a broad and inclusive perspective on human rights governance.²⁵

The Assessment Report on Human Rights at the Local Level in Georgia's recommendations highlights the necessity of a multipronged strategy to improve human rights governance and practices. The advocacy for proactive steps to improve citizen engagement and need-based programming, which emphasises the significance of inclusive and responsive local governance, is at the heart of these proposals.²⁶

Additionally, the paper promotes Georgian local authorities' participation in state policy formation, which is thought to be crucial for improving their ability to carry out their ambitions for human rights. The creation of working groups to promote more efficient collaboration and the application of interagency coordination mechanisms are measures to assist this process. It is advised that local authorities participate in targeted training programs to raise knowledge and capacity, emphasising the value of ongoing education and skill development.²⁷

²⁴ Congress of Local and Regional Authorities of the CoE, 2021, p. 5.

²⁵ Ibid. p. 5.

²⁶ Ibid. pp. 50-56.

²⁷ Ibid.

4. Georgia as a State Party of CoE Human Rights Acts

4.1. ECHR

The ECHR was opened for signature in Rome on 4 November 1950 and entered into force in 1953. Georgia ratified this convention on 20 May 1999. This is a unique document that has had a tremendous impact on the protection of human rights in Europe, because the drafters of the Convention did not only lay down a list of human rights but also designed an innovative system to monitor compliance.²⁸

Most of the rights and obligations stipulated in the convention do not have an absolute nature.²⁹

The main objective of the Convention system is to stipulate effective protection of the fundamental rights guaranteed in the convention and its protocols for everyone within the jurisdiction of the state parties.³⁰

The rule of law has been described as one of the fundamental principles of a democratic society and it is one of the cornerstones of the convention.³¹

The right to a fair trial is an important principle, central to the existence of the rule of law principle. Accordingly, the rule of law, which is stipulated in the preamble of the convention, cannot exist if there is no fair trial.³²

In recent Georgian court cases, the amount of citations and indications of the precedents and case law of ECtHR has increased. There are several cases³³ in which the court analyses the case materials and legal principles based on the ECtHR case law.

²⁸ Gerards, 2023, p. 1.

²⁹ Ibid. p. 286.

³⁰ Ibid. p. 10.

³¹ Schabas, 2017, p. 71.

³² Ibid. p. 265.

³³ The Decision of the Civil Chamber of the Supreme Court of Georgia dated 5 July 2024, No. as-871-2024; the Decision of the Civil Chamber of the Supreme Court of Georgia dated 27 June 2024, No. as-789-2024; the Decision of the Civil Chamber of the Supreme Court of Georgia dated 14 June 2024, No. as-460-2024; the Decision of the Administrative Chamber of the Supreme Court of Georgia dated 7 June 2024 No. bs-756(k-22); the Decision of the Criminal Chamber of the Supreme Court of Georgia dated 13 June No. 207ap-24, and other cases.

Georgia is a member of many CoE conventions; among them, the following are the most important conventions:

- Convention on Human Rights and Biomedicine entered into force in Georgia on 1 March 2001; this is the first convention of CoE that explicitly enshrines dignity.³⁴
- CoE Convention on Action against Trafficking in Human Beings; according to this convention, trafficking constitutes a violation of human dignity³⁵
- European Social Charter
- CoE Convention on Cinematographic Co-production (revised) (Rotterdam, 2017)
- CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)
- CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
- CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
- Convention on the Transfer of Sentenced Persons
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows
- Convention on the Manipulation of Sports Competitions (the Macolin Convention)
- CoE Framework Convention on the Importance of Cultural Heritage for society, the so-called Faro Convention
- CoE Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events
- Framework Convention for the Protection of National Minorities
- European Convention on the Legal Status of Migrant Workers.

The ECHR, in a broader, functional sense, should be categorised as constitutional law for several reasons. These are substantive and institutional reasons: in content, the rights contained in the Convention, similar to those in other international treaties, are typologically constitutional in nature, as they concern the foundations of human existence

³⁴ Peers et al., 2021, p. 9.

³⁵ Ibid.

and are aimed at protecting individuals from encroachment by state authorities.³⁶

Similar to most states party to the ECHR, the Convention is recognised as part of Georgian law. In Georgia, the European Convention can create rights and obligations for natural and legal persons. Any natural or legal person may invoke the provisions of the European Convention before a court or administrative body and claim human rights violations on the basis thereof.³⁷

Georgia has also ratified protocols to the ECHR, including (but not limited to):

- Protocol No. 1 (Protection of Property, Right to Education, and Right to Free Elections) – This protocol extends the protection of property rights, the right to education, and the right to free elections.
- Protocol No. 4 (Prohibition of Imprisonment for Debt, Freedom of Movement, and Expulsion of Aliens) – This protocol prohibits imprisonment for debt, safeguards freedom of movement, and sets conditions for the expulsion of aliens.
- Protocol No. 6 (Abolition of the Death Penalty) – This protocol abolishes the death penalty in peacetime.
- Protocol No. 7 (Additional Rights in Criminal Proceedings) – This protocol includes additional rights in criminal proceedings, such as the right to appeal a conviction and the right to compensation for wrongful conviction.
- Protocol No. 12 (General Prohibition of Discrimination) – This protocol provides a general prohibition of discrimination in the enjoyment of any right set forth by law.
- Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
- Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms.
- Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms.
- Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

³⁶ Arnold, 2021, p. 22.

³⁷ Korkelia, 2007, p. 26.

- Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.

5. National Implementation (Process and Time of Accession/Succession/Ratification) of the ECHR

Georgia's post-Soviet transition reached a turning point with its admission to the CoE in 27 April 1999. To become a member of the CoE, Georgia had to pledge allegiance to the democratic, human rights, and rule of law ideals included in the ECHR. This move was not just symbolic; to bring national laws and practices into compliance with European norms, extensive institutional and legislative reforms were required. On 20 May 1999, Georgia ratified the ECHR. Six months after approval, on 20 November 1999, the ECHR entered into force.³⁸

Georgia's commitment to incorporating European human rights standards into its legal system was demonstrated by the country's ratification of the ECHR on 20 May 1999, and its subsequent coming into force on 20 November of the same year. Georgia was required by its ratification to make sure that its internal laws and judicial procedures upheld the liberties and rights protected by the ECHR. Georgia's legal system has had to undergo significant constitutional and legislative changes to include the ECHR. Georgia's Constitution was amended to guarantee that international treaties – such as the ECHR – supersede domestic legislation. The immediate application of the ECHR inside the domestic legal system was made possible by this fundamental guarantee.³⁹

The goal of further legislative changes was to bring national legislation into compliance with ECHR requirements. These changes covered a broad range of topics, such as freedom of speech, anti-discrimination, and criminal justice. For example, the mission of the ECHR for the protection of human rights was bolstered by changes made to the Criminal Code and the implementation of new anti-discrimination statutes.

One essential element of Georgia's attempts to implement the ECHR has been the creation of human rights institutions. The Human Rights and Civil Integration Committee of the Parliament and the Public Defender (Ombudsman) are two important organisations entrusted with upholding and

³⁸ Korkelia et al., 2004, pp. 2-10.

³⁹ Ibid.

advancing human rights in conformity with the ECHR. These organisations are crucial in resolving abuses of human rights and ensuring that administrative procedures respect ECHR tenets. Additionally, educational programs and public awareness campaigns are essential for promoting a human rights culture. The purpose of these initiatives is to educate the public about their rights under the ECHR and the safeguards in place to preserve those rights.

6. Human Rights Protection Obligations Deriving from the ECHR and Their Effect on the Constitution of Georgia

According to Article 4.2 of the Constitution of Georgia, 'The State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognised human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution'. Further, According to Article 4.5, 'The legislation of Georgia shall comply with the universally recognised principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia'.

After joining the ECHR, Georgia has gradually changed its Constitution and legal structure to reflect these duties, ensuring that fundamental rights such as freedom of expression, the right to a fair trial, the prohibition of torture, and protection against discrimination are safeguarded.

The second chapter of the Constitution is concerned with the preservation of human rights. Precisely, fundamental freedoms are a constitutive component of the Constitution, which is a legislative act with the greatest legal force, meaning that these rights are protected by the Constitution always and everywhere. According to Georgia's Constitution, fundamental freedoms are the guiding principles and foundation of the judicial system.⁴⁰

The right to life is guaranteed by Article 10 of the Constitution, according to which:

'1. Human life shall be protected. The death penalty shall be prohibited.

⁴⁰ Kublashvili, 2019, p. 41.

2. The physical integrity of a person shall be protected’.

This article directly corresponds to Article 2 of the Convention.

The first clause of Article 10 of the Constitution acknowledges the fundamental right to life. Human life is protected, and the death penalty is prohibited. It is worth mentioning that the right to life was acknowledged by Article 15 of the previous version of the Constitution, which included a specific measure of punishment – the death sentence – that might be granted by organic legislation for extremely egregious offenses against life before being completely abolished. Only the Supreme Court of Georgia had the authority to impose this penalty. This provision reflected the situation in Georgia at the time of adoption of the Constitution; in 1995, the Criminal Code of Georgia still allowed for this type of punishment, but this norm was no longer valid since 1997, when the said form of punishment was completely abolished. There is no constitutional foundation for reintroducing the death penalty, as it fundamentally contradicts Georgia's Constitution and the European Convention on the Protection of Human Rights.⁴¹

According to Article 11.1 of the constitution, ‘All persons are equal before the law. Any discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited’. This corresponds to Article 14 of the Convention and protocol 12, which prohibit discrimination. The Georgian Constitution completely adheres to this obligation; it should be noted that in Georgia, there is also a special law, called the law of Georgia “on the elimination of all forms of discrimination”. It can thus be said that the prohibition of discrimination is an essential component of both the ECHR and Georgia's domestic legal system, notably the Constitution. Georgia, as a signatory to the ECHR, is bound by Article 14, which forbids discrimination in the exercise of the rights and freedoms of the Convention. Furthermore, Georgia has adopted Protocol No. 12 to the ECHR, which broadens this ban to include discrimination in the exercise of any legally protected right.

Article 9 of the Georgian Constitution states that ‘human dignity shall be inviolable and protected by the state’. This concept is fundamental and provides a thorough safeguard against any sort of abuse that might damage personal dignity, such as torture or cruel treatment. The right to human dignity is therefore inscribed as a core element of Georgia's constitutional

⁴¹ Ibid. pp. 111-112.

structure, offering wide protections for people against state or private actor violations. Article 3 of the ECHR creates an absolute prohibition on torture, cruel or degrading treatment, or punishment, which has become one of the most important aspects of international human rights law. Georgia guarantees that the prohibition of torture is recognised as a key constitutional principle by linking Article 9 of its Constitution with Article 3 of the ECHR. This congruence indicates the state's commitment to upholding both national and international legal norms, as torture and other forms of inhumane treatment are not only illegal but also subject to strict inspection and legal penalties.

According to Article 12 of Georgia's Constitution, 'Everyone has the right to the free development of their personality'. This wide and fundamental right interacts with various other constitutional rights, demonstrating its comprehensive character and relationship to diverse facets of personal liberty. Several significant sections of the Georgian Constitution, including the Right to Privacy, Freedom of Religion, and Freedom of Opinion and Expression, strengthen and expand on this right. These constitutional safeguards relate to many provisions of the ECHR, therefore incorporating Georgia's international human rights commitments into its domestic legal system.

Article 15 of the Georgian Constitution establishes the Right to Personal and Family Privacy, declaring that 'Personal and family life shall be inviolable'. This right may be limited solely in conformity with the law to ensure national security or public safety, or to preserve the rights of others, as essential in a democratic society. This right is consistent with Article 8 of the ECHR, which provides the right to respect for private and family life, the home, and communication. Both sections seek to safeguard individuals against arbitrary or unlawful intrusion by the state or other bodies in their personal life.

Article 16 of Georgia's Constitution affirms that 'everyone has freedom of belief, religion, and conscience'. This is closely related to Article 9 of the ECHR, which also safeguards the right to freedom of thought, conscience, and religion. Both articles guarantee that people can freely exercise and profess their religious views without government intervention.

Article 17 of the Georgian Constitution ensures the right to freedom of thought, information, mass media, and the internet, guaranteeing that free expression of opinion is safeguarded. No one shall be harassed for holding

or expressing an opinion. Everyone has the freedom to freely receive and share information. Mass media must be free. Censorship should be prohibited. Everyone has the right to freely utilise the internet. This is consistent with Article 10 of the ECHR, which protects the right to freedom of speech, including the right to hold opinions and receive and impart information without interference from governmental authorities.

Article 21 of Georgia's Constitution, which provides freedom of assembly, closely conforms to Article 11 of the ECHR. Both sections respect individuals' basic right to peaceful assembly, which is a cornerstone of democratic society and assures citizens may express their opinions, advocate for their interests, and participate in public life without excessive official intervention. Article 22 of Georgia's Constitution, which provides freedom of association, relates to Article 11 of the ECHR. Both sections guarantee individuals' rights to freely create and join groups, such as political parties, labour unions, and other organisations, which are an essential component of democratic society.

Article 19 of Georgia's Constitution, which guarantees the right to property, corresponds to Article 1 of Protocol No. 1 to the ECHR. Both sections defend people's basic right to own, use, and dispose of their property, and they establish that property rights can only be deprived or interfered with under authorised conditions and for a valid public purpose.

Article 26 of the Constitution of Georgia guarantees several fundamental rights related to labour, trade unions, the right to strike, and freedom of enterprise. These rights correspond to various provisions of the ECHR and its associated case law, particularly relating to Article 11 of the ECHR (freedom of association) and additional protections concerning labour rights and economic freedoms.

Article 31 of Georgia's Constitution, which protects procedural rights, is closely related to Article 6 of the ECHR, which provides the right to a fair trial. Both sections promote the essential concepts of fairness, impartiality, and openness in judicial procedures, with an emphasis on the right to a public hearing before an independent and impartial tribunal within a reasonable time frame. This assures that persons facing criminal accusations or civil action are afforded due process rights, such as the presumption of innocence, the right to self-defence, and access to legal counsel.

Furthermore, both Articles 31 and 6 acknowledge particular procedural protections, such as the right to be promptly notified of criminal allegations, right to enough time and facilities to prepare a defence, and

right to cross-examine witnesses. These safeguards are critical for preserving the integrity of judicial procedures and preventing miscarriages of justice, as both frameworks require that legal processes be carried out in a manner that respects the rights and dignity of all parties concerned.

The human rights protection provisions imposed by the ECHR have had a considerable impact on Georgia's Constitution, assuring compliance with European legal norms. Georgia's constitutional structure clearly reflects key rights such as torture prohibition, freedom of assembly and association, property rights, and procedural safeguards in fair trials. Georgia has strengthened civil liberties protection by embracing ECHR principles, ensuring that individuals have rights that are commensurate with international norms, and judges frequently use ECoHR law for advice.

This alignment enhances Georgia's democratic institutions and the rule of law by incorporating the essential human rights safeguards of the ECHR into national legislation. The correlation between Georgia's Constitution and the ECHR, particularly in areas such as freedom of association, property protection, and procedural fairness, demonstrates the country's commitment to upholding human rights and ensuring that its legal system provides effective remedies and protections for its citizens.

7. Major Law-Making Processes that Transpired in Georgia Thanks to the ECHR

Court rulings are known to expose flaws in Georgian legislation as well as the activities of administrative, investigative, and judicial entities.⁴² The state is required to carry out the decision by taking express or implicit actions. The State's position may alter over time in the direction of the change anticipated by the ECtHR ruling, or vice versa (e.g. owing to the relocation of executive or legislative powers).⁴³

Certain decisions issued by the ECtHR against Georgia in recent years have established procedural breaches of Articles 2 and 3 of the Convention as a result of inadequacies discovered during the inquiry. Common issues have been noted in both legislation and investigative practice, including judicial bodies. One issue that emerges from all of the rulings in this category is the investigating agencies' independence and impartiality. In *Garibashvili v. Georgia*, the court underlined the importance of investigating

⁴² Tsereteli, 2016, p. 163.

⁴³ Ibid. p. 166.

agencies' independence from those involved in the events under inquiry for the probe to be effective. This entails not just a lack of hierarchical or institutional links but also actual autonomy.⁴⁴

In its decision in *Khaindrava and Dzamashvili v. Georgia*, the ECtHR stressed that the inquiry must be impartial and open to the victim's relatives. In *Tsintsabadze v. Georgia*, the European Court affirmed that the independence and impartiality of persons in charge of the inquiry are necessary elements for an efficient investigation. Although the participation of representatives from the MIA was stressed early in the inquiry, the MIA spearheaded the probe. The Court cited the institutional link and hierarchical subordination between the senior MIA officials involved in the case and investigators in charge of the case, concluding that during the MIA investigation, the investigation lacked significant independence and impartiality, which harmed its subsequent course. In *Mikiashvili v. Georgia*, a case involving an inquiry into alleged police mistreatment in prison, the Court pointed out a number of flaws, including a two-month delay in initiating the investigation and a late medical examination of the applicant.⁴⁵

Although the Court did not provide particular direction on the actions to be taken by the state in these circumstances, the Committee of Ministers' monitoring procedure stressed the need for broad measures. Furthermore, the Court's identification of flaws has allowed national human rights groups to rely on rulings of the European Court of Justice. Several legislative amendments have occurred in this domain. For example, in April 2013, Article 74 of the Prison Code was changed to reflect the 2011 *Enukidze and Girgvliani* ruling. Based on the court's conclusions, the weaknesses of the legislation surrounding the victim's involvement in investigative actions were identified, and adjustments to the Criminal Procedural Code were adopted to assure the victim's participation throughout the inquiry. These modifications acknowledge the victim's right to obtain information on the progress of the investigation and become acquainted with the contents of the criminal case, provided that this does not conflict with the interests of the inquiry (subparagraph "h" of Part One of Article 57). There is also the right to appeal to a court against a prosecutor's decision to deny victim status and have such status revoked after appealing to a higher level prosecutor. It should be highlighted that this privilege only applies to situations involving especially serious crimes (Art. 56(5)(6)), severely limiting court review of

⁴⁴ Ibid. pp. 167-170.

⁴⁵ Ibid.

prosecutor judgments. The victim may also file an appeal against the prosecutor's decision to stop the inquiry or prosecution. Similarly, the right to appeal to the court is recognised only in circumstances of exceptionally serious crimes (Article 106(1)).⁴⁶

Changes have been implemented in accordance with the directives of the European Court of Justice to safeguard the independence and impartiality of the investigating bodies. The Order of the Minister of Justice No. 178 of 29 September 2010 on investigative subordination was replaced by the Order of the Minister of Justice No. 34 of 7 July 2013, but the issue of an institutional link between the investigative bodies and those involved in the events under investigation remains.⁴⁷

In 2023, as in previous years, the Human Rights Protection Department of the Georgia Prosecutor's Office monitored facts of unlawful treatment by an official or individuals equivalent to him/her, as well as criminal cases under investigation.⁴⁸

To remove prejudice and prevent hate crimes, the state is constantly introducing comprehensive measures. On 5 September 2022, the Government of Georgia adopted the National Strategy for the Protection of Human Rights for 2022–2030, which was then submitted to Parliament for ratification. The Georgian parliament adopted the policy on 23 March 2023. The aforementioned plan was established in collaboration with the government administration, representatives of international and non-governmental organisations, and appropriate state entities. The comprehensive strategic document addresses all fundamental rights and freedoms, with an emphasis on protecting the rights of vulnerable groups, developing anti-discrimination measures, increasing institutional capacity, and so on. The Strategy has four key aims, the third of which is to reflect constitutional guarantees of equality in public policy and put them into effect, as well as to realise human rights and freedoms without discrimination. The Strategy seeks to put constitutional and international guarantees of equality into effect. Special emphasis is placed on promoting equality at all levels of the public and commercial sectors, removing situations that lead to inequality, and combatting intolerance, hate crimes, and other violations.⁴⁹

⁴⁶ Ibid. p. 172.

⁴⁷ Ibid. p. 173.

⁴⁸ Ministry of Justice of Georgia, 2024, p. 50.

⁴⁹ Ibid. pp. 69-70.

The state continues to prioritise the protection of minority rights and growing minority participation in civic life and public administration. From this perspective, the policy strives to put in place suitable measures to enhance minority engagement in social, economic, cultural, and political life while also strengthening an equitable environment. The third focus of the plan is to increase the protection of minority rights and contribute to the creation of a more equitable environment. It should be mentioned that to achieve the aims and objectives of the strategy, the Action Plan for the Protection of Human Rights of Georgia for 2024–2026 was designed and adopted by the Georgian government in December 2023. The administration of the Government of Georgia managed the document's development, with assistance from foreign organisations. Improving institutional democracy; assuring equitable enjoyment of civil, political, social, cultural, and economic rights; and improving equality and care policies for citizens impacted by the occupation are all objectives that play essential roles in the action plan. By approving the aforementioned declaration, the Georgian government confirms its commitment to the preservation of human rights and basic freedoms, which involves the constant and ongoing execution of a systematic and long-term human rights protection policy.⁵⁰

As a result of the reform carried out in the Prosecutor's Office of Georgia in 2022 and taking into account the recommendation of the Council of Prosecutors, the Department for the Protection of Human Rights was established by order of the Prosecutor General. The Department for the Protection of Human Rights closely cooperates with non-governmental and international organisations protecting human rights, as well as with the diplomatic corps and international organisations on issues within the competence of the Prosecutor's Office of Georgia. The Department of Human Rights Protection plays an important role in the process of reforming the Prosecutor's Office of Georgia as an institutionally independent, strong, and impartial human rights-oriented body.⁵¹

Combating hate crimes and ensuring victim-centred investigations are among the Special Investigation Service's top goals. In 2022, the Special Investigation Service established the Department for Monitoring and Analysing the Quality of Investigations to ensure high investigation quality,

⁵⁰ Ibid.

⁵¹ Ibid.

conduct internal monitoring of the investigative process, develop a unified investigative policy, and implement practices of the ECtHR.⁵²

On 23 March 2023, Georgia's Parliament passed the National Strategy for the Protection of Human Rights for 2022–2030, which was designed to improve the country's fundamental human rights and freedoms as well as institutional democracy. The key strategic direction identified in this paper is to improve the protection of minority and women's rights. The national plan aims to improve victim-centred responses to crimes motivated by intolerance based on discrimination, as well as to expand protection measures for victims of violence against women and/or domestic abuse. Various public-sector entities work to foster gender equality, safeguard women's rights, prevent domestic abuse, and contribute to the practical execution of legislative guarantees.⁵³

The group responsible for establishing the status of victims of violence against women and/or domestic violence under the interdepartmental commission working on gender equality, violence against women, and domestic violence has been eliminated as a result of legislative changes. This reform makes it simpler for survivors of violence to access public services. Prior to the legislative change, it was necessary to obtain the status of victim/survivor for gaining access to public services, including shelter, which in many cases represented a significant barrier and risk of secondary victimisation for a person experiencing violence in need of this service. Thus, the state's will stated by ratification of the Istanbul Convention ensures that Georgian legislation is consistent with the Convention – granting simple and unfettered access to support services by victims (without obstacles).⁵⁴

Extensive jail system changes were implemented between 2010 and 2014 to enhance medical treatment, and a new jail Code was enacted, which included the right to health in accordance with European prison rules. All prison establishments were equipped with doctors and psychiatrists to guarantee proper prevention and control of mental health disorders.⁵⁵

The 2010 Code of Criminal Procedure codified rules to enable timely judicial management of detention, including when the prosecutor transfers the case file to the trial court. Furthermore, under the Organic Law on

⁵² Ibid. p. 78.

⁵³ Ibid. p. 88.

⁵⁴ Ibid. p. 90.

⁵⁵ ECtHR, 2013; *Case of Jeladze v Georgia*, App. no. 1871/08, 18 March 2013

Common Courts of 2009, the ability of bailiffs to arrest persons was better constrained, and provisions were given for the conduct of a public hearing and the respect for equality of arms.⁵⁶

A modification to the Criminal Procedure Code in 2010 made it possible to receive compensation for wrongful detention, regardless of whether convicted or acquitted.⁵⁷

The adversarial concept was adopted into all criminal procedures, and the Criminal Procedure Code was amended in 2006 and 2007 to ensure the need for reasoned judicial rulings. The Code's 2010 modification expanded and strengthened one's right to be excluded from court costs where required to maintain one's ability to access court. The provision of restarting cases to give effect to the decisions of the ECtHR was added.⁵⁸

The Code of Civil Procedure, as revised in 2008, and the new Code of Criminal Procedure of 2010 established tougher time limitations and procedures.⁵⁹

Enforcement of judicial rulings was increased, in particular, by allocating a special budget in 2007 that allowed the state to fulfil past judgment debts and establishing a new enforcement organisation, the National Bureau of Enforcement. Enforcement was further improved in 2010 by amendments to the Civil Code, the Code of Civil Procedure, and the Enforcement Procedures Act, which allow for the forcible execution of cases in which the State is the debtor to be carried out by a special Department that requests the Finance Ministry to pay the amount owed by the Government Fund to the creditor. The Code of Civil Procedure allows compensation for damages and loss of income.⁶⁰

The 2017 Environmental Assessment Code mandated the conduct of a Strategic Environmental Assessment and Transboundary Environmental Impact Assessment for hazardous economic operations of both commercial

⁵⁶ *Case of Patsuria v. Georgia*, App. No. 30779/04, 6 November 2007; *Case of Kakabadze and Others v. Georgia*, App. No. 1484/07, 2 October 2012.

⁵⁷ *Case of Jgarkava v. Georgia*, App. No. 7932/03, 24 February, 2009.

⁵⁸ *Case of Donadze v. Georgia*, App. No. 74644/01, 7 March 2006; *Case of FC Mretebi v. Georgia*, App. No. 38736/04, 31 July 2007. Final on 31 January 2008. Rectified on 24 January 2008.; *Case of Gorgiladze v. Georgia*, App. No. 4313/04, 20 October 2009, Final on 20 January 2010.

⁵⁹ *Case of Kharitonashvili v. Georgia*, App. No. 41957/04, 10 February 2009, Final on 10 May 2009.

⁶⁰ *Case of "Iza" Ltd and Makrakhidze v. Georgia*, App. No. 28537/02, final on 27 December 2005.

and governmental organisations. The code ensures that the public has access to important information, participates in decision-making, and receives frequent public evaluations. Operations without the necessary authorisation carry administrative and criminal penalties. The Criminal Code was updated appropriately in 2017. Furthermore, the 2017 Law on Environmental Responsibility established a legal framework to prevent and redress major environmental harm using the "polluter pays" approach. Furthermore, the technical Regulation on Ambient Air Quality norms of 2018 guaranteed air quality assessment in compliance with European norms.⁶¹

The Civil Code was changed in 2004 to distinguish between value judgments and facts, as well as to provide a right to respond in the media and seek compensation for non-financial and pecuniary damages for violations of honour, dignity, private life, personal security, and reputation. The 2004 Freedom of Speech and Expression Law superseded the previous Press and Media Law. It defines defamation and distinguishes between defamation against a private individual and public personality. It states that the defendant must establish that a fact is incorrect and that he or she incurred prejudice as a result of its publishing. Concerning defamation against a public personality, the defendant's legal obligation is engaged if the plaintiff establishes that the defendant was aware that the fact was incorrect.⁶²

The challenged Law of 11 December 1997 and the Code of Administrative Procedure were changed in 2011 to allow victims of Soviet political persecution and their first-generation heirs to apply for monetary compensation. While the assessment of the appropriate amount of compensation was previously in the exclusive competence of the Tbilisi City Court, later amendments of 2014 enlarged the territorial jurisdiction.⁶³

In 2014 and 2015, legislative amendments to the electoral laws established detailed criteria for the invalidation of election results by the Central Electoral Commission, as well as a new mechanism for dispute resolution in the event of complaints against Precinct Election Commission decisions. In 2011, the Constitution was changed to provide inmates convicted of "crimes of little gravity" the right to vote. The Electoral Code was updated appropriately. In 2017, a new constitutional change banned

⁶¹ *Case of Jugheli and Others v. Georgia*, App. No. 38342/05, final on 13 October 2017.

⁶² *Case of Gorelishvili v. Georgia*, App. No. 12979/04, 5 June 2007. Final on 5 September 2007.

⁶³ *Case of Klaus and Yuri Kiladze v. Georgia*, App. No. 7975/06, final on 2 May 2010.

from voting only those in jail on a conviction for especially serious criminal acts.⁶⁴

8. Landmark Cases of Georgia before the ECtHR

8.1. *Georgia v. Russia (I)*[GC] (*Just Satisfaction*), 13255/07 31 January 2019

In the case *Georgia v. Russia (I)* (Application no. 13255/07),⁶⁵ the Georgian government accused Russia of carrying out a coordinated campaign of arrests, detentions, and expulsions of Georgian citizens living in Russia between September 2006 and January 2007. Following the September 2006 arrest of four Russian officers in Tbilisi on espionage charges – an act that Russia denounced as provocative – tensions between the two nations grew more intense. In retaliation, Russia allegedly started persecuting Georgian citizens on the basis of their nationality and race.

Thousands of Georgian citizens were held by Russian authorities at this time, frequently under terrible conditions, and many of them were later forced to leave the nation. According to reports, inmates endured filthy, cramped circumstances in addition to limited access to food and medical services. According to the Georgian government, these acts violated multiple articles of the ECHR, such as the right to liberty and security, the ban on torture and inhuman treatment, and the right to respect for one's private and family life. They also constituted a form of collective punishment and ethnic discrimination against Georgians.

According to its 2014 ruling in *Cyprus v. Turkey* (No. 25781/94, 12.05.14), which outlined three factors to be taken into account, the Court determined that Article 41 permits it to award reparations to State parties in inter-State cases. These factors include, '(1) the type of complaint made by the applicant Government, which must concern the violation of basic human rights of its nationals (or other victims), (2) whether the victims could be identified, and (3) the main purpose of bringing the proceedings'. The Court determined that Georgia's claim satisfied all three requirements as it addressed Russia's conduct of 'arresting, detaining, and collectively expelling Georgian nationals' in contravention of its ECHR responsibilities.

Georgia also submitted a claim for compensation for the victims who had been identified, not 'with a view to compensating the State', after being

⁶⁴ *Case of Ramishvili v. Georgia*, App. No. 48099/08, 31 May 2018.

⁶⁵ *Case of Georgia v. Russia (I)*, App No. 13255/07, 31 January 2019.

able to produce a "detailed list" of the victims. The Court stated that separate petitions pertaining to an interstate matter might be distinguished from an interstate case for just satisfaction. The Court granted Georgia €10,000,000 in non-pecuniary damages (for trauma, distress, anxiety, and humiliation) based on a list of at least 1500 Georgian nationals who were victims of at least a violation of Article 4 of Protocol 4, as well as the principles derived from and *Cyprus v Turkey* and *Varnava and others v Turkey* [GC].

The Court mandated that Georgia establish an efficient system, overseen by the Committee of Ministers, for allocating the awards to the various victims. Judge Dedov criticised this in his dissenting opinion, stating that it was unfortunate that the Court did not permit the Russian Government to distribute the award directly in cooperation with the Georgian Government. He contended that this diminished the Russian Federation's standing as a member of the CoE.

The ruling upheld the fundamental rights outlined in the ECHR, namely vis-à-vis the treatment of non-citizens and ban on mass deportation. It emphasised the need for nations to treat people with respect and dignity, irrespective of their nationality, and to ensure that the law is obeyed when someone is detained or expelled. This case was noteworthy because it addressed the more general problems of collective punishment and ethnic discrimination, and it established a crucial precedent for the defence of human rights in comparable situations.

8.2. *Enukidze and Girgvliani v. Georgia*

The ECHR rendered a decision in the *Enukidze and Girgvliani v. Georgia* case on 26 April 2011. The decision had several crucial and noteworthy consequences for Georgia's investigating departments.⁶⁶

The case dealt with the 2006 kidnapping, beating, and death of the applicants' son at the hands of many senior law enforcement officers, as well as the inadequate investigation and punishment that followed. The petitioners protested that the Government had only provided a portion of the evidence required for the application to be examined, and even that had been completed much later than expected.⁶⁷ Girgvliani and his friend Bukhaidze visited a café in Tbilisi on the evening of 27 January 2006,

⁶⁶ Georgian Young Lawyers' Association (GYLA), n.d.

⁶⁷ *Case of Enukidze and Girgvliani v. Georgia*, App. No. 25091/07, 26 April. Final on 26 July 2011.

where they got into a fight with several senior officers from the MIA. Later that evening, four Ministry officers wrestled Girgvliani and Bukhaidze into a vehicle. While Girgvliani was transported to a secluded location close to Tbilisi, severely assaulted, and left to die, Bukhaidze was able to escape. The next day, Girgvliani's corpse was discovered with numerous bruises that suggested he had been severely beaten and tortured. Protecting the high officials involved, the ensuing inquiry and trial were widely condemned for being prejudiced and shallow. Four lower-ranking officials were detained, put on trial, and given jail terms; nonetheless, the penalties were viewed as light, and the investigation was thought to have fallen short of holding the higher-ranking authorities responsible.

The case was brought before the ECtHR, which found multiple violations of the ECHR:

Article 2 (Right to Life): The Court concluded that there was insufficient inquiry carried out by Georgian authorities into the death of Sandro Girgvliani. Serious flaws in the inquiry included delays and omissions that betrayed a lack of sincere commitment to find the truth and hold all involved accountable. The participation of high-ranking officials in the incident and the actions taken to shield them from punishment thereafter showed a disregard for the right to life.

Article 3 (Prohibition of Inhuman or Degrading Treatment): Sandro Girgvliani was subjected to inhumane and degrading treatment. The evidence suggested that before his death, he had been severely physically and mentally abused and subjected to harsh beatings. The Court came to the conclusion that the government had neglected to shield Girgvliani from this kind of abuse as well as to appropriately investigate the crime and prosecute those responsible for it.

Article 13 (Right to an Effective Remedy): Regarding the breaches of Articles 2 and 3, the Court found that the applicants – Girgvliani's parents – were not provided with a meaningful remedy. It was determined that the domestic investigation and court processes were insufficient and unfair, and that the petitioners were not given a fair chance to seek compensation for their son's untimely death.

Article 38 (Examination of the Case): When the Court was reviewing the case, the Georgian government did not entirely comply. This included the government's unwillingness to turn over certain records and data that the court had asked for, which made it more difficult for the court to determine all the relevant facts and evaluate the infractions.

The ECtHR decided in favour of the petitioners after considering these conclusions and granted the following:

Non-Monetary Losses: The parents of Sandro Girgvliani were awarded EUR 50,000 by the court as compensation for non-pecuniary harm. The purpose of this recompense was to alleviate the anguish and sorrow brought about by their son's passing and the inadequacy of the authorities' inquiry.

Fees and Expenses: Additionally, the applicants' fees and expenditures in taking the action before the ECtHR were awarded by the Court in the sum of EUR 6,000. This sum was meant to pay for the related legal and other costs of the proceedings.

Enukidze and Girgvliani v. Georgia was an important case that brought to light structural problems in Georgia's legal and law enforcement institutions. It made the issue of the widespread lack of accountability and corruption of high-ranking officials more visible. The case demonstrated how far these officials will go to avoid accountability, eroding public confidence in the government's commitment to justice and the rule of law. Multiple breaches of the ECHR were established by the ECtHR, highlighting the inability of Georgian authorities to carry out a sincere and thorough investigation into the savage murder of Sandro Girgvliani. This case demonstrated how urgently Georgia's institutions need to be reformed to guarantee that justice is administered impartially, regardless of the position of those involved.

In addition, the case had a huge impact on Georgia's hopes for deeper links with European organisations, such as the European Union, as well as its standing internationally. The conclusions of the ECtHR and the attention that the case garnered thereafter brought to light the disparities between Georgia's declared human rights policies and its actual behaviour. It became imperative that Georgia's government take action on these concerns to show that it is committed to protecting human rights norms and re-establishing confidence with both its people and the international world. This case marked a turning point in Georgia's continuous attempts to fortify its democratic institutions and bring itself into compliance with European standards by galvanising public demand for accountability, transparency, and changes within the court and law enforcement forces.

8.3. Rustavi 2 Broadcasting Company Ltd v. Georgia

Rustavi 2 Broadcasting Company Ltd. and Others v. Georgia (Application no. 16812/17)⁶⁸ was a protracted court dispute over the ownership of Rustavi 2, a significant Georgian television network well known for its oppositional views against the state. The conflict started in 2006 when former owner Kibar Khalvashi stated that he was forced to sell his interests. Khalvashi claimed that the transaction had been coerced and illegal when he launched a lawsuit in 2015 to recover his shares. At every stage of the legal process, from the Tbilisi City Court to the Supreme Court of Georgia, rulings in support of Khalvashi resulted in the restoration of Khalvashi's ownership and the nullification of the transactions that had transferred the shares to the present owners.

Owing to their critical editorial position, Rustavi 2 and its directors claimed that the legal actions were politically motivated and unfair, with the intention of silencing the station. They filed an application with the ECtHR, claiming that their rights to property protection, freedom of speech, and a fair trial had been violated. The ECtHR first approved temporary restrictions to stop ownership transfer, but later removed them. On 18 July 2019, the ECtHR declared that there was no proof of political interference or judicial prejudice in the domestic proceedings and that the petitioners had been given a fair hearing.

The ECtHR examined the claims brought by Rustavi 2 Broadcasting Company and its directors, which included allegations of violations of:

Article 6 (Right to a Fair Trial): The applicants argued that the Georgian legal system was prejudiced and unjust, and they claimed that the government had swayed the judiciary's judgment against them. The Court looked at the legal system, the reasoning of Georgian courts, and the protections put in place for procedural justice. The ECtHR concluded that national courts followed procedure and gave thorough justification for their rulings. It was not demonstrated by any convincing evidence that the courts had behaved unfairly or with undue influence from the government. The ECtHR found that there was no infringement of the petitioners' right to a fair trial, as guaranteed by Article 6.

Article 10 (Freedom of Expression): The applicants claimed that Rustavi 2, which was renowned for its critical reporting on the government, was intended to be silenced, and that this was the political motivation for the

⁶⁸ *Case of Rustavi 2 Broadcasting Company Ltd v. Georgia*, App. No. 16812/17, 9 December 2019.

legal dispute and the eventual transfer of ownership. The Court deliberated over whether the decisions made in the domestic proceedings resulted in a restriction on the applicants' right to free speech. Although a media firm was engaged in the case, it was pointed out that the conflict was more about ownership and property rights than the outright repression of journalistic activity. The Court concluded that there was no clear connection between the ownership dispute and the state's intentional attempt to restrict the broadcaster's right to free speech. As the interference did not attempt to impede the applicants' right to free speech, the ECtHR found that Article 10 had not been violated.

Article 1 of Protocol No. 1 (Protection of Property): The applicants stated that their property rights had been violated by the arbitrary and unreasonable transfer of the shares to Khalvashi and the invalidation of their ownership rights. The Court looked at the legitimacy, proportionality, and legality of the applicants' interference with their property rights. The decisions made by domestic courts, according to the ECtHR, were grounded on a legal procedure that sought to rectify a forced sale and pursue the justifiable goal of regaining rightful ownership. The actions performed were thought to be appropriate for reaching this goal. The ECtHR determined that the interference with the applicants' property rights was appropriate and did not violate Article 1 of Protocol No. 1.

The outcome of the case was as follows: The Georgian courts' processes were deemed to be unbiased and fair by the ECtHR. The criteria of Article 6 of the Convention were satisfied by the thorough justification given by the domestic courts and the observance of procedural safeguards. There was no proof of judicial prejudice or improper influence. The Court came to the conclusion that there was no attempt to stifle the broadcaster's right to free speech in the midst of the ownership lawsuit. There was, therefore, no breach of Article 10. According to the ECtHR, the interference with the applicants' property rights was appropriate and reasonable and followed a justifiable goal. The transfer of ownership back to Khalvashi rectified a forced sale and complied with Article 1 of Protocol No. 1.

The case was significant for Georgia because it brought to light important questions about political interference, media freedom, and judicial independence. Rustavi 2, a major television network renowned for its scathing reporting on the administration, found itself at the heart of a court dispute that cast doubt on the independence of Georgia's judiciary. The legal system in Georgia was questioned for its impartiality due to claims of

political motive and prejudice throughout the court procedures. After carefully examining these allegations, the ECtHR concluded that there was no proof of prejudice or political meddling. This decision made clear how crucial it is to maintain fair trial standards and showed that the court is capable of withstanding criticism for its independence and commitment to the rule of law.

The case also had important ramifications for media freedom. The ownership dispute was especially contentious because of the critical position of Rustavi 2 towards the government, which also touched on more general concerns of press freedom and the function of independent media in a democratic society. The ECtHR reaffirmed the idea that property rights and legal disputes should be settled within the bounds of the law, without compromising journalistic freedoms, by analysing the legal aspects of the ownership dispute and concluding that there had been no breach of freedom of speech. This case added to the continuing discussion about media independence and the rule of law in Georgia by serving as a reminder of the difficult balance that must be struck between defending property rights and ensuring that media organisations may work freely without fear of political reprisal.

8.4. Vazagashvili and Shanava v. Georgia

The case of Vazagashvili and Shanava v. Georgia (Application number. 50375/07)⁶⁹ concerns the shooting death of 22-year-old Zurab Vazagashvili by Georgian law enforcement on 2 May 2006, during a special operation in Tbilisi. The purported goal of the operation was to capture accused criminals. When police opened fire on the car occupied by Vazagashvili and two other young men, he and one of his friends were killed. The police stated that the people inside the car were armed and had shot at them, and they were acting in self-defence. However, further evidence revealed that Vazagashvili and the others were unarmed and posed no threat, casting doubt on the police's use of fatal force.

After the shooting, Yuri Vazagashvili, Zurab Vazagashvili's father, fiercely pursued justice for his son, alleging that investigation into the shooting was biased and faulty. He asserted that the government was trying to hide the illegal killing. Despite his best efforts, no one was found guilty in the first probe, which increased suspicions of a law enforcement cover-up.

⁶⁹ *Case of Vazagashvili and Shanava v. Georgia*, App. No. 50375/07, 18 March 2013.

The case was brought before the ECtHR, which found multiple violations of the ECHR:

Article 2 (Right to Life): The petitioners, Zurab Vazagashvili's parents, claimed that the Georgian government had infringed their son's right to life by using deadly force against him and then failing to carry out a thorough inquiry into his passing. After reviewing the details of the police action, the Court concluded that Zurab Vazagashvili was not entitled to be killed. Vazagashvili and the other occupants of the automobile were shown to be unarmed and did not immediately constitute a threat to the engaged police, according to evidence produced in court. The Court found that the police had violated Article 2 in its substantial sense by using disproportionate and illegal force. The Georgian authorities' investigation was also examined by the ECtHR. The inquiry was deemed by the Court to be seriously flawed and neither thorough nor timely. Most importantly, the investigation did not look into all the pertinent information and did not hold the murderers accountable. The Court came to the conclusion that the state had violated the procedural provisions of Article 2 by failing to carry out a thorough inquiry into Zurab Vazagashvili's death.

Georgia was found to have breached both the substantive (unlawful killing) and procedural (failure to undertake an adequate inquiry) aspects of Article 2 of the ECHR. The petitioners were granted EUR 50,000 in non-pecuniary damages by the ECtHR, which recognised the psychological anguish and suffering they had experienced as a result of their son's death and the state's subsequent inadequate investigation of the matter.

The ruling emphasised how crucial governmental responsibility is in the event of deadly force used by the police. It emphasised the importance of launching quick, in-depth, and unbiased investigations into these kinds of events to provide justice for the victims and their families. The case also emphasised the judiciary's responsibility for maintaining the rule of law and defending people's rights from abuse by the government. The case raised questions about Georgia's police procedures and the efficiency of the legal system in resolving allegations of wrongdoing by the police. It reaffirmed the necessity of changes to guarantee that acts of law enforcement adhere to human rights norms and that violations are swiftly and successfully dealt with by the courts.

8.5. Saakashvili v. Georgia

Former Georgian President Mikheil Saakashvili is the subject of the case *Saakashvili v. Georgia* (Applications nos. 6232/20 and 22394/20).⁷⁰ Saakashvili was found guilty in absentia of several crimes, including abuse of authority, and was given an incarceration term. When Saakashvili returned to Georgia in October 2021 after several years overseas, he was immediately detained and imprisoned. Saakashvili stated during his detention that he was mistreated and that his detention was politically motivated. He went on a hunger strike, claiming he was treated inhumanely by the Georgian government and that they had neglected his medical needs. Arguing that Saakashvili's imprisonment breached many sections of the ECHR, Saakashvili's legal team took the issue to the ECtHR.

The Court could not find sufficient evidence to draw the conclusion that Saakashvili's rights under Article 18 in combination with Article 5 were violated or that his incarceration was motivated by politics. The Court judged there was no evidence of a violation of these principles in the legal justification for his detention. Additionally, the Court found that Saakashvili's right to a fair trial under Article 6 had not been clearly violated because the evidence did not establish that Saakashvili's trial had been improperly affected by political factors.

8.6. Sarishvili-Bolkvadze v. Georgia

In 2004, the applicant's child was hospitalised for critical care due to a catastrophic injury and died a month later in the hospital. A panel of specialists determined that a medical mistake had occurred during his treatment. The applicant's refusal to allow an autopsy and an exhumation later resulted in the criminal inquiry being dropped in 2008, as the prosecutor was unable to demonstrate a direct relationship between the claimed medical malpractice and her son's death. Meanwhile, the civil courts determined that his death was the result of medical negligence, that the hospital engaged in illegal operations in different disciplines, and that part of the medical personnel lacked the authority to practice medicine independently. The petitioner was granted approximately EUR 2,700. Her claim for non-pecuniary damages was denied because domestic law did not provide for compensation for non-pecuniary loss caused by an infringement on a relative's right to life.⁷¹

⁷⁰ *Case of Saakashvili v. Georgia*, App. Nos. 6232/20 and 22394/20, 1 March 2022.

⁷¹ *Case of Sarishvili-Bolkvadze v. Georgia*, App. Nos. 58240/08, 19 October, 2018.

In the case of claimed medical negligence, states' substantive positive responsibilities were confined to establishing an effective regulatory framework that required institutions to implement adequate steps to preserve patients' lives. In terms of whether the responding State had fulfilled its regulatory obligations, the hospital had been performing unlicensed medical activities in several fields, including cardiology and clinical transfusion in relation to the applicant's son, and several doctors involved in his treatment lacked the necessary licenses or qualifications, in violation of domestic law. While there was a legislative structure in place to oversee compliance with the applicable licensing requirements, the respondent Government had not specified how it was implemented in reality, if at all. Consequently, the State had violated its substantial affirmative commitment to create an adequate regulatory framework that would ensure compliance with applicable legislation aimed at protecting patients' lives.

The decision to end the criminal inquiry into the death of the applicant's son was not made quickly. Based on the conclusions of the appropriate forensic specialists, it was determined that it was impossible to prove a causal relationship between medical malpractice and death without performing an autopsy or exhumation, which the applicant had repeatedly refused to allow. Furthermore, the prosecutor exhibited extraordinary vigilance by writing to the appropriate ministry, indicating that a medical error made in the current instance necessitated 'the implementation of adequate measures to prevent similar violations'. The termination of the criminal proceedings in respect of medical negligence did not violate the procedural requirements of Article 2 of the Convention.

The legal procedures against the hospital were successful in establishing the key facts surrounding the applicant's concerns. However, the domestic legal system did not allow a deceased victim's surviving next-of-kin to seek and recover non-pecuniary damages in circumstances of medical malpractice. In light of the applicant's psychological grief as a result of her young son's death, the whole and unconditional legislative restriction had unfairly denied her the right to seek an enforceable award of compensation for non-pecuniary damages.

8.7. Jugheli and Others v. Georgia

At the time, the applicants resided in a block of apartments in the city centre, approximately 4 m from a thermal power plant that supplied energy and heat to the surrounding residential districts. The plant had been in

operation since 1939, but owing to financial difficulties, it stopped producing power in part in 2001. According to the applicants, while the factory was active, its harmful operations were not subject to applicable rules, and as a result, different poisonous compounds were discharged into the environment, severely impacting their well-being.⁷²

Even if the air pollution did not cause any demonstrable harm to the candidates' health, it might have rendered them more susceptible to various ailments. Furthermore, there was no denying that it had harmed their quality of life at home. Thus, there had been an interference with the applicants' rights that was severe enough to fall inside the meaning of Article 8 of the Convention. The core of the problem in this case was the virtual absence (until 2009) of a regulatory framework relevant to the plant's risky operations, as well as the inability to manage the resulting air pollution, which had a detrimental impact on the petitioners' rights under Article 8.

States, in particular, have a duty to implement rules tailored to the unique characteristics of the activity in issue, particularly in terms of the possible degree of risk. The complete dearth of any legal and administrative framework applicable to the plant's potentially hazardous operations in the present case allowed it to operate in close proximity of the applicants' residences without adequate protections to avoid or at least reduce air pollution and its negative impact on the applicants' well-being and health, as confirmed by a specialist testing ordered by the local courts. The situation was worsened by the fact that in spite of requesting the facility to install the necessary filtering and cleansing equipment to reduce the effect of pollutants on the building's residents, the competent authorities took no effective steps to carry out the request. In these circumstances, the respondent State failed to strike an equitable equilibrium between the community's interests in having an operable thermal power plant and the applicants' effective exercise of their right to respect for their home and private life.

8.8. *Gloveli v. Georgia*

The applicant was a practicing lawyer in Georgia with 22 years of experience. Between 1999 and 2005, she also served as a judge on the Tbilisi Court of Appeal. She then competed for three empty judge posts, the most recent of which was in October 2017. All of her applications were denied. The current case involves the procedure relating to her recent

⁷² *Case of Jugheli and Others v. Georgia*, App. No. 38342/05, 13 October 2017.

attempt to secure the appointment. In 2016, the applicant and two failed candidates filed a constitutional lawsuit stating that the Act of 13 June 1997 on Courts of Ordinary Jurisdiction violated Articles 29 and 42 of the Constitution. The complaint claimed that they did not have access to a court to pursue their constitutional right to a fair process in admission to public service. In 2017, revisions to the Courts Act enhanced the ability of the Supreme Court to review judicial nominations. The Constitutional Court dismissed the suit, finding that the amendments had addressed the issue by establishing the Supreme Court's Chamber for the Review of Judicial Appointments. The candidate sought a vacant judge position but was denied based on her competence score. She appealed to the Qualifications Chamber, stating that the judgment was arbitrary and biased. The Chamber deemed the appeal inadmissible for lack of jurisdiction.

The applicant alleged a breach of her right to access a court because she was unable to secure a judicial review of a decision not to appoint her to a judicial position. The Government contended that Article 6 of the Convention was inapplicable in its civil aspect in the instant case because there was no "right" at issue recognised by domestic law, and there was no real and serious disagreement over a "right" that the applicant might claim under domestic law. The government also cited a Qualifications Chamber ruling that rendered another rejected judicial candidate's case inadmissible due to a lack of jurisdiction. The applicant disputed the Government's claims, stating that her "civil" right to equal access to public service and employment, as well as access to a court in connection with related problems, was recognised by applicable domestic legislation. She claimed that the relevant ruling of the High Court of Justice (HCJ) had effectively decided her civil right to compete on an equal basis in the judicial competition, and that she should thus have been entitled to a fair hearing in that determination.⁷³

In the *Baka* case, the ECHR analysed the applicability of Article 6 of the Convention in disputes concerning the appointment, career, and dismissal of judges. The Court found that Article 29 of the Constitution provided for the right of equal access to public service, which was applicable to judicial competitions. The Court considered the dispute to be "genuine" and "serious" as it concerned the fairness of the judicial selection and appointment procedure and could lead to the annulment of the contested decision and reconsideration of the applicant's application for the post. The

⁷³ *Case of Gloveli v. Georgia*, App. No. 18952/18, 7 July 2022.

Court also noted that the amended sections 191 § 1, 354(1), and 365(1) of the Courts Act provided that an appeal could be lodged with the Qualifications Chamber against a decision of the HCJ refusing appointment to judicial office. However, the Qualifications Chamber had no jurisdiction to entertain the applicant's application, as it did not concern a final decision of the HCJ refusing appointment to a judicial post. The Court could not conclude that domestic law contained an explicit exclusion of access to a court for the type of dispute concerned. It must determine whether access to a court had been excluded under domestic law before, rather than at the time, the impugned measure concerning the applicant was adopted. The Court must also ensure that the exclusion was justified on objective grounds in the State's interest. The Court has stated that judicial independence is a prerequisite to the rule of law and that the manner of appointment of its members must be taken into account. The Court found that the exclusion of the applicant from a judicial competition in the absence of any judicial review of this decision cannot be regarded as being in the interest of a State governed by the rule of law. In conclusion, the Court found that Article 6 § 1 of the Convention under its civil head is applicable, and the Government's preliminary objection as to the applicability of Article 6 § 1 must be dismissed. The complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention.

The applicant argued that her right to challenge the arbitrary and discriminatory decision of the HCJ had been breached, citing the importance of the selection and appointment of judges for the proper functioning of the judiciary. The Government argued that the applicant's right of access to court had not been violated, as domestic legislation provided for judicial review of HCJ decisions. The Qualifications Chamber had full jurisdiction to review decisions concerning the selection and appointment of judges, and the decision was in line with domestic case-law. The right of access to a court is established as an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention in *Golder v. the United Kingdom*. However, the Court acknowledged that the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce access to the individual. The applicant's appeal against the rejection of her candidacy for a judicial post was not reviewed by the Qualifications Chamber, which declared her appeal inadmissible for lack of jurisdiction. The Court considered that the deprivation of jurisdiction of the Qualifications Chamber

to examine the applicant's appeal impaired her right to access to a court, as guaranteed by Article 6 § 1 of the Convention.

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SNJEZANA VASILJEVIC*

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

* Full professor, University of Zagreb, Croatia. snjezana.vasiljevic@pravo.unizg.hr.

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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 Charter⁹ 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 CJEU¹⁷ case,

¹⁵ de Búrca, 2011.

¹⁶ *Case 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 McCarthy 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.

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:

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 Camasso 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 decision⁶⁴ 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 procedure⁶⁵ 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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NEBOJŠA B. VUČINIĆ* - SANJA GRBOVIĆ**
In collaboration with: Ksenija Mišović, LLM

The European Convention on Human Rights – the protection of human rights under the ECHR and Central Europe: Montenegro***

ABSTRACT: Although the Convention came into force in Montenegro on 3 March 2004, the Court began examining the first cases against Montenegro in 2009. To date, it has issued 71 judgments and 73 decisions concerning various conventional rights. A significant influence has been exerted on the legal system, particularly on the judicial practice of Montenegrin courts, regarding the protection of fundamental rights safeguarded by the European Convention. However, in our opinion, this is insufficient for the real and effective implementation of the rights prescribed by the Convention. Thus far, Montenegro has, responsibly and within the deadline, executed all the judgments and decisions of the European Court. However, despite ongoing trainings and seminars, judges, prosecutors and other legal practitioners in Montenegro lack a certain degree of courage and impartiality to implement the Convention.

KEYWORDS: state succession, protection of life and bodily integrity, deprivation of liberty, fair trial, Montenegro, Constitutional Court.

1. Introduction

While the European Convention on Human Rights (ECHR) came into force in Montenegro on 3 March 2004, the European Court of Human Rights (ECtHR) began examining the cases against Montenegro in 2009. More than several thousand cases have been declared inadmissible, and the Court has delivered 71 judgments and 73 decisions on admissibility.¹ However, there

* Full Professor, Faculty of Law, University of Montenegro, Montenegro. Former Judge of the European Court of Human Rights. ne.vu62@gmail.com.

** Teaching Assistant, PhD, Faculty of Law, University of Montenegro, Montenegro. sanjag@ucg.ac.me.

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¹ See more precisely at <https://www.gov.me/dokumenta/6207dd5b-b07f-4d51-97a4-95356dc4449c>.

have been no Grand Chamber cases, established systemic or endemic issues or pilot judgment procedures yet. Consequently, the ECHR has had an important and long-lasting impact on the legal system of Montenegro; nonetheless, in our opinion, the protection of Convention rights has not been sufficiently influenced in the legal system.²

Hence, the Convention has had an important impact, yet certain problems and shortcomings have been identified. Influenced by Court judgments, they are currently being resolved domestically.³ One of the main objectives of the Convention and the Court's case law is the domestic implementation of the standards developed by the Court, which is slowly being accomplished. Pursuant to Article 9 of the Constitution of Montenegro, ratified and published international treaties and generally accepted rules of international law are an integral part of the Montenegrin legal system, are superior to the national legislation and shall apply directly when they regulate relations differently from the national legislation. Hence, the Constitution of Montenegro adopted a monistic position concerning the priority of international law over national law, which is important for the implementation of human rights. In practice, this means that treaties, such as the ECHR, and judgments and decisions of international courts have supremacy over national legislation.⁴

2. ECHR and the issue of state succession

The Court judgment in *Bijelic v. Montenegro and Serbia*⁵ was significant for its impact on the domestic legal system and because it was the first judgment. Furthermore, it was important for public international and universal human rights law. Notably, the judgment represented a considerable contribution to customary international law concerning the validity of international treaties on human rights in the situation of the peaceful division (dissolution) of a state and state succession, that is, the changing political status of a territory. One of the principal questions raised in this case was that of the temporal (*ratione temporis*) application of the Convention concerning Montenegro, given that the independence of Montenegro, proclaimed on 6 June 2006, was pursuant to the democratic

² Vučinić, 2016, pp. 290–304.

³ Council of Europe, 2021.

⁴ Article 9 of the Constitution of Montenegro, 2007.

⁵ *Case of Bijelić v. Montenegro and Serbia*, App. No. 11890/05, 28 April 2009.

referendum held on 21 May 2006, in which the majority of citizens voted in favour of reestablishing⁶ an independent State of Montenegro.

In the *Bijelic* judgment, the Court ruled that the Convention had been binding on Montenegro since 3 March 2004, namely, when the State Union of Serbia and Montenegro joined the Council of Europe (CoE) and ratified the ECHR, which ended in May 2007, when Montenegro became a full member of the CoE and a party to the Convention. Consequently, this judgment dismissed any uncertainties about the *ratione temporis* issue concerning Montenegro before May 2007. By this same reasoning, the Court confirmed a rule close to customary international law, that human rights treaties, which had been in force in respect of one territory or federal units, continued to be binding for the territory, regardless of political changes, such as obtaining independence. This reasoning was based on the proposition that a human rights treaty was a specific type of international treaty, with the primary purpose of protecting individual human beings from government abuses or intrusions.

In adopting this approach, the Court took into consideration the opinion of third parties, namely, the Venice Commission and of ‘Human Rights Action’, a nongovernmental organisation from Podgorica. They argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities, as of 3 March 2004, when these instruments had entered into force in the State Union of Serbia and Montenegro. In support of this argument, the Court referred to practical considerations: the domestic and international context surrounding Montenegrin independence, its own

⁶ The Principality of Montenegro (from 1910 the Kingdom of Montenegro) was recognised as an independent State at the Berlin Congress on 13 July 1878. At the end of November 1918, an illegitimate and unlawful so-called Great National Assembly, organised by the supporters of the Kingdom of Serbia, with the help of Serbian armed forces, abrogated the Kingdom of Montenegro and proclaimed the so-called unconditional unification. This was subjugation to the Kingdom of Serbia. Hence, Montenegro ceased to exist as a political and national subject. After World War II and the socialist revolution, Montenegro regained part of its statehood and the Socialist Republic of Montenegro was established as a federal unit in the framework of the Yugoslav federation, with ‘inherent right to self-determination of the people’, including the right to opt for its own State. See Peric, 1999; Sukovic, 1999; and Vucinic, 2001, p. 154. Pursuant to a decision of Badinter’s Arbitration Commission for former Yugoslavia, this right was confirmed to all the units of the Federation of Yugoslavia. Under the auspices of the European Union, and on condition of a special qualified majority, a democratic referendum was held on 21 May 2006, in which the majority voted for reestablishing an independent Montenegro. See Davies, 2012, pp. 600–620.

established practice regarding Czech and Slovak Republics⁷ and the opinion of the Human Rights Committee (International Covenant on Civil and Political Rights, ICCPR) on the issue of state succession and the continuation of human rights treaties. By resolving this particular case against Montenegro, the Court considerably contributed to the clarification of this legal issue of general importance and indirectly improved the principles of legal security and certainty.

3. Protection of the right to life

Relatively late, at the end of 2017, the Court made its first decision in relation to Article 2 of the ECHR. The case related to the inefficient and ineffective investigation of the shipwreck of the boat “Miss Pat”, which, through the help of an organised criminal group from Montenegro, transported Roma immigrants from Montenegro to Italy. An overloaded ship sank in the night between August 14 and 15, 1999, and several dozen immigrants lost their lives. At the time the application was submitted to the Court (in 2011), the criminal proceedings were ongoing in different courts in Montenegro (transfer of jurisdiction between the Kotor, Bar and Podgorica courts). Hence, the Court found that the procedural aspect of Article 2 of the ECHR was violated due to the long-term, inefficient and ineffective investigation and awarded the applicants 12,000 euros in non-material damage and 500 euros in compensation for expenses.

Referring to relevant precedents (*Branko Tomašić and others v. Croatia*, App. No. 46598/06, paragraph 62, 15 January 2009; *Toğcu v. Turkey*, App. No. 27601/95, paragraph 109 in fine, 31 May 2005; and *Manson v. the United Kingdom* (dec.), App. No. 47916/99, 6 May 2003), the Court concluded that the investigative actions taken by the Montenegrin authorities were neither quick nor effective. The qualifications in the indictments were often changed, and the main hearings before various courts in Montenegro were postponed multiple times; hence, the judicial authorities of Montenegro could not *de facto* determine what happened and who was responsible for it, which contradicted the essential requirements of the procedural part of Article 2 of the ECHR.

Although the Court did not conclude that it was a systemic problem, especially in connection with effective investigations under Article 3 of the

⁷ *Case of Konecny v. the Czech Republic*, App. Nos. 47269/99, 64656/01 and 65002/01, 26 October 2004.

ECHR, which are similar to the obligations in Article 2, this can be considered a key problem in the application of the ECHR in Montenegro. It seems that the Montenegrin authorities did not sincerely and responsibly accept the application of these standards in the internal legal system, because a significant number of cases of torture and inhuman behaviour remained unexplained, covered up or the perpetrators were released from criminal responsibility. Unfortunately, the Court's decision on the inadmissibility of the appeal of a group of refugees deported from Montenegro to Bosnia and Herzegovina during the war in Bosnia and Herzegovina in the early 1990s, most of whom were killed by the Bosnian Serb army, is controversial and, in our humble opinion, unfair.

At the beginning of the war in Bosnia and Herzegovina, fleeing from the persecution of the Bosnian Serb army, several dozen refugees, mostly Muslim and individuals of Serbian and Croatian nationality, sought refuge in Montenegro. Instead of providing them with protection following the imperative international legal standards on the protection of refugees and the special rule of non-refoulement, the Montenegrin authorities, with the help of the paramilitary units of the Republika Srpska army, deprived them of their freedom and returned them to Bosnia and Herzegovina, allegedly for exchanging prisoners, where the majority were liquidated. The survivors and their descendants asserted their right to state compensation in civil legal proceedings in Montenegro; however, no one was held criminally responsible, that is, high-ranking officials of the security service and the Ministry of Internal Affairs were released from any responsibility after a lengthy criminal proceeding. The Montenegrin criminal courts concluded that Montenegro was not formally a participant in the conflict in Bosnia and Herzegovina, and the state authorities could not commit the war crime of taking the civilian population as hostages. This conclusion came despite the position of the Hague Tribunal⁸ that the conflict in Bosnia and Herzegovina was of an international character, that Serbia and Montenegro were actively helping the Bosnian Serb side, and, for the qualification of a war crime, it was sufficient that the act was committed 'in the context of an armed conflict'. However, the Montenegrin criminal courts concluded that it was a "benign" crime of illegal deprivation of liberty, which had become statute-barred in the meantime.

⁸ ICTY, Tadić, IT-94-1, [Online]. Available at: <https://www.icty.org/bcs/case/tadic> (Accessed: 21 June 2025).

The Court concluded that the applicants lost their victim status due to the civil legal compensation received before the Montenegrin courts, and the investigation and criminal proceedings were conducted efficiently and effectively, although they did not result in individual criminal responsibility, referring to the precedent of the Grand Chamber.⁹ We believe that the Court's comparison with the case of *Armani de Silva* was not adequate because, in that case, there was an unintentional, albeit serious, mistake by the members of the UK special police regarding a person who was mistaken for a terrorist, while the criminal proceedings in Montenegro unequivocally showed that state authorities deliberately and knowingly helped the Bosnian Serb side by arresting these persons for exchanging prisoners. In our opinion, the Court acted formalistically, *de facto* abolishing the state for serious violations of international law, refugee and humanitarian law.

In *Ražnatović v. Montenegro*, regarding the applicant's request to protect the life of a voluntary psychiatric patient, that is, for the state to take all reasonable measures to that end, the Court found that there was no violation of positive obligations following Article 2 of the ECHR. The Court concluded that there were no convincing elements to deviate from the conclusions reached by the domestic courts, which referred to the fact that the Central Clinical Hospital of Montenegro-Psychiatry Clinic did not know, nor should have known, about the immediate risk to life of M.R., who was undergoing treatment at the same Clinic voluntarily. Consequently, the Court did not consider it necessary to evaluate the second part or whether the competent authorities took all the measures that could reasonably be expected of them.¹⁰

4. Prohibition of torture

In relation to Article 3 of the ECHR, the Court issued its first verdict against Montenegro in *Milić and Nikezić*.¹¹ The case referred to the treatment of persons deprived of their liberty while serving a prison sentence, subjected to torture and inhuman treatment by members of the prison police. The Court concluded that there was a 'complex' violation of Article 3, in both substantive and procedural aspects. Based on the complaint of the mother of

⁹ *Case of Armani de Silva v. The United Kingdom*, App. No. 5878/08, 30 March 2016.

¹⁰ *Case of Osman v. The United Kingdom*, App. No. 23452/94, 28 October 1998.

¹¹ *Case of Milić and Nikezić v. Montenegro*, App. No. 5499/10 and 10609/11, 28 April 2015.

one of the applicants, a relatively fair investigation was conducted before the domestic authorities, with the participation of the Ombudsperson. However, in addition to the established sufficient and relevant facts, the prosecutor refused to initiate criminal prosecution *ex officio* for the beating of the applicants in the ZIKS (Administration for the Execution of Criminal Sanctions) premises. The Court, as an aggravating fact, in support of the state's responsibility, highlighted the failure of the prosecutor to use the official recordings of the video surveillance installed in the premises of ZIKS in the proceedings. Hence, this case, once again, showed the unwillingness of the Montenegrin authorities to face the violation of Article 3, the prohibition of torture and inhumane treatment.

The same conclusion was reached by the Court in *Siništaj and others v. Montenegro*,¹² a double violation of Article 3 due to torture, inhumane treatment and inadequate investigation in the case against persons accused of preparing a terrorist rebellion. This case was characteristic as the Court stated that a constitutional appeal before the Constitutional Court of the Republic of Montenegro was an effective and efficient legal remedy and must be used before addressing the Court.

Similar to the deportation case, the Court declared inadmissible the appeal of Milorad Martinović for the severe form of torture that he was exposed to during the 2015 demonstrations.¹³ Martinović received compensation in civil proceedings for being beaten by members of the special police, unmarked with identification marks and numbers, and enduring serious physical injuries. The Court found that Martinović could not claim to be a 'victim' under Article 34 and his appeal, based on Articles 3 and 13 of the Convention, must be rejected in accordance with Article 35 Section 3 (a) and 4.

This decision was based on three reasons. First, the Court noted that the Constitutional Court of Montenegro found a violation of the material and procedural aspect of Article 3, as the Constitutional Court expressly accepted the violation complained of by the applicant. Second, the applicant reached an agreement with the state and received compensation of 130,000 euros for all existing and future damage related to this event, both monetary and non-material. Third, the investigation carried out led to: (a) the identification of the two immediate perpetrators, X and Y, who were

¹² *Case of Siništaj and others v. Montenegro*, App. Nos. 1451/10, 7260/10 and 7382/10, 24 November 2015, para. 94/103.

¹³ *Case of Martinović v. Montenegro*, App. No. 44993/18, 1 April 2021.

currently on trial for torture and grievous bodily harm and (b) criminal prosecution and sentencing of the commander of the relevant police unit for assisting the perpetrator after the commission of the crime.¹⁴

One of the more recent cases, *Baranin and Vukčević v. Montenegro*, is interesting and characteristic.¹⁵ The applicants were brutally beaten by the police during the crackdown on violent demonstrations in September 2015 by the Democratic Front. Neither did the applicants participate in any riots or resist the police officers, nor did the police deprive them of their freedom or bring any proceedings against them. They were forced to lie down on the sidewalk by order of the police, when they received multiple physical blows all over their bodies that caused the injuries identified by the medical report. Additionally, they were exposed to inhumane and degrading treatment because the policemen shouted at them, cursed, insulted them and left them, injured and beaten, lying on the street without help. There was a video of the event on the Internet. Even after five years, the perpetrators had not been identified, and at the time the application was submitted to the Court, the case was in the preliminary stage.

The NGO, Action for Human Rights, filed constitutional appeals, which were unanimously adopted by the Constitutional Court and, for the first time, found a violation of the constitutional prohibition of torture due to ineffective investigation into police abuse. Unfortunately, the Basic State Prosecutor's Office in Podgorica did not implement the decision of the Constitutional Court and did not conduct an investigation of police violence against the applicants following the minimum standards of the ECHR.

The Court found that the competent state authorities, primarily the prosecutor's office and the police, did not conduct an effective and efficient investigation to discover the perpetrators and adequately punish them. The investigation was not prompt, thorough and independent, all of which significantly affected its ability to identify those responsible. Furthermore, even after the decision of the Constitutional Court, the state authorities did not make sufficient effort to remove the shortcomings of the investigation and obey the instructions of the Constitutional Court. The Court stated that the responsibility of the special anti-terrorist unit (SAJ) commander for

¹⁴For more information [Online]. Available at: <https://www.hraction.org/2021/04/01/odluka-suda-u-strazburu-u-predmetu-martinovic-protiv-crne-gore/>.

¹⁵ *Case of Baranin and Vukčević v. Montenegro*, App. Nos. 24655/18 and 25656/18, 11 March 2021.

helping perpetrators of abuse was established, and he was sanctioned for this; however, it could not be concluded that the state fulfilled all its duties in accordance with Article 3 for conducting an effective investigation.

The Court further pointed out that, although the state prosecutor continued to carry out most of the necessary investigative actions after the Constitutional Court's decision, such as interviewing most of the witnesses who could be traced, it was only done two years after the incident, even though promptness is one of the key elements of an effective investigation due to the possibility of evidence destruction and contamination. Moreover, the prosecutor did not undertake all possible investigative actions because she did not interview a large number of witnesses, did not establish whether only SAJ members were on the ground that night, and did she provide evidence that the Forensic Center was involved in the investigation.

The Court determined that, contrary to domestic law, the applicants, as injured parties and their representatives, could not attend the questioning of the witnesses and ask them questions because they were not informed about the place and time of the questioning. What was particularly significant in the context of Article 3 was that the state prosecutor, during evidence collection for the identification of the perpetrators, was largely dependent on the assistance of the Security Center of the Police Administration, which was subordinate to the same chain of command as the officers under investigation, raising questions about the investigation's independence and impartiality.

Referring to the applicants receiving compensation from the domestic courts and the SAJ commander being punished for helping the perpetrators, the Court emphasised that the violation of Article 3 of the Convention could not be corrected only by compensation. It required the implementation of an effective investigation of decisive importance. In this case, as an effective investigation was not conducted even after the Constitutional Court's decision, the Court concluded that the applicants did not lose their victim status and unanimously found a violation of the procedural aspect of Article 3.

The concerns surrounding the prohibition of torture and inhumane behaviour remain problematic in Montenegro, especially regarding controlling the authority of police officers to use force and the readiness of the prosecution and courts to adequately apply the standards of fast, impartial, efficient and effective investigation. This is in addition to constant training, seminars and education of police and prosecutor-judicial personnel.

The real issue is the lack of will and readiness to apply the standards. According to the regulations of the Ministry of Internal Affairs, it is a strict obligation for all members of the police, including regular and special police (under helmets and masks), to wear visible external identification numbers and signs, which is an improvement compared to the previous state of affairs and an important assumption in determining individual criminal responsibility.

As the latest cases mentioned in the Report of the NGO, Action for Human Rights, show, proving torture and inhuman behaviour is difficult and problematic, and punishing suspected police officers is rare. Thus, in the last case of B.M., the basic court acquitted the suspected policeman because the victim, with visible injuries all over his body, failed to recognise the policemen who tortured him because they had phantoms on their heads and did not have the mandatory identification number on their uniforms. Hence, this issue, if not resolved urgently and radically, will soon become a systemic problem of the application of Article 3 of the ECHR in Montenegro.

5. Right to liberty and security

As in the prohibition of torture and inhumane treatment, the application of the standards of Article 5 of the Convention remains problematic in Montenegro. This is related to the conditions for determining and extending detention, that is, the relative inability of domestic prosecutors and courts to concretely assess the circumstances of each case and provide sufficient and relevant reasons for determining or extending detention. There is a *de facto* tendency that, especially under inappropriate pressure from the “public” and journalists, detention is treated as a criminal sanction, instead of a measure to ensure the suspect’s presence in criminal proceedings, which is the main aim of detention. Alternative measures to custody, which are otherwise decisively prescribed by the Code of Criminal Procedure, are rarely used.

In *Bulatović v. Montenegro*,¹⁶ which referred to Article 5 of the Convention, a violation was established because the detention lasted longer than five years. In *Mugoša v. Montenegro*,¹⁷ the decision on the extension of detention was made after the expiration of the legal term for control of detention, which was sufficient for finding a violation of the applicant’s

¹⁶ *Case of Bulatović v. Montenegro*, App. No. 67320/10, 22 July 2014, para. 137/149.

¹⁷ *Case of Mugoša v. Montenegro*, App. No. 76522/12, 21 June 2016, para. 48/57.

rights because, according to the standard of the Court, the inconsistency of detention with domestic regulations, *prima facie*, violates the Convention. In *Bigović v. Montenegro*,¹⁸ detention was extended according to the ‘copy/paste’ system, that is, on grounds that were not supported by sufficient and relevant reasons and lasted longer than five years. Similarly, in *Šaranović v. Montenegro*,¹⁹ the Court found that the detention was illegal, because the validity of the detention during a period was not reviewed within the legal term, similar *Mugoša*.

The Court found a further violation of Article 5 due to illegal deprivation of liberty in a more recent case, *Asanović v. Montenegro*.²⁰ The applicant, a lawyer, received a verbal order from the state prosecutor through a police officer to provide certain information, in his capacity as a citizen, due to the suspicion that he had committed the criminal offence of tax and contribution evasion. The police officer did not find him at the registered address; hence, the state prosecutor requested that he be deprived of his liberty due to the well-founded suspicion that he was on the run. The appellant called a police officer as soon as he was able to do so and was told to come to the Basic Court building in Podgorica. The police officers handed him a summons to ‘immediately’ come to the police station for questioning; therefore, he was transported to the police station in a police car. The official note indicated that he was deprived of his liberty at 10:40 a.m. on 13 September 2017. He was brought to the state prosecutor for questioning. He pleaded ‘not guilty’ and explained that earlier that morning, he had visited a client in prison, where there was no mobile phone signal. At 1:45 p.m. on the same day, he was released. Criminal proceedings were conducted against Asanović for tax and contribution evasion; however, he was later acquitted. His Constitutional appeal was dismissed as unfounded.

The ECtHR found that Article 259 of the Code of Criminal Procedure enabled a person who does not respond to a summons to be forcibly brought, if he was warned about it in the summons. The invitation contained the warning; however, it indicated that Asanović must respond “immediately”. The Court concluded that the term “immediately” did not give the applicant the chance to respond to the summons of his free will, which was contrary to Article 259. Furthermore, the official police report did not specify the legal basis for the deprivation of liberty. It only referred

¹⁸ *Case of Bigović v. Montenegro*, App. No. 48343/16, 19 March 2019, para. 175/218.

¹⁹ *Case of Šaranović v. Montenegro*, App. No. 31775/16, 5 March 2019, para. 64/89.

²⁰ *Case of Asanović v. Montenegro*, App. No. 52415/18, 20 May 2021, para. 46/68.

to some reasons from Article 175 of the Code of Criminal Procedure, such as the possibility that the person was hiding or might destroy evidence. Moreover, Article 23 of the Law on Advocacy stated that a lawyer could only be deprived of liberty for offences related to the practice of law if a decision is made by the Chamber of the competent court. As there was no such court decision, even if the police had reasons under Article 175, the deprivation of liberty was illegal, which led the Court to unanimously conclude that there was a violation of Article 5 paragraph 1 of the ECHR.

Recently, the problem of using encrypted communications, especially those of organised criminal groups (such as the SKY application), as evidence in investigations and criminal proceedings, has become increasingly topical. Detention is often determined and extended solely based on this evidence, sometimes under unprincipled pressure from the public and journalists, which creates problems regarding the legality of detention. The ECtHR has not yet ruled in any of its judgments on the legal validity of these means, especially in cases where they are the only and exclusive evidence. In Montenegro, opinions range from a complete denial of the validity of this evidence, which is neither provided for nor regulated by the Criminal Procedure Code,²¹ to views that (as in any other case) the Court, at the main trial, should determine the validity and credibility of the evidence according to the procedure. For now, one invalid criminal case has been sent back for retrial due to the use of evidence obtained in this manner.²² This will be a big challenge, both for the Supreme Court and the Constitutional Court of Montenegro.

6. Right to a fair trial

The principal positive result of the judgment, one of the first against Montenegro, was in *Garzicic v. Montenegro*²³ regarding the change of the practice of the Supreme Court of Montenegro for value determination in civil disputes/claims and the elimination of excessive formalism of the Montenegrin courts. Having found a violation of Article 6 paragraph 1

²¹ Official Gazette of Montenegro, Nos. 57/2009, 49/2010, 47/2014, 2/2015, 35/2015, 58/2015, 28/2018 and 116/2020.

²² The Court of Appeals of Montenegro annulled, in August 2024, the first-instance verdict against D.J., which was based on Sky communications as evidence, due to a lack of clear and valid reasons regarding the admissibility or inadmissibility of the evidence, and returned the case for retrial to the High Court in Podgorica.

²³ *Case of Garzicic v. Montenegro*, App. No. 17931/07, 21 September 2010, para. 22/34.

(access to the court), the Court assessed the practice of the Supreme Court as excessively formalistic concerning an appeal on points of law (revision). Until then, the party had been obliged to assess the value of the claim. If the assessment was unrealistic, the courts could assess the value. In *Garzicic*, the appellant failed to make the assessment; hence, the lower courts did so. However, the Supreme Court, on appeal, ignored that the lower courts had determined the value of the dispute and rejected the appeal on points of law without examining the merits of the case.

The Court considered that, even though the domestic courts, including the Supreme Court, had no strict and explicit obligation in this respect, no provision in the Civil Procedure Act prohibited the courts from establishing the value of the dispute when the plaintiff had failed to do so in the statement of a claim. In this case, the domestic courts established the value of the claim in the first and second remittal, accounting for expert findings and the value specified by the parties. Although these values differed, the Court did not consider it necessary to determine which of the two was more accurate, as both allowed for an appeal on points of law in accordance with Article 382 § 3 of the Civil Procedure Act 1977. The Court ruled that, in any event, the applicant should not suffer any detriment on account of the domestic courts' failure to order the applicant to pay the difference between the court fees paid and the fees corresponding to the established values of the claim.

Therefore, the Court assessed that the aforementioned practice of the Supreme Court of Montenegro amounted to excessive formalism and breached the applicant's right of access to the Supreme Court, violating Article 6 paragraph 1 of the Convention. In the retrial following the Court's judgment,²⁴ the Supreme Court accepted the Court's reasoning, changed the practice, allowed for the applicant's appeal on points of law and examined the case on its merits. This practice was subsequently followed by the lower courts. Notably, at approximately the same time, the Constitutional Court of Montenegro decided on a constitutional appeal of another appellant raising the same issue and endorsed the standard developed in the Court's jurisprudence, ruling that the aforementioned practice of the Supreme Court was excessively formalistic and constituted a violation of the right of access to the court.

²⁴ Section 428a of the Civil Procedure Act of Montenegro provides for the possibility of a retrial, following a judgment of the ECtHR finding a violation of a certain human right or freedom.

Hence, the Court's case law was incorporated into the domestic jurisprudence. Several judgments had been rendered by the Court on the subject of the excessive length of domestic proceedings, including the length of enforcement proceedings (*Zivaljevic v. Montenegro*, *Stakić v. Montenegro*, *Novovic v. Montenegro and Serbia*, and *Vukelic v. Montenegro*).²⁵ This resulted in a considerable decrease in the backlog of cases domestically. While excessively long proceedings were not a systemic problem in Montenegro, it remained a significant and, to an extent, widespread issue. The Right to a Trial within a Reasonable Time Act²⁶ was adopted in 2007 following the model of the "Pinto" and "Kudla" laws, that is, the Italian and Polish laws adopted to deal with the excessive length of domestic proceedings further to this Court's extensive jurisprudence against, *inter alia*, those States on the subjects. However, even before this Act was adopted, there was sufficient legal basis for dealing with complaints about excessively long proceedings.

Several laws in force at the time provided for this possibility. Particularly, Section 7 of the Courts Act provides that everybody has the right to an impartial trial within a reasonable time. Furthermore, Section 11 of the Civil Procedure Act ensures, *inter alia*, that the domestic courts have an obligation to ensure that proceedings are conducted without delay and within a reasonable period of time. Section 172(1) of the Obligations Act, in force at the time, provides that a legal entity (including the State) was liable for any damage to a third party by one of its bodies in exercising its functions or functions in relation thereto. However, despite these seemingly clear provisions, the Supreme Court of Montenegro considered them differently and issued an opinion on this matter:

The domestic legal system offers no legal remedy against violations of the right to a hearing within a reasonable time, which is why the courts in the Republic of Montenegro have no jurisdiction to rule in respect of claims seeking non-pecuniary damages caused by a breach of this right. Any person who considers himself a victim of a violation of this right may

²⁵ *Case of Živaljević and Others v. Montenegro*, App. No. 17229/04, 8 March 2011; *Case of Stakić v. Montenegro*, App. No. 49320/07, 2 October 2012; *Case of Novović v. Montenegro and Serbia* App. No. 13210/05, 23 October 2012; *Case of Vukelić v. Montenegro*, App. No. 58258/09, 4 June 2013.

²⁶ Published in the Official Gazette of Montenegro, No. 11/07.

therefore lodge an application with the European Court of Human Rights, within six months as of the adoption of the final judgment by the domestic courts.

[When asked to rule in respect of the compensation claims referred to above] ... the[them]... inadmissible (pursuant to Article 19 paragraph 3 of the Civil Procedure Code).

[...] courts in the Republic of Montenegro must decline jurisdiction ... and declare...

The right to a hearing within a reasonable time is provided in Article 7 of the Courts Act, whereas the Civil Proceedings Code provides in Article 11 paragraph 1 a duty of the courts to attempt to conduct the proceedings without delays, within a reasonable time....

Article 200 of the Obligations Act provides that... non-pecuniary damage can be awarded for... violations of... the rights of individuals....

It can be concluded from the above-mentioned regulations that the legal system guarantees everybody the right to a hearing within a reasonable time, and not only because the European Convention on Human Rights is directly applicable on the national level, but also because the domestic legislation explicitly provides for that right.

Hence, the Supreme Court of Montenegro completely misunderstood its role as a supreme judicial body that was competent, among other things, to ensure consistent case law and interpret and apply the laws as 'living instruments'. It further misunderstood the subsidiary role of the ECtHR. The Court communicated several such complaints to the government of Montenegro, and the parties reached a friendly settlement, further to which the government agreed to pay *ex gratia* certain sums of money in compensation for nonpecuniary damage and for costs and expenses, acknowledging that there had been a violation of the related rights.²⁷

The Montenegrin legislation provides, under certain circumstances, for the possibility of having lengthy proceedings, expedited by a request for review, and an opportunity for the claimants to be awarded compensation by an action for fair redress. Section 44, particularly, provides that this Act

²⁷ *Case of Vujisic and others v. Montenegro*, App. Nos. 17412/07, 17314/07, 17318/07, etc., 4 June 2013.

shall be applied retroactively to all proceedings from 3 March 2004, taking into account the duration of proceedings before that date as well. This Act entered into force on 21 December 2007 and did not refer to the ‘delay’ applications pending with the Court.

Section 10 of the Act provides that the president of the relevant court shall decide upon the request for review, which, pursuant to Section 9, is to be submitted to the court before which the case is pending and must contain the name and the address of the party, the registration number of the case or other data based on which it can be established to which case the request refers, the data and the circumstances indicating why it is claimed that the court is unjustifiably prolonging the proceedings and the signature of the party. Section 17 provides that, if the judge notifies the president of the court that certain procedural measures would be undertaken no later than four months after the receipt of the request for review, the president shall notify the party thereof and finalise the procedure upon the request for review. Section 23 provides that, if the president of the court acts pursuant to Section 17, the party cannot file another request for review in the same case before the expiry of the period specified in the notification. Pursuant to Section 24, if the president of the court does not deliver a notification on the request for review to the party according to Section 17, the party may appeal.

In all the aforementioned ‘length’ cases, the government of Montenegro relied on *Grzincic v. Slovenia*²⁸ to ask the Court to declare these applications inadmissible because the applicants did not use the new statutory remedy (the 2007 Act) retroactively. However, the Court dismissed the preliminary objections and considered that these complaints were not manifestly ill-founded for two principal reasons. First, the Court observed that, in cases against Slovenia, Poland and Italy, specific legislation regarding the length of the proceedings was enacted primarily in response to a great number of applications pending before the Court, indicating a systemic problem in these States. These laws contained specific transitional provisions, bringing within the jurisdiction of domestic courts the cases pending before the ECtHR (*Grzincic v. Slovenia*, cited in the

²⁸ *Case of Grzincic v. Slovenia*, App. No. 26867/02, 3 May 2007.

preceding text, paragraph 48; *Charzynski v. Poland* (dec.);²⁹ *Brusco v. Italy* (dec.)³⁰).

Accordingly, the Court considered that those States should be allowed to prevent or put right the alleged violation, therefore, allowed for an exception to the general rule that the assessment of whether domestic remedies had been exhausted was carried out with reference to the date on which the application was lodged. Furthermore, the Court allowed for such an exception even though the relevant remedies had been recently introduced and there was no established domestic case law confirming their effectiveness (*Giacometti and others v. Italy* (dec.);³¹ *Ahlskog v. Finland* (dec.);³² *Nogolica v. Croatia* (dec.),³³ and *Grzincic v. Slovenia* [cited in the preceding text]). However, the Court had no reason to doubt the effectiveness of these remedies at such an early stage after their introduction.

Second, the Montenegrin Right to a Trial within a Reasonable Time Act had not been adopted to deal with a structural problem or in answer to a great number of applications pending before the Court. Unlike the preceding cases against, *inter alia*, Italy and Croatia, the Montenegrin Act had been in force for about three years when the applicants from Montenegro lodged their complaints before the ECtHR. While the majority of the review requests were dealt with by setting periods in which certain procedural measures were to be undertaken, until the application in *Vukelic v. Montenegro*, the government had provided no information regarding whether these actions and time limits had been complied with and if the proceedings had been expedited and/or concluded. Additionally, unlike the Slovenian, Polish and Italian laws, which contained transitional provisions concerning the cases pending before the Court, the Montenegrin Act did not contain such provisions that would explicitly bring such applications within the jurisdiction of the national courts.

Since the proceedings in the aforementioned cases against Montenegro had been pending domestically for years (from 7 to 11 years) before the introduction of the above-mentioned legislation, they had not

²⁹ *Case of Charzynski v. Poland*, App. No. 15212/03, 01 March 2005; ECHR 2005-V, para. 20.

³⁰ *Case of Brusco v. Italy*, App. No. 69789/01, 27 March 2003, ECHR 2001-IX.

³¹ *Case of Giacometti and others v. Italy*, App. No. 34939/97, ECHR 2001-XII.

³² *Case of Ahlskog v. Finland*, App. No. 5238/07 (dec.), 9 November 2010.

³³ *Case of Nogolica v. Croatia*, App. No. 77784/01 (dec.), 5 September 2002.

been decided when the relevant Act was adopted and the government did not submit any case law proving the effectiveness of the aforementioned remedy, the Court considered it unreasonable to require the applicants to try this avenue of redress. However, in *Vukelic v. Montenegro*,³⁴ communicated in 2010 and recommunicated in 2012, the Court asked the government for a factual update, particularly, for the relevant domestic case law adopted pursuant to the Right to a Trial within a Reasonable Time Act. According to the information provided by the government, between 21 December 2007 (when the Act entered into force) and 3 September 2012, the courts in Montenegro had considered more than 121 requests for review. The Court of First Instance in Cetinje submitted data only for the period between May 2011 and May 2012, and the Court of First Instance in Zabljak submitted data only for the period between January 2011 and June 2012. Additionally, the Courts of First Instance in Danilovgrad and Kolasin did not provide the exact number of requests dealt with. All the other courts dealt with 121 requests for review.

In 46 cases, the courts issued notifications specifying the actions that were to be taken in each case within four months for expediting the proceedings. In 30 of these cases, the relevant actions were undertaken within the time limit (a main hearing concluded, a decision or a judgment rendered, etc.). In 14 cases, the relevant actions were undertaken within periods ranging from 4 to 12 months. In 2 cases, the relevant action was not undertaken even after 12 months.

In 33 cases, the review requests were dismissed as unfounded. In 21 of these cases, the relevant domestic proceedings were pending before the first-instance courts from five months to one year and nine months. In 1 case, the relevant civil proceedings, of which the request for review was dismissed as unfounded, had been pending for at least four years and five months before a first-instance court. In 11 cases, the duration for the domestic proceedings was unclear. Furthermore, it is unclear how the additional 33 requests for review were dealt with. However, in 18 of these cases, the relevant domestic proceedings ended soon thereafter. The status of the remaining 15 cases was unknown. In 5 cases, the appellants were informed that the relevant decisions had been rendered and, in 4 cases, the review requests were withdrawn.³⁵

³⁴ *Case of Vukelić v. Montenegro*, App. No. 58258/09, 4 June 2013, para. 72/89.

³⁵ *Case of Vukelić v. Montenegro*, cited in the preceding text, 4 June 2013, paras. 67-71.

Consequently, the Court observed that the Montenegrin case law on the request for review had considerably evolved. In nearly all the cases in which the relevant domestic courts specified a time limit for undertaking certain procedural activities, these activities had been undertaken and, in most cases, on time. Moreover, there had been a basis for the rejection of most of the requests that were dismissed as unfounded. While there were some cases in which the outcome of the request for review was unclear, the Court considered that, in view of the considerable development of the relevant domestic case law, a request for review must, in principle and whenever available in accordance with the relevant legislation, be considered an effective domestic remedy within Article 35 paragraph 1 of the Convention, for all the applications against Montenegro after the date of the judgment. The Court further held that an action for fair redress was not capable of expediting proceedings (*Mijuskovic v. Montenegro*).³⁶

It appears that the Court's case law regarding Montenegro, namely several judgments in which the Court found violations of a right to a trial within a reasonable time, considerably influenced the evolution of the relevant domestic case law. Furthermore, the Court's case law represented a considerable impetus for full, efficient and effective implementation of the 2007 Act and the positive evolution of the case law. It considerably influenced, albeit indirectly, the substantial decrease of the general backlog in the Montenegrin courts: more than 70% in the past two years, according to the latest Report of the Supreme Court of Montenegro.³⁷

Although the regulations³⁸ have been adopted to speed up the procedure and are relatively solidly applied, the issue of trial within a reasonable time remains a problem, as evidenced by the fact that the Court adopted several judgments against Montenegro where it found a violation of this important aspect of Article 6.³⁹ In *Živaljević v. Montenegro*,⁴⁰ the Court unanimously found a violation of various aspects of the right to a trial within a reasonable time. It did not establish the facts or arguments referred

³⁶ *Case of Mijušković v. Montenegro*, App. No. 49337/07, 21 September 2010, para. 72.

³⁷ <http://sudovi.me> (Accessed: 14 December 2022).

³⁸ Official Gazette of Montenegro, Nos. 22/2004, 28/2005, 76/2006 and Nos. 47/2015, 48/2015, 51/2017, 75/2017, 34/2019, 42/2019 and 76/2020.

³⁹ The analysis of judgments of the European Court of Human Rights in relation to Montenegro for the year 2020, p. 31. [Online]. Available at: <https://www.gov.me/dokumenta/f1cfdd52-c2de-46f6-b56b-55cf701bd502> (Accessed: 25 June 2025).

⁴⁰ *Case of Živaljević and Others v. Montenegro*, App. No. 17229/04, 8 March 2011;

to by the Government's representatives that would justify the total duration of the procedure at the national level. Accounting for the rich judicial practice, the Court concluded that, in the specific case, which was not particularly complex, the duration of 11 years, 3 months and 22 days at one level of jurisdiction was excessive and did not meet the 'reasonable time' requirement.

The court particularly pointed out the various aspects of this important right and the problems faced by the domestic courts in this context, in *Stakić v. Montenegro*.⁴¹ The case referred to a civil lawsuit for damages regarding the criminal offence of participating in a fight in 1973, in which the applicant initiated legal proceedings against the participants of the fight for compensation for damage to the eye, loss of vision and reduced work ability. The litigation was initiated in 1978 before the Basic Court in Podgorica and was ongoing at the time of the consideration of this case by the ECtHR (2012). The main hearing was concluded twice, and first-instance decisions were made, which were overturned by the High Court on appeal.

The Court noted that four witnesses and five experts were heard. However, contrary to the Government's allegations, it was clear that most of the evidence was obtained before the Convention entered into force regarding Montenegro. The court noted that some claims for damages were more complex than others; however, it did not consider this claim to be of such complexity to justify the length of the proceedings. Additionally, the disputed procedure did not require priority or urgent action and did not justify a procedural delay of such duration, which could be considered a *de facto* denial of justice. The Court noted that the applicant changed the exact amount of the requested compensation on two occasions, after Montenegro ratified the Convention; however, this could not significantly contribute to the length of the procedure, since the request was not changed in its essence. Some hearings scheduled before 3 March 2004 (date of ratification) were postponed at the applicant's request, yet nothing in the case file indicated that the procedural delays after the date of ratification were due to the applicant. Instead, they occurred due to the authorities' failure to be diligent in their actions.

The Court noted that the first decision after the ratification was made in October 2008, 4 years and 7 months later. The decision was revoked in September 2009, and the case returned to the first-instance court, where it

⁴¹ *Case of Stakić v. Montenegro*, App. No. 49320/07, 2 October 2012, para. 32/51.

was held for almost 3 years. In the meantime, only one hearing was held. Consequently, this violated Articles 6 and 13 of the ECHR, that is, the right to an effective legal remedy. Hence, the applicant was awarded 5,000 euros as compensation. The review of the judgments of the Court against Montenegro in this context shows that the duration of the proceedings ranged from 6 years and 3 months to 9 years and 2 months, mostly on three levels (First Instance Court, Higher Court, and Court of Appeal). In the period from the ratification to the end of 2019, the right to a trial within a reasonable time was violated in 27 judgments, which was reduced to 7 judgments in 2020. Notably, these were mostly judgments made by a three-member Chamber. Guided by the principles of those judgments, the Supreme Court of Montenegro found a violation of this right in several cases.⁴²

Among the main reasons for the long duration of the procedure were excessive formalism in the application of law, multiple annulment of decisions, conflicts of jurisdiction of different courts, failure of lower courts to act on annulment orders of higher ones, behaviour of parties who often misused certain procedural mechanisms to unjustifiably prolong the duration of the procedure and the impossibility of serving court summons on time.⁴³ The Court further found a violation of Article 6 due to non-execution of final judgments and court settlements in *Mastilović v. Montenegro*⁴⁴ and a violation of the right to access the court in *Madžarović v. Montenegro*.⁴⁵

By the end of 2019, the Court found a violation of the right to access the court in four cases.⁴⁶ *Madžarović and others v. Montenegro* was particularly interesting. Applicants, Mr Madžarević, and the company, Zetmont d.o.o. and Bermont d.o.o., complained based on Articles 6 and 13 that they were denied access to the court and an effective domestic remedy,

⁴² Ibid., pp. 36–44.

⁴³ The analysis of judgments of the European Court of Human Rights in relation to Montenegro for the year 2022, pp. 63–69. [Online]. Available at: <https://www.gov.me/dokumenta/26735f99-e48f-4e19-8d84-aef62e469c19> (Accessed: 29 June 2025).

⁴⁴ *Case of Mastilović and others v. Montenegro*, App. No. 28754/10, 24 February 2022.

⁴⁵ *Case of Madžarović and others v. Montenegro*, App. No. 54839/17 and 71093/17, 11 September 2017.

⁴⁶ The analysis of judgments of the European Court of Human Rights in relation to Montenegro for the year 2020, p. 46. [Online]. Available at: <https://www.gov.me/dokumenta/26735f99-e48f-4e19-8d84-aef62e469c19> (Accessed: 29 June 2025).

given that the appeals against the decisions of the Commercial Court from 2013 were dismissed after they were withdrawn by a person who was never the debtor's legal representative. The Court found that the applicants' right to access the court was violated because their appeal in commercial litigation proceedings was rejected by the Appellate Court of Montenegro without deciding on its merits.

Contrary to the current regulations, the court did not recognise the suspensive effect that the appeal against the decision of the appointment of the company's executive director had on the decisions made by that director. It referred to the decision to withdraw the complaints on behalf of the company in court proceedings. The Court of Appeal treated those appeals as withdrawn and did not decide on their merits. The Court found that the filing of an appeal against the appointment of the executive director must have a suspensive effect on the execution of the disputed decision, because it was prescribed by the domestic law. It was established that the decision to appoint a new executive director never became final. After the Appellate Court rejected the appeals, the Ministry of Finance annulled the decision of the appointment of a new executive director, and the company withdrew the request for his registration before the Central Register of Business Entities. Hence, the Court concluded that it was not necessary to decide on the applicant's appeal due to the alleged violation of the right to tenancy because it could not speculate what the domestic courts' decision would be regarding their appeal for the transfer of shares to the creditor. The applicants were awarded 3,600 euros in damages.

7. Right to respect for private and family life

In the first judgment concerning Article 8 of the ECHR on the protection of private and family life, *Mijušković v. Montenegro*,⁴⁷ a violation of the right in question was found. This was due to the inadequate and irresponsible behaviour of the state guardianship body, and the execution of a final judgment on guardianship. Due to the passivity and inaction of the state authorities, a mother of two minor children could not get in touch with her children for several years due to the state's failure to execute a temporary order on custody and hand over the children to their mother. Although the applicant missed the deadline for submitting a compensation request, at the initiative of the President of the Chamber, Sir Nicola Braza, the Chamber

⁴⁷ *Case of Mijušković v. Montenegro*, App. No. 49337/07, 21 September 2010.

unanimously decided to pay the applicant 10,000 euros as compensation for non-material damage.

In *Alković v. Montenegro*,⁴⁸ the Court established a violation of Article 8 of the Convention, along with Article 14, that is, the prohibition of discrimination due to the violation of the right to protection of the psychological and physical integrity of the applicant of Roma nationality. The applicant complained about the inadequate and ineffective investigation by the state authorities for a series of ethnically and religiously motivated attacks on his home by private persons and neighbours on several occasions during 2009. The applicant was awarded 6,000 euros in non-material damages and 5,000 euros for the procedural costs. This case showed that the Montenegrin investigative bodies, especially the police and the prosecutor's office, were often not up to the task when a quick, impartial and effective investigation was to be carried out, especially in sensitive ethnically and racially motivated attacks.

The case of university professors, Antović and Mirković, at the Faculty of Science and Mathematics is interesting due to violations of the right to private life under Article 8 of the Convention.⁴⁹ In the amphitheatre of the university, where the faculty gave lectures, the dean installed cameras for video and audio surveillance in violation of regulations. It should be noted that the national authorities in charge of this issue stated that video and audio surveillance were illegally conducted. The Court determined, by a majority of votes, that this was an illegal invasion of private life; hence, the professors were awarded 1,000 euros in compensation for non-material damages and 1669.50 euros for the costs of the proceedings.

In one of the latest judgments related to Article 8, the Court found a violation due to the failure of the authorities to protect the applicant from mobbing to which she was exposed at her workplace in ZIKS by her male colleagues. The state's responsibility was determined due to the inadequate application of civil and criminal law and failure to account for the overall context of the situation, including the fact that the petitioner pointed out irregularities and possible corruption in the institution as a whistleblower. Ms Spadijer, while working as the head of the shift in the women's prison in 2013, reported five of her male colleagues for inappropriate behaviour at work, specifically inappropriate contact with female inmates on New Year's

⁴⁸ *Case of Alković v. Montenegro*, App. No. 66895/10, 9 November 2010, para. 46/73.

⁴⁹ *Case of Antović and Mirković v. Montenegro*, App. No. 70838/13, 28 November 2017, para. 40/60.

Eve. After that, she experienced various inconveniences that caused her health problems, so she asked the ZIKS management to start a procedure for protection against mobbing, which was rejected as unfounded. At the end of August 2013, she left her job and went on sick leave due to active and passive abuse by colleagues and superiors. Her employment ended in 2015 due to the loss of working capacity.

The applicant turned to the courts, asking for protection from mobbing and compensation for material damage. However, the courts rejected her request, claiming that the events she complained about did not constitute mobbing because they did not have the character of systemic psychological abuse; only sporadic and individual. The Constitutional Court rejected her constitutional complaint, stating that there was no legal basis to indicate that she suffered mobbing at the workplace. The applicant complained about the violation of Articles 3, 6 and 13 of the Convention; however, the ECtHR, in accordance with its jurisdiction, determined that the application should be examined in relation to Article 8 of the Convention.

The Court assessed that the mediation procedure with the employer was not in accordance with the relevant regulations because it was not completed within the legal deadlines. It was determined that the mediator exceeded his legal powers because he was not authorised by law to determine whether the applicant's request was founded. The relevant jurisprudence in Montenegro regarding protection against mobbing is rare and unestablished, especially concerning the continuity of abuse, which is needed to directly implement the Law on Prohibition of Abuse in the Workplace. The Court found that the Montenegrin courts investigated only some of the instances, while several incidents remained completely unexamined. The national courts failed to determine how often these incidents occurred and repeated, and in what period, or to examine them individually and in relation to other incidents. They further failed to examine the context and wider background of the incidents.

The Court indicated that the civil and criminal legal mechanisms were applied inadequately and insufficiently. This was particularly related to the lack of assessment of all the disputed events and the failure to consider the entire context of the case. The damage to the applicant's motor vehicle in 2013 and the physical attack on her in 2015, including the possible context of 'whistling', were sufficient for the Court to find a violation of Article 8 in the context of the failure of the respondent state to fulfil its positive obligation to protect the applicant from mobbing. The court awarded the

applicant compensation for material damages and the costs of the procedure. Although such court proceedings are rare in Montenegro, the issue of mobbing is topical. However, victims hesitate to report abuse, and the courts show a certain degree of excessive formalism in the qualification of mobbing and distinguishing it from the prohibition of discrimination.⁵⁰ Nevertheless, this important judgment will likely trace the path of development of judicial practice in suppressing this negative social phenomenon.

*Dražković v. Montenegro*⁵¹ was an interesting case, as the Court found that the state violated the applicant's right to respect for private and family life because the competent authorities did not respect her right to exhume and move her husband's remains from Montenegro to Bosnia and Herzegovina. The applicant's husband died in 1995 and was buried in the family grave in Montenegro, which was owned by his nephew. She asked for permission to move her husband's remains to her grave in Trebinje; however, the nephew refused, explaining that his uncle never lived in Trebinje but in Belgrade, and his uncle's last wish was to be buried in Montenegro. In the proceedings before the courts of Montenegro, it was established that the applicant had no legal interest in submitting such a request, as she neither had a right to her husband's remains nor did she have the right regarding the place of burial.

The Court found that the domestic courts failed to balance the applicant's interest in the exhumation and transfer of the remains and the state's interest in preserving the inviolability of the graves and the rights of another family member. It was established that the domestic courts failed to examine other important facts, including whether the applicant's husband wanted to be buried in Montenegro and whether the applicant and he jointly bought a burial plot in Bosnia and Herzegovina to be buried together. The Court found that domestic laws did not regulate how to resolve disputes between family members regarding the last resting place of relatives based on Article 8. The administrative body in charge of exhumations did not have the authority to resolve such disputes and ordered the parties to first resolve the dispute and then submit a request for exhumation. Regular courts and

⁵⁰ The analysis of judgments of the European Court of Human Rights in relation to Montenegro for the year 2021, pp. 127–135, [Online]. Available at: <https://www.gov.me/dokumenta/26735f99-e48f-4e19-8d84-aef62e469c19> (Accessed: 29 June 2025).

⁵¹ *Case of Drašković v. Montenegro*, App. No. 40597/17, 9 June 2020, para. 46/58.

the Constitutional Court did not recognise the existence of any right for the wife based on Article 8 and did not balance her interest with the conflicting interest of her husband's relatives.

8. Freedom of expression

The Court adopted two judgments against Montenegro concerning Article 10 of the Convention in *Sabanovic v. Montenegro and Serbia*⁵² and *Koprivica v. Montenegro*, where it found violations of the applicants' rights to freedom of expression. As in other former communist countries, this is a sensitive and open political and legal issue in Montenegro, especially for the courts. The main problem is the willingness and capacity of the domestic courts, including the highest court, to apply the standards and principles developed in the Court's case law concerning Article 10. This is particularly regarding the implementation of the test to assess, in a concrete case, the compatibility of an interference under Article 10 paragraph 2 of the Convention.

Before these judgments, the case law of the Montenegrin courts on the relationship between the rights of privacy and expression showed a tendency to protect privacy, namely the reputation and honour of an allegedly insulted person. This was the heritage of a socialist approach and a conservative patriarchal society in which reputation and honour were the most important values for self-determination. This issue is more important than the decriminalisation of defamation, which is currently being considered in a great number of Member States of the CoE because freedom of expression can be, and is, endangered, with high compensations for defamation in civil cases. Therefore, domestic courts must be capable of applying the aforementioned test, namely, the standards and principles from the Court's case law regarding Article 10 paragraph 2.

After these two judgments were delivered in 2011, the Constitutional Court of Montenegro, in 2012, for the first time, successfully and properly applied the said test during a constitutional appeal in the case of Mr Nikolaidis.⁵³ In this case, the Court of First Instance in Podgorica properly applied this test in its judgment and acquitted the respondent (Mr Nikolaidis). Unfortunately, the High and Supreme Courts overruled this

⁵² *Case of Sabanovic v. Montenegro and Serbia*, App. No. 5995/06, 31 May 2011, para. 36/44.

⁵³ Uz-3-br.87/09, 19 January 2012.

judgment and allowed for a high compensation (about 12,000 euros) to the plaintiff. Thus, instead of encouraging the lower courts to apply the standards of the Convention, the higher courts discouraged them. However, the respondent lodged a constitutional appeal before the Constitutional Court of Montenegro.

The respondent was a well-known novelist and journalist. He had written an article titled 'The Devil's Apprentice' that was published in a well-known weekly magazine, in which he had severely criticised the plaintiff, a famous film director, for his publicly expressed political views about the wars, the atrocities in former Yugoslavia, the punishment of the main war criminals, particularly in Bosnia and Herzegovina, his relationship with the Serbian nationalist regime and his political, national and religious attitudes. The respondent used offensive and sharp language describing, *inter alia*, the plaintiff as 'bad, ugly, and stupid'. The High and Supreme Courts considered this defamation in the press, which severely insulted the plaintiff's honour and reputation, and awarded 12,000 euros in compensation and legal costs.

The Constitutional Court of Montenegro applied, for the first time, properly and completely, the test developed in the Court's case law for assessing whether the interference with the respondent's freedom of expression could be justified under Article 10 paragraph 2 of the Convention, that is, 'in accordance with the law, pursuing a legitimate aim, necessary in a democratic society, proportionality of the aims pursued and means employed, sufficient and relevant reasons for the decision and severity of the punishment or compensation'. The Constitutional Court found that the High and Supreme Courts did not properly apply the Convention in the particular circumstances of this case and violated the respondent's right to freedom of expression. The Constitutional Court quashed the judgment of the Supreme Court and remitted the case to the Court of First Instance in Podgorica. Hence, it relied particularly on the fact that the plaintiff was a well-known public person who made strong public statements concerning issues of public interest, exposing himself to different and possibly strong public reactions. While the respondent used sharp and offensive language, he expressed a series of value judgments, with a strong factual basis, in the course of an important public debate on a matter of public interest. The Constitutional Court concluded that the respondent's sharp criticisms of the plaintiff's political and social attitudes did not overstep the level of permissible criticism under Article 10. Hence, there

was a violation of the respondent's right of freedom of expression, accounting for the severity of the compensation to the plaintiff (more than forty times the average salary in Montenegro at the time).

In the remittal, the Court of First Instance of Podgorica, having applied fully and properly the test for compliance with Article 10, ruled in favour of the respondent. This remains the most significant influence of the Convention and the Court's case law on the legal system and the courts' practice in Montenegro because, in a relatively short period after the Convention entered into force, the domestic courts started applying the standards and procedures from the Court's case law. It is worth mentioning that, in the meantime, defamation was decriminalised. Following the recommendations of the CoE, defamation and insult were removed from the Criminal Code through appropriate amendments,⁵⁴ making the protection of an individual's honour and reputation a matter of civil law.

9. Protection of property

In *A. and B. v. Montenegro*,⁵⁵ a violation of the right to peaceful enjoyment of property was established due to the non-execution of final and enforceable court decisions related to the old foreign currency savings of the applicants' legal predecessor. The Court challenged the effectiveness of the constitutional appeal due to its lack of effectiveness. As the applicants were prevented from withdrawing a significant amount of old foreign currency savings deposited in the bank, the Court concluded that Article 1 of Protocol 1 was violated.

In *Mijanović v. Montenegro*,⁵⁶ the Court found a violation of Article 1 of Protocol 1 and Article 6 paragraph 1, due to the long-term non-execution of a final and enforceable court verdict. The applicant, an engineer and inventor, due to the copyright of machines and tools in Radoje Dakić, a company in state-social ownership in the then Titograd, achieved a significant financial income, which was confirmed to him by the domestic courts. However, the final judgments could not be performed for several years. Unfortunately, the applicant died during the proceedings, yet his daughter continued the proceedings. Establishing a violation of both the mentioned articles of the Convention, the Court ordered the state to pay the

⁵⁴ Official Gazette of Montenegro, Articles. 195 and 196, No. 32/11 of 1 July 2011.

⁵⁵ *Case of A. and B. v. Montenegro*, App. No. 37571/05, 5 March 2013, para. 58/64.

⁵⁶ *Case of Mijanović v. Montenegro*, App. No. 19580/06, 17 September 2013, para. 81/87.

applicant the full amount awarded by the domestic courts, including legal interest and related legal costs, as pecuniary damage.

*Kips DOO and Drekalović v. Montenegro*⁵⁷ was a case characterised by a large compensation of 4,535,595.20 euros for material damages for the violation of Article 1 of Protocol 1. In this case, the Court further found a violation of Article 6 paragraph 1 for the right to a trial within a reasonable time regarding the administration of the procedure, Article 13 for the right to an effective legal remedy. The reason for the petition was the refusal of the state and local authorities in Podgorica to issue a building permit to the investor, the excessive duration of the administrative procedure (ping/pong method) for the arbitral transfer of jurisdiction from one authority to another in connection with the purchase of an urban plot, and arbitrary and frequent changes in urban plans, due to which the applicant was *de facto* and *de jure* unable to build a large shopping centre.

In *Petrović and others v. Montenegro*,⁵⁸ the Court did not find a violation of Article 1 of Protocol 1. The case was related to the regime of possible private ownership in the zone of maritime property. The domestic courts did not recognise the applicants' right to ownership of the parcels in the zone of public maritime property (Morsko dobro), the owner of which was their father, until it was deleted from the Cadastre in favour of the state. The courts found and determined that the father was not registered as the owner at the time of his death, due to the changed regime of ownership of land in the marine property zone, whereby the state automatically became the owner under the new law. This part of the application was unanimously rejected due to the non-compliance *ratione temporis* with the jurisdiction of the ECtHR. The court concluded that the actual expropriation of property occurred before the ratification of the Convention, and the expropriation of property was an instantaneous act, which does not result in a 'continuous situation of deprivation of rights' covered by court jurisdiction.

The applicants complained of the violation of the first fair trial, due to the alleged failure of the courts, headed by the Supreme Court, to answer the key questions why could they not be recognised as having the right to property in the marine property zone on one plot similar to the right granted to them on a neighbouring plot in the same zone, even though their father

⁵⁷ *Case of KIPS DOO and Drekalović v. Montenegro*, App. No. 28766/06, 26 June 2018, para. 14/21.

⁵⁸ *Case of Petrović and others v. Montenegro*, App. No. 18116/15, 17 July 2018, para. 41/43.

was the owner of both plots? The applicants claimed that the state violated the obligation to adequately explain their decisions, and such a situation *de facto* resulted in a degree of legal uncertainty. However, this part of the application was rejected by a majority of four judges, who considered that this question was not crucial, because it concerned a parcel that was not the subject of the dispute. Instead, they believed that the predecessor needed to be the owner of the property at the time of his death in 1997.

The courts determined that the father, as a private person, could not be the owner of the land in the maritime domain per the 1990 Law on Maritime Domain, that is, the applicants-heirs could not become owners even based on the 2009 Law on Property Legal Relations. This law allowed exceptional property to be acquired in the marine property zone only after the said law came into force; hence, they acquired the neighbouring plot. According to the majority of judges, this was irrelevant to the plot that was the subject of the dispute.

However, judges Morow-Wikstrom, Gricko and Vučinić did not agree with this position. They believed that the Supreme Court of Montenegro did not resolve the key issue reasonably in a case that referred to the legal uncertainty of the property regime in the marine property zone. Among other things, they pointed out that the 1992 Law on Maritime Property exceptionally allowed private ownership in the maritime property zone, and, in this case, it was not explained why the applicants could not, exceptionally, become owners of one plot but not another. They pointed out that the Supreme Court, in its principal legal position on 27 May 2015, on land use in the marine property zone, established that ‘the conditions under which marine property can be an object of private property are not determined by law, which leaves many open questions for practical application’.

Apparently, the dissenting opinion of the three judges in the above case influenced the Court in *Nešić v. Montenegro*⁵⁹ to unanimously establish a violation of the right to peaceful enjoyment of property, because the applicant was deprived of property in the marine property zone without any individual decision or compensation. In 1980, the applicant bought two plots of land from a private owner and registered them in the cadastre. In 2006, the state initiated legal proceedings against him, demanding that his ownership be terminated because they were located in the maritime property zone. In 2014, domestic courts ruled in favour of the state, concluding that

⁵⁹ *Case of Nešić v. Montenegro*, App. No. 12131/18, 03 March 2018, para. 47/54.

the coastal zone, including its seashore, was a natural resource, a public good that could only be owned by the state. The courts determined that the plots were located on the sea coast and the applicant's right to ownership ceased, with the state becoming the sole owner while the applicant remained the beneficiary of the plots. Hence, the state was registered as the owner of the land.

The Court undisputedly determined that the applicant was deprived of the right of ownership, although he had the right to use them. It was established that the Constitution of Montenegro and the 1992 Law on Maritime Property⁶⁰ stipulated that the sea coast represented natural wealth and could not be privately owned, becoming the legal basis for the state's acquisition of property rights. However, the Court noted that the Constitution and other relevant regulations governing property issues guaranteed the right to fair compensation in case of deprivation of liberty, which was absent in the case of the applicant. The Court concluded that the judgments of the competent courts stated that the applicant would have the right to compensation in case of expropriation of the land (Article 3 of the Law on Property⁶¹); however, it was not defined how the expropriation would be carried out was not defined.

The Law on Maritime Property does not prescribe the manner in which the expropriation will be carried out in cases where the state has been registered as the owner based on a court ruling. Hence, whether and when the procedure for formal expropriation of land will be carried out remains unclear, based on which the applicant would be paid fair compensation. This gap left a significant degree of legal uncertainty in this important domain of property rights protection. Therefore, the applicant was awarded 5,400 euros for the costs of the procedure, while the request for non-material damage compensation was not submitted.

This judgment had a far-reaching and, in our opinion, positive impact on the protection of property rights. Based on it, the Supreme Court of Montenegro adopted a general legal opinion according to which the owners of land declared to be maritime property, and who acquired the right of ownership in a legally valid manner until the Law on Maritime Property came into force, their rightful successors would retain the right of ownership until it was expropriated and compensation was paid according to

⁶⁰ Official Gazette of Montenegro, Nos. 014/92, 059/92, 027/94, 051/08, 021/09, 073/10 and 040/11.

⁶¹ Official Gazette of Montenegro, No.19/2009.

expropriation requests.⁶² Accordingly, such land owners had the right to be registered as holders of property rights.

10. Enforcement of judgments

Regarding the execution of judgments, it should be pointed out that Montenegro, although the last admitted member of the CoE and the Convention, conscientiously and responsibly executed all the judgments against it by the ECtHR, without delay.⁶³ In this context, various individual and general measures were taken for the timely execution of judgments, which included payments, compensation for non-material and material damages, repetition of procedures, release from custody of persons illegally deprived of liberty, changes in relevant laws (especially judicial practices), adoption of complex financial plans and programs for cases in which high compensation was determined for victims of violations (KIPS cases and Radoje Dakić workers), and implementation of plans and programs for training police, prosecutors, judges and administrative officers. It should be pointed out that the Committee of Ministers of the Council of Europe as for the resolutions related to the execution of judgments in a timely and responsible manner.⁶⁴

11. Basic role of the Constitutional Court of Montenegro

Over the last 10 years, the Constitutional Court has improved the efficiency and the quality of its decision-making under the influence of the Court's judgments against Montenegro. This was the case even before the Court declared the Constitutional appeal to be an effective legal remedy, in 2015, per Article 35 paragraph 1 of the Convention.⁶⁵ Article 149 of the Constitution of Montenegro⁶⁶ provides that the Constitutional Court shall

⁶² The analysis of judgments of the European Court of Human Rights in relation to Montenegro for the year 2020, p. 70. [Online]. Available at: <https://www.gov.me/dokumenta/26735f99-e48f-4e19-8d84-aef62e469c19> (Accessed: 29 June 2025).

⁶³ The reports on the work of the Office of the Representative of Montenegro before the ECHR are online available at: <https://www.gov.me/kzcg> (Accessed: 29 June 2025).

⁶⁴ Ibid.

⁶⁵ *Case of Siništaj and others v. Montenegro*, App. Nos. 1451/10, 7260/10 and 7382/10, 24 November 2015.

⁶⁶ Official Gazette of Montenegro, No. 1/07.

rule on a constitutional appeal regarding an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective remedies have been exhausted.

It is noteworthy that the Constitution provides a wider corpus of rights and freedoms than the Convention, the former guaranteeing economic, social, cultural and minority rights. Section 48 of the Constitutional Court Act⁶⁷ provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted. Sections 49 through 59 of the Act provide additional details about the processing of constitutional appeals. Particularly, Section 56 provides that, when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body that rendered the decision. This Act entered into force in November 2008.

Until 2010, no constitutional appeal had been accepted by the Constitutional Court. In 2010, it accepted three appeals out of the 337 lodged (0.89%). In 2011, 16 of 475 appeals were accepted (3.37%). In 2012, the court examined 505 appeals, accepting 13 (2.57%). Until the end of 2012, the Constitutional Court had examined 1,317 appeals, of which it had accepted 32 (2.43%). Until 1 June 2013, the Constitutional Court accepted five more appeals.

In accepting the constitutional appeals, the Constitutional Court found that there had been violations of human rights and freedoms protected by the Constitution and the Convention. It quashed 25 judgments and decisions of the Supreme Court of Montenegro, 5 of the High Court, 3 of the Courts of Appeal and 1 of a Court of First Instance. Moreover, it found violations without quashing the related acts in 10 decisions (two decisions of the Court of First Instance, five of the High Court and three of the Court of Appeals). In these rulings, the Constitutional Court established violations of the right to an effective remedy, personal liberty and security (the length and justification of detention on remand), a fair trial, presumed innocence, freedom of expression and peaceful enjoyment of property.

In a few of these constitutional appeals, the Constitutional Court directly referred to the relevant articles of the ECHR and the ECtHR's case

⁶⁷ Official Gazette of Montenegro, No. 64/08.

laws, including Article 5 paragraph 1(c), paragraph 3 and paragraph 4; Article 6 paragraph 1 and paragraph 2; Article 10; Article 13; and Article 1 of Protocol No. 1. Moderately and slowly, but determinedly, the Constitutional Court of Montenegro has started to apply the standards and principles developed by the Courts case law. Additional case laws regarding Montenegro revealed that the Court found that a constitutional appeal in Montenegro had not been an effective remedy up to 2010 (*Koprivica v. Montenegro*, cited in the preceding text), and it was not an effective domestic remedy regarding the length of proceedings, including enforcement proceedings (*Boucke v. Montenegro*).⁶⁸

Particularly, in *Koprivica*, the Court took into consideration that no constitutional appeal had been accepted before 2010 and no judgment rendered in a constitutional appeal had been published before an unspecified date in 2010. Ever since the Court declared a constitutional appeal as an effective legal remedy, a large number of constitutional appeals have been adopted in which violations of the Convention and the Constitution of Montenegro have been determined, especially concerning freedom of expression, legality of detention, prohibition of torture and inhumane treatment, fairness of the judicial procedure and property protection. The verdict *Kusturica v. Nikolaidis*⁶⁹ was particularly significant because the Constitutional Court, for the first time, creatively applied the standards from extensive jurisprudence regarding Article 10 of the Convention, and overturned the judgments of regular courts, in which the journalist Nikolaidis was sentenced to pay high compensatory damages to the film director Kusturica for injury to his honour and reputation.

After 2020, with the change in the political situation, the work of the Constitutional Court stagnated due to the impossibility of electing new judges and the brutal politicisation of the process. For a long time (more than a year and a half), the Constitutional Court was without a quorum for decision-making. Hence, in the meantime, a large number of cases accumulated and, at the domestic level, the question of the effectiveness of the constitutional appeal before the ECtHR was raised. Furthermore, questions were raised whether, in the future, the Constitutional Court would be able to face the challenges of politicisation, since the rejection of the

⁶⁸ *Case of Boucke v. Montenegro*, App. No. 26945/06, 21 February 2012.

⁶⁹ Online Available at: [https://www.hraction.org/2008/04/08/comment-on-the-final-judgment-in-the-case-of-kusturica-v-nikolaidis-and-monitor/?lang=en](https://www.hrraction.org/2008/04/08/comment-on-the-final-judgment-in-the-case-of-kusturica-v-nikolaidis-and-monitor/?lang=en) (Accessed: 29 June 2025).

request for the constitutionality of the Basic Treaty⁷⁰ with the Serbian Orthodox Church, for procedural reasons, shed light on the difficulties of overcoming the challenge. Additionally, following the 2011 amendments to Articles 195 and 196 of the Criminal Code of Montenegro, the offences of defamation and insult were removed from the Criminal Code.⁷¹

12. Other effects of the Convention at a national level

Organised and institutionalised cooperation between the CoE and Montenegro began in 2004 to align Montenegro's legal system with contemporary standards developed by various bodies of the CoE in the areas of human rights, democracy and the rule of law, and ensure the implementation of the concept of constitutional, limited and accountable government. In the same year, a highly complex and comprehensive study was published, examining the extent to which the Montenegrin legal system was harmonised with the CoE standards and the ECtHR's case law.⁷² This marked the essential and substantive beginning of Montenegro's preparation for full membership in the CoE, particularly for accession to the ECHR.

In line with the CoE recommendations, training centres for prosecutors, judges and administrative law practitioners were established to align Montenegro's legal system with European standards. In cooperation with the CoE Office, the training of judicial office holders has been regularly conducted for over two decades, through roundtables, seminars, workshops and expert lectures. Special emphasis has been placed on the training of judges and prosecutors to ensure the practical implementation of the ECHR standards within the Montenegrin legal system, particularly for the prohibition of torture and inhuman or degrading treatment, the effectiveness of legal remedies, the right to a fair trial within a reasonable

⁷⁰ With this act, the SPC was *de facto* placed above the Constitution and laws in Montenegro, and the believers of the Montenegrin Orthodox Church were brutally denied the fundamental right to freedom of religion.

⁷¹ Official Gazette of Montenegro, articles 195 and 196, No. 32/11 of 1 July 2011.

⁷² Council of Europe, 2004, pp. 382. In 2004, the Government of Montenegro established an Expert Team to draft the study on the harmonisation of Montenegrin legislation with the European Convention on Human Rights and Fundamental Freedoms and the Protocols to the Convention. The appointed members of the Expert Team were Prof. Dr Nebojša Vučinić, Dr Milan Marković, Dr Rajko Milović and Miraš Radović. Participating in the work, as associate experts, were Abaz Beli Džafić, Siniša Bjeković, Vojislava Đukić and Dr Ivana Jelić.

time, the right to private and family life, freedom of thought, conscience and religion and the freedom of expression. It is noteworthy that Montenegro has signed and ratified nearly all CoE conventions, specifically, 89 of them, whose implementation is monitored by the CoE Office and competent Montenegrin authorities.

Moreover, at the CoE's initiative, a continuous and expert dialogue is held between the highest Montenegrin courts and the ECtHR, which is reflected in the regular annual visits of ECtHR judges to Montenegro. Over the past 15 years, five Presidents and more than 20 judges of the ECtHR⁷³ have visited Montenegro. During joint sessions with the judges of the Supreme Court and the Constitutional Court, they discussed the most current issues concerning the application of the ECHR, particularly issues related to the application of Article 6, the right to a fair trial.

To understand whether there have been legislative developments in Montenegro influenced by the Court's case law, two crucial changes must be noted. First, according to Section 428a of the Civil Procedure Act, when the Court finds a violation of human rights or fundamental freedoms guaranteed by the Convention, the party may, within three months from the final judgment of the Court, seek that the impugned domestic decision be duly changed by the same first-instance Court that issued it, if the violation cannot be remedied except by reopening the proceedings.⁷⁴ To date, two actions have been reopened pursuant to this provision: *Garzicic* and *Koprivica*.

Second, Section 424 (6) of the Criminal Procedure Code provides that criminal proceedings, where a final judgment has been adopted, may be reopened in favour of an accused where the ECtHR (or another court established by a ratified international treaty) finds that human rights and freedoms have been violated during criminal proceedings and the judgment is based on such violations, so long as such reopening can remedy the violation.⁷⁵ Since the Court has not yet issued any judgment against Montenegro in criminal proceedings, the question of reopening a domestic action has not arisen.

⁷³ Thus, Montenegro has been visited by Jean-Paul Costa, Vincents (Vine) Spielmann, Robert Spano, Linos-Alexandre Sicilianos and Marko Bošnjak.

⁷⁴ Section 428a of the Civil Procedure Act, Official Gazette of Montenegro, No. 76/06.

⁷⁵ Section 424 (6) of the Criminal Procedure Act, Official Gazette of Montenegro, No. 57/09.

Regarding the training of domestic judges, a Judicial Training Centre was established within the Supreme Court of Montenegro. In the last three years, among its other activities, this centre has organised more than 15 seminars, roundtables and workshops, primarily about Articles 5, 6, 8, 10 and 13 of the Convention, the compatibility of the Criminal Procedure Code with the Convention and the prohibition of discrimination, emphasising the LGBT population and disabled persons. Various issues are discussed in these seminars, such as the justification for detention, the presumption of innocence, equality of arms, defence rights, and so on.

These seminars are organised in cooperation with the AIRE Centre of London, Embassies of the United States, the United Kingdom and France, the OSCE Mission in Montenegro and the Foundation of Konrad Adenauer, along with nongovernmental organisations from Montenegro, such as the Centre for Democracy and Human Rights and the Human Rights Centre of the Faculty of Law in Podgorica. The seminars' participants comprise judges of all courts in Montenegro and prosecutors from all levels.

Based on the discussion, it can be concluded that these educational activities are extremely important to enable the Montenegrin judges to apply the Court's standards. In the future, special attention should be paid to the construction of an even closer connection and dialogue between the Court and the highest courts in Montenegro, notably the Supreme Court and the Constitutional Court. The Court's judges and the members of the Court's Registry should be regularly involved in these activities as a part of judicial dialogue.

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REVIEW

BENCE UDVARHELYI*

The scope of eurocrimes and their possible extension

ABSTRACT: Article 83(1) of the Treaty on the Functioning of the European Union empowers the European legislator to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. This legal harmonisation competence was frequently used by the EU and resulted in the adoption of several criminal law directives. The Treaty determines ten areas of crime which can subject to legal harmonisation and most of which have already been regulated at the EU level. The objective of the article is to provide a detailed analysis of the requirements of the legal harmonisation competence, the scope of harmonisation, its procedural conditions and the possibility of the extension of the list of EU crimes. The paper also intends to present and analyse the legislative practice of the EU institutions and tries to formulate the relevant tendencies in connection with the current EU criminal policy.

KEYWORDS: EU criminal law, legal harmonisation, eurocrimes, cross-border criminality, emergency brake procedure.

1. Introductory remarks

The European criminal policy of the 20th and 21st centuries faces several fundamental challenges¹, including the significant *increase in cross-border, transnational criminality*. Due to the intensive technological, economic and political changes caused by the globalisation, criminality has become borderless, the international dimension of criminal offences has increased, and new forms of cross-border crimes have emerged. The development of the European integration also played an important role in this process. Along their incontestable advantages, the abolishment of the internal borders between the Member States and the recognition of the principle of

* Associate professor, Department of Criminal Law and Criminology, Institute of Criminal Sciences, Faculty of Law, University of Miskolc, Hungary. bence.udvarhelyi@uni-miskolc.hu.

¹ See in detail: Sieber, 1997, pp. 369-370. See also: Cotterrell, 2015, pp. 7-23.

free movement of persons, goods, services and capital also resulted in numerous security risks, since their benefits can be exploited not only by law-abiding citizens, but also by criminals.²

The European Union also realised the risks posed by the increasing cross-border criminality which forced the Member States to begin a slow intergovernmental cooperation in the field of criminal law. This collaboration later resulted in the signature of the Treaty of Maastricht in 1992 which extended the European integration to justice and home affairs. Later, the Treaty of Amsterdam, entered into force in 1999, explicitly provided the European Union the possibility to adopt '*measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking*'.³ Finally, the Treaty of Lisbon signed in 2007 and entered into force in 2009, determined ten criminal offences, the so-called '*eurocrimes*' or '*EU crimes*' which can be regulated at the EU level. This legislative competence is regulated in Article 83(1) of the Treaty on the Functioning of the European Union. According to the rule

*the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*⁴

Under this provision, the European Union intends to combat the most serious forms of crimes with cross-border dimension through the establishment of minimum rules concerning the definition of these criminal offences and their sanctions.

In order to combat serious cross-border criminal offences, the main tool in the hand of the European Union is the so-called '*legal harmonisation*'. Harmonisation of criminal offences and sanctions primarily aims to gradually eliminate the differences between the criminal law

² Hecker, 2015, pp. 18-19.

³ Article 34(e) of the Treaty on European Union.

⁴ See: Article 83(1) of the Treaty on the Functioning of the European Union (TFEU)

systems of the Member States.⁵ Since criminal law is deeply rooted in national, historical and cultural traditions and specificities of the Member States, significant disparities can be observed between their national criminal laws. Due to these differences, it can easily happen that the same conduct is considered a criminal offence in one Member State, an administrative offence in a second, and a non-punishable act in a third.⁶ Even if a criminal conduct is punishable in each Member States, significant differences could be marked regarding the factual elements of the offence, the scope of criminal liability and the type and level of criminal sanctions. The criminals can easily take advantage of this and, through the so-called '*forum shopping*', they can choose the country for the commission of the offence where the chances of criminal liability are the lowest and the criminal penalties are the less severe.⁷ The gradual reduction and elimination of differences between national criminal laws may deprive criminals of this forum shopping.⁸ With the approximation of national substantive criminal laws, the European Union tries to ensure that all Member States criminalise certain unlawful conduct in the same way and prescribe similar sanctions against offenders committing these offences.

The objective of this paper is to provide a thorough analysis of the legal harmonisation competence of the European Union under Article 83(1) TFEU. In this regard, the article presents the conditions of the competence, the scope of criminal harmonisation, the procedural provisions and requirements of legal harmonisation and the possibility of the extension of the list of eurocrimes. The paper not only provides for a dogmatical examination of the provisions of the Treaty but also dissects the post-Lisbon legislative practice of the European institutions. It should be noted, however, that the European Union processes another harmonisation competence under Article 83(2) TFEU whose conditions are different.⁹ This so-called '*ancillary harmonisation competence*' is not examined within the framework of this paper.

⁵ See in detail: Klip, 2000, pp. 627-628; Spencer, 2002, pp. 43-53; Vogel, 2002, pp. 59-63.

⁶ Hecker, 2007, p. 562.

⁷ Ligeti, 2005, p. 22.

⁸ See: Van der Wilt, 2002, p. 78; Vogel, pp. 279-280.

⁹ Under Article 83(2) TFEU, '*(i) if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned*'.

2. The conditions of the legal harmonisation competence under Article 83(1) TFEU

As it can be seen from its phrasing, Article 83(1) TFEU empowers the European Union to counter certain *particularly serious, cross-border, transnational crimes*. The exercise of this legal harmonisation competence is subject to two conjunctive criteria: the offence concerned must be particularly serious and have a transnational dimension.¹⁰ However, the exact meaning of these requirements is not precisely defined by the Treaty.

The first condition of *particular seriousness* requires that the offence reach a certain sufficient level of gravity to justify the fight against it at supranational level. It is obvious that there is no need for legal harmonisation at the level of the EU in case of bagatelle, petty offences.¹¹ However, the particular seriousness alone is not sufficient to legitimise the harmonisation competence; the condition of *cross-border nature* of the crime is also required. The transnational dimension of an offence is determined by the Treaty based on three alternative criteria: the *nature of the offence*, the *impact of the offence* and the *special need to combat it on a common basis*.

- A crime is considered to have a cross-border dimension by its nature if the criminal conduct is typically carried out in the territory of more than one state. This is typical e.g. in case of illegal drug trafficking, human trafficking, smuggling, money laundering or terrorism.
- The cross-border dimension of a crime by its effect can be established if the criminal conduct committed in a Member State causes harmful result in other countries. The harmful effects of the offence can involve more states, e.g. in case of environmental crimes or counterfeiting of money, since neither the pollution caused by illegal conduct nor the counterfeit money entering international financial circulation stops at national borders.
- The particular need to combat the offence based on a common basis requires that action at EU level represents an *added value*¹² in the fight

¹⁰ See in detail: Böse, 2012, pp. 1073-1074; Mansdörfer, 2010, p. 16; Safferling, 2011, p. 413; Satzger, 2016, pp. 140-141.

¹¹ Asp, 2012, pp. 85-87; Böse, 2013, pp. 154-156.

¹² See: Mitsilegas, 2016, p. 59.

against the crime in question, compared with the sole national repressive measures.¹³

As it was mentioned above, Article 83(1) TFEU lists ten areas of crime which meet the above-mentioned two conditions and can therefore be subject for possible legal harmonisation: *'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'*.

On the legal basis of the harmonisation competence under Article 83(1) TFEU, the EU legislator has already adopted a total of eight directives on the aforementioned eurocrimes: *trafficking in human beings*¹⁴, *sexual abuse and sexual exploitation of children and child pornography*¹⁵, *attacks against information systems*¹⁶, *counterfeiting of the euro and other currencies*¹⁷, *terrorism*¹⁸, *money laundering*¹⁹, *fraud and counterfeiting of non-cash means of payment*²⁰ and *violence against women and domestic violence*²¹, while another directive on *fight against corruption*²² is currently

¹³ Asp, 2012, pp. 86-87; Dorra, 2013, pp. 195-200; Simon, 2012, pp. 247-248.

¹⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101, 15.4.2011, pp. 1-11]

¹⁵ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [OJ L 335, 17.12.2011, pp. 1-14]

¹⁶ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [OJ L 218, 14.8.2013, pp. 8-14]

¹⁷ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [OJ L 151, 21.5.2014, pp. 1-8]

¹⁸ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [OJ L 88, 31.3.2017, pp. 6-21]

¹⁹ Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [OJ L 284, 12.11.2018, pp. 22-30]

²⁰ Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA [OJ L 123, 10.5.2019, pp. 18-29]

²¹ Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence [OJ L, 2024/1385, 24.5.2024, ELI: <http://data.europa.eu/eli/dir/2024/1385/oj>]

under negotiations. In 2022, the list of eurocrimes was extended (see in detail in Chapter 5) to the violation of Union restrictive measures about which another directive has already been adopted.²³ It can therefore be ascertained that the European Union has actively used its legal harmonisation competence and has already regulated almost all ten eurocrimes.²⁴

However, it shall be mentioned that these EU directives are not without precedent, because the European Union have already adopted several *third pillar legal acts* in connection with these crimes before the Treaty of Lisbon²⁵, most of which have been repealed by the newer

²² Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council [COM(2023) 234 final, 3.5.2023]

²³ Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 [OJ L, 2024/1226, 29.4.2024, ELI: <http://data.europa.eu/eli/dir/2024/1226/oj>]

²⁴ It should also be briefly mentioned that the EU legislator has also adopted some criminal law directives based on its harmonisation competence under Article 83(2) TFEU, which is not subject to the examination of the article. See: Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse [OJ L 173, 12.6.2014, pp. 179-189], Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, pp. 29-41], Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC [OJ L, 2024/1203, 30.4.2024, ELI: <http://data.europa.eu/eli/dir/2024/1203/oj>]

²⁵ See for example: Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [OJ L 140, 14.6.2000, pp. 1-3], Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [OJ L 329, 14.12.2001, p. 3], Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment [OJ L 149, 2.6.2001, pp. 1-4], Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [OJ L 182, 5.7.2001, pp. 1-2], Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [OJ L 164, 22.6.2002, pp. 3-7], modified by Framework Decision 2008/919/JHA [OJ L 330, 9.12.2008, pp. 21-23], Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human

directives. Moreover, there are other criminal offence which were regulated in third pillar instruments under the Treaty of Amsterdam but are not included in the catalogue of Article 83(1) TFEU, e.g. racism and xenophobia²⁶, facilitation of unauthorised entry, transit and residence²⁷ or environmental crimes²⁸. Therefore, one can argue that the catalogue of the Treaty about the criminal offences is not an absolute novelty. However, as a counter-argument, it has to be highlighted that the Treaty of Amsterdam mentioned only three criminal offences (organised crime, terrorism and illicit drug trafficking) with regard to the legal harmonisation competence, therefore, the adoption of criminal law secondary legal acts in the field of other criminal offences was mostly due to the extensive interpretation of the Treaty by the European Commission and the Council. Therefore, according to our point of view, the most important significance of the Treaty of Lisbon in this context is that it provided for an '*expressis verbis*' catalogue of criminal offences which can indisputably be subject to legal harmonisation. Consequently, legal acts regarding these categories of crime can now be adopted on the basis of a clear primary law provision, rather than through barely an expansive interpretation of the Treaty.

As a critical remark regarding the legal competence in Article 83(1) TFEU, it should be mentioned that the catalogue of offences listed does not always mention specific criminal offences as in national criminal laws, but

beings [OJ L 203, 1.8.2002, pp. 1-4], Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector [OJ L 192, 31.7.2003, pp. 54-56], Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography [OJ L 13, 20.1.2004, pp. 44-48], Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [OJ L 335, 11.11.2004, pp. 8-11], Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems [OJ L 69, 16.3.2005, pp. 67-71], Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [OJ L 300, 11.11.2008, pp. 42-45]

²⁶ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [OJ L 328, 6.12.2008, pp. 55-58]

²⁷ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [OJ L 328, 5.12.2002, pp. 1-3]

²⁸ Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law [OJ L 29, 5.2.2003, pp. 55-58], Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution [OJ L 255, 30.9.2005, pp. 164-167]

rather relatively broad, vaguely worded and fairly imprecisely describe *criminological categories of crime* (e.g. terrorism, sexual exploitation of women and children, cybercrime, organised crime). Obviously, it cannot be required from a Treaty provision to contain too precise and detailed legal concepts and definitions. In connection with this, the real problem lies in the fact that such vague wording and lack of precision of the categories of offences makes it difficult to foresee the extent and the limits of EU competence in practice.²⁹ If the experiences of the recent legislative practice of the Union is analysed, a tendency of over-criminalisation can clearly be observed which can also be partly led back to this regulatory peculiarity. It can be observed that the recently adopted criminal law directives (e.g. the Directive 2017/541 on combating terrorism or the Directive 2024/1385 on combating violence against women and domestic violence) cover a wide range of punishable acts, some of which are only very distantly related to the categories of crimes listed in the Treaty. This extensive criminalisation trend is highly questionable, with regard to the *ultima ratio* principle, because the criminal sanctioning of these behaviours cannot in every case be justified with a legitimate purpose, since some of the criminal conducts regulated in the directives do not necessarily meet the requirements of particular seriousness and cross-border dimension determined by Article 83(1) TFEU.

A more serious objection in connection with Article 83(1) TFEU can also be formulated, namely that some of the offences listed in the catalogue do not fully meet the general conditions (particular seriousness and cross-border dimension) laid down in the Treaty.³⁰ There are criminal offences that cannot be considered particularly serious (e.g. certain types of computer crime or corruption), while others do not necessarily affect more than one states (e.g. sexual exploitation of women and children, corruption or counterfeiting of currency). Furthermore, other offences could also be cited which could meet the conditions laid down in the Treaty (e.g. offences against intellectual property or environmental crimes). It is therefore important to clarify how the general conditions of Article 83(1) TFEU relate to the list of offences. In this regard, the following three theoretical solutions can be set up:

²⁹ See: Asp, 2012, pp. 90-91; Mitsilegas, 2016, pp. 59-60; Satzger, 2016, p. 140. See also: Kubiciel, 2010, p. 743.

³⁰ See: Rosenau and Petrus, 2012, pp. 469-470.

- The general requirements are decisive for the use of the competence, and the catalogue only provides with examples that meet the conditions of the Treaty.
- As regards the competence of the European Union, the catalogue has priority, which means that the legislator may adopt legal acts only in relation to these ten offences. Consequently, the general conditions have a merely descriptive nature.
- As regards the assessment of the scope of harmonisation, both the general conditions and the catalogue are relevant, i.e. the European Union is entitled to adopt harmonisation measures if the criminal offence concerned is among the ten listed offences and if it meets the parameters of particular seriousness and cross-border dimension set out in Article 83(1) TFEU.³¹

As regards these possible interpretations, the first one clearly seems the less plausible³², since the wording of the Treaty (*'These criminal offences are the following'*) clearly indicates that the criminal law competence of the European Union only applies to the listed ten eurocrimes. Based on the grammatical interpretation of the Treaty, the second interpretation seems to be more acceptable. In this case, however, the question arises whether it was necessary at all to include the general requirements of legal harmonisation in the text of the Treaty. Therefore, it can be concluded that the third solution is the more convincing, which results that the harmonisation competence of the EU only covers the ten eurocrimes, however, during the exercise of the competence, the legislator shall consider that only those types of the listed crimes could be criminalised which are particularly serious and have cross-border dimensions. In case of less serious minor offences or crimes affecting only one state, legal harmonisation is unnecessary and unjustified.³³ This interpretation is also in line with the observance of the general principles of *ultima ratio*, *subsidiarity* and *proportionality* which requires that EU criminal law can only be used as a last resort³⁴, if the proposed action cannot be sufficiently achieved by the Member States, and be better achieved at Union level.³⁵

³¹ Asp, 2012, pp. 80-81.

³² See: Asp, 2012, pp. 81-84.

³³ See: Dorra, 2013, pp. 191-192.

³⁴ See further: Herlin-Karnell, 2009, p. 356.

³⁵ See: Article 5(3) TEU

Fortunately, several positive examples can be found in the adopted directives which respect this interpretation. Some legal acts only require the criminalisation of the most serious forms of the criminal offences concerned and leave the opportunity to the Member States to use non-criminal means for the less severe conducts. Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, for example, refers to the discretionary right of the Member States whether to criminalise certain consensual conducts (e.g. consensual sexual activities between peers, who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse; or production and possession of pornographic material by the producer solely for his/her private use provided that the act involves no risk of dissemination of the material).³⁶ Similarly, Directive 2013/40/EU on attacks against information systems do not require the Member States to punish with criminal punishments each conducts, they can use criminal means only '*at least for cases which are not minor*'.³⁷ Furthermore, part of the directives only require the Member States to prescribe effective, proportionate and dissuasive criminal penalties in case of less serious forms of conducts and leaves the decision on type and extent of the sanction to the national legislators, while they set out the minimum level of the upper limit of the imprisonment only in case of the more severe punishable conducts.³⁸ These regulatory examples are definitely in line with the *ultima ratio* and subsidiarity principle.

3. The scope and content of legal harmonisation

According to the provisions of Article 83(1) TFEU, the legislator of the European Union is entitled to adopt '*minimum rules concerning the definition of criminal offences and sanctions*'. It can therefore be stated that the Treaty does not provide for full legal harmonisation, but rather for so-called '*minimum harmonisation*', which imposes on Member States the obligation to comply with the minimum standards laid down in the EU legal acts.³⁹ It means that Member States are obliged to criminalise the conduct

³⁶ Articles 5(8) and 8 of Directive 2011/93/EU

³⁷ Articles 3-7 of Directive 2013/40/EU

³⁸ See for example: Article 5 of Directive 2014/62/EU, Article 5 of Directive 2018/1673, Article 10 of Directive 2024/1385, Article 5 of Directive 2024/1226

³⁹ Asp, 2012, pp. 110-111, Böse, 2012, pp. 1077-1078; Klip, 2012, pp. 162-163.

defined in directives as criminal offences and prescribe minimum sanctions for the perpetrators committed the offences. However, Member States can neither add additional elements to the criminal offences which could narrow the scope of criminalisation, nor can national legislator prescribe sanctions that are less severe than those laid down in EU standards.⁴⁰ Notwithstanding, minimum harmonisation, do not prevent Member States from introducing or maintaining stricter rules compared to the EU legal sources. Therefore, national legislators are entitled to criminalise other conducts not included in EU legal acts or to prescribe more severe penalties.⁴¹

Under the provisions of the Treaty, the European Union cannot regulate all criminal law-related issues, minimum rules can be adopted only in connection with the *definition of criminal offences and sanctions*. However, the Treaty does not answer the question of what exactly the harmonisation of criminal offences and penalties may cover. However, if the post-Lisbon legislative practice of the European Union is analysed⁴², it can be ascertained that the legal harmonisation competence is interpreted broadly compared to the narrow grammatical meaning of the Treaty, and in addition to definition of criminal offences and sanctions, the directives often include other regulatory elements as well.

Regarding the *definition of offences*, directives can define the elements of the crimes, i.e. the description of the *actus reus* and *mens rea* elements of the prohibited, punishable conducts.⁴³ Some of the directives (e.g. Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting or Directive 2018/1673 on combating money laundering) only limit its scope to one criminal offence, while other directives (e.g. Directive 2011/93/EU on combating the sexual abuse and sexual

⁴⁰ Böse, 2013, pp. 157-158; Dorra, 2013, pp. 219-221.

⁴¹ Böse, 2013, p. 157; Buisman, 2011, p. 138; Klip, 2011, pp. 24-25; Safferling, 2011, p. 417; Satzger, 2016, p. 144; Schermuly, 2013, p. 56.

⁴² See in detail: Asp, 2012, pp. 95-102; Böse, 2013, pp. 158-159; Csonka and Landwehr, 2019, pp. 264-265; Dorra, 2013, pp. 79-91, 222-229; Hecker, 2015, pp. 286-287; Killmann, 2014, pp. 296-301; Klip, 2012, pp. 179-211, 316-330; Miettinen, 2013, pp. 134-142; Mitsilegas, 2009, pp. 87-90; Peers, 2016, pp. 197-209; Safferling, 2011, pp. 417-419; Satzger, 2016, pp. 144-146; Spencer, 2011, pp. 356-357; Stuckenberg, 2013, pp. 386-405.

⁴³ Article 2 of Directive 2011/36/EU, Articles 3-6 of Directive 2011/93/EU, Articles 3-7 of Directive 2013/40/EU, Article 3 of Directive 2014/62/EU, Articles 3-12 of Directive 2017/541, Article 3 of Directive 2018/1673, Articles 3-7 of Directive 2019/713, Article 3 of Directive 2024/1226, Articles 3-8 of Directive 2024/1385

exploitation of children and child pornography or Directive 2017/541 on combating terrorism) cover a wide range of punishable acts and prescribe extensive criminalisation. In addition to specifying the definition of criminal offences, several directives also address other issues arising from the nature of the crime.⁴⁴ Because of the differences in the criminal justice systems of the Member States, directives also '*expressis verbis*' refer to the criminalisation of *ancillary conducts* (instigating, aiding and abetting) as well as the *attempt* to commit the offence.⁴⁵ However, the directives fail to give exact definitions for these notions and do not specify further which kind of criminal offences should be created to punish the inciting, aiding, abetting and attempt. In the absence of unified, autonomous EU definitions, the national criminal law regulations of the Member States has to be applied, which sometimes show significant differences which could also affect the punishability of these conducts.⁴⁶ EU criminal law norms primarily punish *intentional acts or omissions*, but in some cases, they also sanction *more serious forms of negligence*.⁴⁷ However, the definition of serious negligence is also not defined by the EU directives. Because of the principle of guilt, the EU directives cannot oblige the Member States to criminalise and punish certain behaviour with *strict liability*, regardless of the guilt of the perpetrator.⁴⁸

Apart from offences committed by natural persons, EU legal acts, with the exception of Directive 2024/1385 on combating violence against women and domestic violence, also regulate the *liability of legal persons* for the committed crimes.⁴⁹ In connection with the liability of legal persons, it has

⁴⁴ For this purpose, for example, Article 8 of Directive 2011/93/EU contains provisions in connection with the age of sexual consent and the criminalisation of consensual sexual acts by the Member States; while Article 2(1) of Directive 2018/1673 defines the catalogue of the predicate offences of money laundering and the determines special rules for proving them.

⁴⁵ Article 3 of Directive 2011/36/EU, Article 7 of Directive 2011/93/EU, Article 8 of Directive 2013/40/EU, Article 4 of Directive 2014/62/EU, Article 14 of Directive 2017/541, Article 4 of Directive 2018/1673, Article 8 of Directive 2019/713, Article 4 of Directive 2024/1226, Article 9 of Directive 2024/1385

⁴⁶ See: Di Francesco Maesa, 2018, pp. 1463; Karsai, 2019, p. 465.

⁴⁷ Article 3(2) of Directive 2018/1673, Article 3(3) of Directive 2024/1226

⁴⁸ Kaiafa-Gbandi, 2011, p. 31.

⁴⁹ Article 5 of Directive 2011/36/EU, Article 12 of Directive 2011/93/EU, Article 10 of Directive 2013/40/EU, Article 6 of Directive 2014/62/EU, Article 17 of Directive 2017/541, Article 7 of Directive 2018/1673, Article 10 of Directive 2019/713, Article 6 of Directive 2024/1226

to be mentioned that the EU norms completely respect the national sovereignty and criminal law tradition of the Member States⁵⁰ in this respect, because they only oblige them to sanction the legal persons, but does not refer that the sanctions have to be criminal sanctions. Therefore, it is up to the Member States whether they fulfil their sanctioning obligation by means of criminal law or by other less restrictive (e.g. civil or administrative) measures.

As regards *sanctions*⁵¹, the directives usually use the requirement of *effective, proportionate and dissuasive penalties* which was elaborated by the Court of Justice of the European Union.⁵² The requirement of effectiveness means that the sanction must be suitable for achieving the desired objective. The condition of proportionality demands that the selected penalty must be proportionate to the gravity of the crime, and its effects must not exceed the necessary extent to achieve its aim. And finally, the criterion of dissuasiveness requires that the sanction must have an appropriate deterrent effect on future offenders.⁵³ Besides this general requirement, the EU legislator can also determine the type and/or the minimum level of the penalties which could be imposed to natural or legal persons having committed the criminal offences defined in the directives. Relating to sanctions against natural persons, the directive primarily prescribe imprisonment. In some cases, the directives leave to the Member States to determine the minimum and/or maximum limit of the imprisonment, while in other cases the directives set out the minimum level of the upper limit of the imprisonment. The legal acts often define the range of imprisonment in a differentiated manner based on the punishable conducts, the value of or the damage caused by the offense, or other aspects.⁵⁴ Some of the legal acts also determines other type of sanctions against natural persons as well (e.g. prevention from exercising professional

⁵⁰ Some Member States reject the introduction of criminal responsibility of legal persons because it is inconsistent with the principle of guilt. See: Kaiafa-Gbandi, 2011, p. 31.

⁵¹ On the critical analysis of the harmonisation affecting sanctions see further: Satzger, 2019, pp. 116-119; Kert, 2019, pp. 7-20.

⁵² Judgement of 21 September 1989, Case 68/88, Commission v. Greece, ECLI:EU:C:1989:339, para. 24.

⁵³ Hecker, 2015, pp. 238-239.

⁵⁴ Article 4 of Directive 2011/36/EU, Articles 3-6 of Directive 2011/93/EU, Article 9 of Directive 2013/40/EU, Article 5 of Directive 2014/62/EU, Article 15 of Directive 2017/541, Article 5 of Directive 2018/1673, Article 9 of Directive 2019/713, Article 5 of Directive 2024/1226, Article 10 of Directive 2024/1385

activities involving direct and regular contacts with children⁵⁵, fines, withdrawal of permits and authorisations to pursue activities, disqualification from holding a leading position within a legal person, temporary bans on running for public office, or publication of the judicial decision⁵⁶). Sanctions against legal persons typically include criminal and non-criminal fines and other sanctions, e.g. exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from commercial activities, placing under judicial supervision or judicial winding-up.⁵⁷ One of the latest criminal law directive also determines the maximum level of fines against legal persons.⁵⁸ Furthermore, most of the EU legal acts also often define certain aggravating (e.g. committed within the framework of a criminal organisation) and/or mitigating circumstances (e.g. providing information to the administrative or judicial authorities).⁵⁹

In addition to the regulation on criminal offences and sanctions, the EU directives often regulate other relevant issues which can be classified to the *general part of the criminal law* or to the *criminal procedural law* (e.g. establishment of jurisdiction⁶⁰, freezing and confiscation instrumentalities and proceeds from the criminal offences⁶¹, statutory limitation period⁶², protection of victims of crime⁶³, crime prevention measures⁶⁴, criminal law

⁵⁵ Article 10 of Directive 2011/93/EU

⁵⁶ Article 5(5) of Directive 2024/1226

⁵⁷ Article 6 of Directive 2011/36/EU, Article 13 of Directive 2011/93/EU, Article 11 of Directive 2013/40/EU, Article 7 of Directive 2014/62/EU, Article 18 of Directive 2017/541, Article 8 of Directive 2018/1673, Article 11 of Directive 2019/713, Article 7 of Directive 2024/1226

⁵⁸ Article 7(2) of Directive 2024/1226

⁵⁹ Article 4(2)-(3) of Directive 2011/36/EU, Article 9 of Directive 2011/93/EU, Article 9(4)-(5) of Directive 2013/40/EU, Articles 15(4)-16 of Directive 2017/541, Article 6 of Directive 2018/1673, Article 9(6) of Directive 2019/713, Articles 8-9 of Directive 2024/1226, Article 11 of Directive 2024/1385

⁶⁰ Article 10 of Directive 2011/36/EU, Article 17 of Directive 2011/93/EU, Article 12 of Directive 2013/40/EU, Article 8 of Directive 2014/62/EU, Article 19 of Directive 2017/541, Article 10 of Directive 2018/1673, Article 12 of Directive 2019/713, Article 12 of Directive 2024/1226, Article 12 of Directive 2024/1385

⁶¹ Article 7 of Directive 2011/36/EU, Article 11 of Directive 2011/93/EU, Article 9(4)-(5) of Directive 2013/40/EU, Article 20(2) of Directive 2017/541, Article 9 of Directive 2018/1673, Article 9(6) of Directive 2019/713, Article 10 of Directive 2024/1226

⁶² Article 11 of Directive 2024/1226, Article 13 of Directive 2024/1385

⁶³ Articles 11-17 of Directive 2011/36/EU, Articles 18-21 of Directive 2011/93/EU, Articles 24-26 of Directive 2017/541, Article 16 of Directive 2019/713, Articles 14, 16-21, 25-33 of Directive 2024/1385

cooperation and exchange of information with Member States and EU bodies⁶⁵).

4. Procedural requirements of legal harmonisation

According to the provisions of Article 83(1) TFEU legal harmonisation measures can be adopted in the form of *directives*. It is a significant step forward compared to the pre-Lisbon state when special third-pillar instruments (mostly framework decisions) could be adopted. A directive is a stronger legal act compared to a framework decision, since the European Commission may bring infringement proceedings before the European Court of Justice against a Member State which fails to implement the provisions of the directive.⁶⁶ It means that after the Treaty of Lisbon the European Union has legal means to enforce the implementation and application of the criminal law norms. However, it also shall be highlighted that Article 83(1) TFEU only allows the adoption of directive; directly applicable regulations are excluded.⁶⁷

Under the Treaty, criminal law directives can be adopted by the European Parliament and the Council on the proposal of the European Commission or a quarter of the Member States⁶⁸, with the *ordinary legislative procedure by qualified majority*. The prescription of the ordinary legislative procedure and the qualified majority voting is also a significant improvement compared to the provision of the Treaty of Maastricht and Amsterdam, since these treaties required unanimous voting within the Council regarding the application of criminal law norms.

Although the previous unanimity was replaced by qualified majority voting, it shall be highlighted that the Member States have included a special provision in the Treaty in order to protect their national sovereignty in the field of criminal law. This is the so-called '*emergency brake procedure*' which allows any Member State to interrupt the legislative

⁶⁴ Article 18 of Directive 2011/36/EU, Articles 22-24 of Directive 2011/93/EU, Article 17 of Directive 2019/713, Articles 34-37 of Directive 2024/1385

⁶⁵ Article 9 of Directive 2011/36/EU, Articles 15-16 of Directive 2011/93/EU, Articles 13-14 of Directive 2013/40/EU, Article 9 of Directive 2014/62/EU, Article 20(1) of Directive 2017/541, Article 11 of Directive 2018/1673, Articles 13-15 of Directive 2019/713, Articles 13, 15-16 of Directive 2024/1226, Articles 15, 40-44 of Directive 2024/1385

⁶⁶ See: Article 258 TFEU

⁶⁷ See: Ambos and Bock, 2017, p. 196.

⁶⁸ See: Article 76 TFEU

process⁶⁹ by exercising a kind of *suspensive veto*.⁷⁰ According to this procedure, under Article 83(3) TFEU, any Member States can request to suspend the ordinary legislative procedure and to refer the draft directive to the European Council if the state considers that the draft would '*affect fundamental aspects of its criminal justice system*'. The Treaty does not answer to the question of which of the principles of a Member State's national criminal law can be regarded as of fundamental importance, its determination falls within the exclusive right of the states.⁷¹ Examples of these fundamental principles can be the *ultima ratio* principle, the legality principle, the *lex certa* requirement, the principle of guilt, the principle of proportionality, the prohibition of retroactive effect or the liability of legal persons.⁷² It is irrelevant whether other states or EU institutions share the position of the Member State concerned.⁷³ If the draft directive is referred to the European Council, it has four months to discuss it. If the European Council reach a consensus within this period, the draft shall be referred back to the Council which terminate the suspension and continue the ordinary legislative procedure. However, if there is disagreement within the European Council within the same timeframe, the legislative procedure cannot be pursued. In this case, however, it is possible that at least nine Member States establish *enhanced cooperation*⁷⁴ based on the draft directive, about which they are obliged to notify the European Parliament, the Council and the Commission.

The emergency brake clause can be regarded as a serious exception to the qualified majority rule.⁷⁵ With this provision, the national veto implicitly remained around judicial cooperation in criminal matters, since even one state can stop and suspend the ordinary legislative procedure. However, the emergency brake procedure is not a real veto, since the Member State cannot prevent the other states from adopting the draft proposal within the framework of enhanced cooperation. In fact, the vetoing countries can only achieve that they do not have to participate in a decision that they found

⁶⁹ See: Satzger, 2016, p. 146.

⁷⁰ Böse, 2013, p. 163.

⁷¹ Satzger, 2016, p. 147.

⁷² Hecker, 2014, pp. 291-292; Heger, 2009, pp. 414-415; Mylonopoulos, 2011, p. 639.

⁷³ Heger, 2009, p. 414; Safferling, 2011, p. 420.

⁷⁴ Detailed rules on enhanced cooperation can be found in Article 20 TEU and Articles 326-334 TFEU.

⁷⁵ See: Heger, 2009, p. 414.

unfavourable to them.⁷⁶ Therefore, the emergency brake procedure can ultimately be regarded as a '*mini opt-out right*'.⁷⁷ However, Member States cannot use the emergency brake procedure unjustifiably or abusively. In such cases, the European Commission may initiate infringement proceedings against the Member State because of the breach of its obligations under the *principle of sincere cooperation*.^{78, 79}

The inclusion of the emergency brake procedure in the Treaty is the result of a compromise aimed at protecting the national sovereignty and the coherence of their criminal law systems of the Member States. This provision guarantees that the EU legislator cannot force a Member State to accept any regulation that is contrary to its own criminal law dogmatic system.⁸⁰ However, the emergency brake clause and possibility of enhanced cooperation may raise serious problems, as their application may entail the risk of creating a '*multi-speed Europe*', in which a number progressive Member States can deepen criminal law integration between themselves. This would create several different areas of freedom, security and justice, which would fundamentally jeopardise the objectives of the European Union and would increase the fragmentation.⁸¹ However, until now, the emergency brake has not been used and it is highly unlikely that this procedure will be used too often in the future, since the fundamental principles of the criminal law system are common (or at least very similar) to most Member States. Consequently, if a directive infringes one of these fundamental principles, it is likely that not just one or few, but a vast majority of Member States will object to it. Therefore, the adoption of the draft would fail not due to the emergency procedure but because of the lack of the necessary majority.⁸² However, it can be easily imagined that contrary to its original function, the emergency brake procedure becomes primarily a mean of exerting political pressure.⁸³

⁷⁶ Safferling, 2011, p. 422.

⁷⁷ Herlin-Karnell, 2010, p. 61.

⁷⁸ Article 4(3) TEU

⁷⁹ Ambos, 2018, pp. 575-576.

⁸⁰ Dorra, 2013, pp. 251-252, Klip, 2012, p. 36.

⁸¹ Satzger, 2008, p. 27.

⁸² See: Asp, 2012, p. 140.

⁸³ See in detail: Öberg, 2021, pp. 506-530.

5. The extension of the legal harmonisation competence

As it has already been mentioned above, the European Union can exercise its legal harmonisation competence in connection with the ten eurocrimes listed in Article 83(1) TFEU. However, the provisions of this Article also stipulate that *‘on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph’*. This provision of the Treaty allows the EU legislator to respond to changes in delinquency and the threats posed by emerging new forms of criminality.⁸⁴ According to the Treaty, the catalogue of crimes may be expanded on the basis of the development of crime, however, it is an important requirement that the general conditions determined by the Treaty have to be applied to the new criminal offence which is intended to be included in the scope of the harmonisation. Therefore, the Council must prove whether the new crime concerned meets the requirements of particular seriousness and cross-border dimensions.⁸⁵ The scope of eurocrimes can be extended through a secondary legal act, no Treaty-amendment is needed.⁸⁶ During the adoption of such decision, the Council acts *‘unanimously after obtaining the consent of the European Parliament.’*

5.1. The violation of Union restrictive measures as a new eurocrime

The Council used its competence laid down in Article 83(1) TFEU for the first time on 28 November 2022, when, based on the proposal from the Commission⁸⁷ and with the consent of the European Parliament⁸⁸, it extended the Union’s legislative harmonisation competence to the *violation*

⁸⁴ Dorra, 2013, pp. 214-215; Jacsó, 2017, pp. 66-67; Safferling, 2011, p. 414.

⁸⁵ See: Asp, 2012, p. 81; Jacsó, 2011, p. 113; Schermuly, 2013, p. 55.

⁸⁶ Mansdörfer, 2010, p. 16.

⁸⁷ Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union [COM(2022) 247 final, 25.2.2022]. At the same time, the Commission also issued a Communication to the European Parliament and the Council: Towards a Directive on criminal penalties for the violation of Union restrictive measures [COM(2022) 249 final, 25.2.2025]

⁸⁸ European Parliament legislative resolution of 7 July 2022 on the draft Council Decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union (10287/1/2022 — C9-0219/2022 — 2022/0176(NLE))

of Union restrictive measures adopted on the basis of Articles 29 TEU and 215 TFEU.⁸⁹

In the preamble of its Decision, the Council provided detailed arguments for the fact that the violation of EU restrictive measures⁹⁰ meets the conditions set out in Article 83(1) TFEU.⁹¹ In connection with the requirement of *particular seriousness*, the Decision states that the violation of Union restrictive measures, in terms of gravity, is of a similar degree of seriousness to the areas of crime listed in Article 83(1) TFEU, since it can pose perpetuate threats to international peace and security, undermine the consolidation of and support for democracy, the rule of law and human rights and result in significant economic, social, societal and environmental damage. Furthermore, violation of Union restrictive measures can also be related to some of the ten eurocrimes, such as terrorism and money laundering.⁹² The *cross-border dimension* of this criminal offence is proved by the Council by the fact that these violations are often be committed by natural persons or with the involvement of legal entities operating on a global scale, and, in some cases, Union restrictive measures, such as restrictions on banking services, even prohibit cross-border operations. Their violation therefore equates to conduct on a cross-border scale requiring a common cross-border response at Union level.⁹³ In addition to its cross-border nature, the Council also stressed the *need for common action at EU level* against this criminal offence. In connection with this, the Decision stipulates that although violation of Union restrictive measures is already a criminal offence in the majority of the Member States, there are significant differences between the regulation of the states. Some countries use broad definitions (e.g. '*breach of UN and EU sanctions*' or '*breach of EU regulations*') while others have more detailed provisions (e.g. providing a list of prohibited conducts). The criteria of criminalisation vary among

⁸⁹ Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union [OJ L 308, 29.11.2022, pp. 18-21]

⁹⁰ Such restrictive measures can be for example the freezing of funds and economic resources, the prohibition on making funds and economic resources available and the prohibition on entry into the territory of a Member State of the Union, as well as sectoral economic measures and arms embargoes. See: Preamble (3) of Council Decision 2022/2332

⁹¹ See: Van Ballegooij, 2022, pp. 147-148.

⁹² Preamble (6) and (10) of Council Decision 2022/2332

⁹³ Preamble (13) of Council Decision 2022/2332

Member States, they are usually related to the gravity of offence (serious nature), or determined in qualitative (intent, serious negligence) or quantitative (damage) terms. Because of the differences in the national criminal laws, the enforcement of EU sanctions highly depends on the Member State where the infringement is pursued, which can even lead to forum shopping by offenders and a form of impunity because they could choose to conduct their activities in those Member States that provide for less severe penalties for the violation of Union restrictive measures. This undermines the Union objectives of safeguarding international peace and security and upholding Union common values, and the consistent application of Union policy on restrictive measures. Consequently, there is a particular need for common action at Union level to address the violation of EU restrictive measures by means of criminal law and by effective, proportionate and dissuasive penalties. Legal harmonisation in this area would, therefore, increase the effectiveness, proportionality and dissuasiveness of Union restrictive measures, enhance law enforcement and judicial cooperation and contribute towards a global level playing field among Member States and third countries.⁹⁴

Based on this justification, the Decision of the Council established that violation of Union restrictive measures shall be an area of crime within the meaning of second subparagraph of Article 83(1) TFEU.⁹⁵ However, the Decision was not stopped here, but also declared that, as a second step, it is necessary to adopt a substantive secondary legislation on the establishment of minimum rules concerning the definition of criminal offences and penalties for the violation of Union restrictive measures.⁹⁶ Based on the authorisation of the Council Decision, the European Commission submitted an already prepared directive proposal on 2 December 2022, just a few days after the adoption of the Decision.⁹⁷ The proposal on the definition of criminal offences and sanctions for infringements of EU restrictive measures was adopted by the European Parliament and the Council on 24 April 2024.⁹⁸ This new directive determines the detailed rule concerning the

⁹⁴ Preamble (9), (12) and (14) of Council Decision 2022/2332

⁹⁵ Article 1 and Preamble (15) of Council Decision 2022/2332

⁹⁶ Preamble (18) of Council Decision 2022/2332

⁹⁷ Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures [COM(2022) 684 final, 2.12.2022]

⁹⁸ Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union

definition of criminal offences and penalties for the violation of Union restrictive measures.

5.2. Future tendencies about the extension of legislative competence

Beside the violation of Union restrictive measures, the question of extension of the legal harmonisation competence of the European Union has already been on the European agenda in connection with another type of offences. In 2021, the European Commission submitted a Communication⁹⁹ in which it suggested the extension of the list of eurocrimes to *hate speech and hate crime* based on race, colour, religion, descent or national or ethnic origin.¹⁰⁰ In the communication, the Commission established that all forms and manifestations of hatred and intolerance are incompatible with the values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities, as enshrined in Article 2 TEU. According to the Commission, *'hate speech and hate crime are particularly serious crimes because of their harmful impacts on the individuals and on society at large, which undermine the foundations of the EU'*. The particular seriousness of these criminal offences are also proven by the fact that they endanger the common values and fundamental rights of the European Union, as enshrined in Articles 2 and 6 of the TEU and in the Charter of Fundamental Rights of the EU; violate the victims' fundamental right to dignity and to equality; have serious and often long-lasting consequences on victims' physical and mental health and well-being; threaten the democratic values, social stability and peace; heighten social divisions, erode social cohesion and trigger retaliation, resulting in violence and counter-violence. The Commission also emphasised that hate speech and hate crime have cross-border dimension too which *'is evidenced by the nature and by the impact of these phenomena as well as by the existence of a special need to combat them on a common basis'*. The cross-border dimension of these crimes is evident in case of

restrictive measures and amending Directive (EU) 2018/1673 [OJ L, 2024/1226, 29.4.2024, ELI: <http://data.europa.eu/eli/dir/2024/1226/oj>]

⁹⁹ Communication from the Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime [COM(2021) 777 final, 9.12.2021]

¹⁰⁰ It has to be mentioned that a framework decision has already been adopted in connection with hate crimes. See: Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [OJ L 328, 6.12.2008, pp. 55-58]

online perpetration, however, hate messages expressed offline (e.g. in written press, in television broadcasts, in political speech or sport events) could also have a cross-border dimension evidenced by their impact as they are easily reproduced and widely disseminated across borders.

Despite the efforts of the European Commission and the support of the European Parliament¹⁰¹, the Communication of the Commission has not been followed by the adoption of a Council decision yet. Moreover, the question of criminalisation of hate crimes has currently been taken off the European agenda. According to our opinion, it was a right decision, because it is highly questionable whether these criminal offences comply with the requirements of Article 83(1) TFEU. While the particular seriousness of hate crime is without doubt, the criterion of cross-border dimension is not necessary fulfilled in each case, since this criminal offence is not inevitably committed in more Member States. Therefore, the criminalisation of these criminal offences doesn't seem to be necessary at EU level, and it could also be opposite to the conditions of the legal basis of Article 83(1) TFEU.

Although the extension of the list of eurocrimes to hate speech and hate crime has not been supported by the Council yet, there are several other criminal offences which clearly meet the requirements of particular seriousness and cross border dimension set out by Article 83(1) TFEU, e.g. *cross-border economic crimes* (insider trading, market manipulation etc.), *tax-related crimes* (in particular VAT fraud), *crimes related to data protection*, *crimes against the interests of consumers*, *illegal employment and facilitation of illegal entry, transit or residence*, *environmental crimes* or *crimes against intellectual property*. Although some of these criminal offences were already regulated by directives adopted on the legal basis of Article 83(2) TFEU¹⁰², it is quite plausible that the Council will further use its competence in the future and extend the legal harmonisation competence of the European Union to other categories of criminal offences.

6. Final thoughts

It can be concluded that the Treaty of Lisbon provided a *widespread and effective legal harmonisation competence* to combat certain particular serious cross-border criminal offences. The Treaty determines ten

¹⁰¹ European Parliament resolution of 18 January 2024 on extending the list of EU crimes to hate speech and hate crime (2023/2068(INI) – P9_TA(2024)0044)

¹⁰² See: fn. 25.

eurocrimes, which can be subject to harmonisation, and the scope of these criminal offences can further be extended as it has already happened. It is also positive that the competence of the Treaty did not remain on paper, since the European legislator has frequently used its legal harmonisation competence and has adopted several criminal law directives related to most of the listed eurocrimes.

If the current EU criminal law legislation is analysed, an *increasing trend of criminal law repression* can be observed, which is even more obvious if the post-Lisbon directives are compared with the pre-Lisbon framework decisions. Directives adopted after the Treaty of Lisbon usually contain increasingly detailed and severe rules with regards to both the criminal offences and the sanctions than the previous legal acts. The new directive often expanded the range of the punishable offences; their scope generally involves more and more criminal conducts. In some cases, they even prescribe the criminalisation of certain criminal offences which could hardly be justified with the legitimising factors of EU criminal law and could be opposite to the requirements of Article 83(1) TFEU. The regulation of the sanctions also becomes more and more harsh. While the previous framework decisions did not in all cases determine the maximum level of the penalties and often prescribed only the requirement of effective, proportionate and dissuasive sanctions, the directives stipulate almost in each case the minimum upper limit of the imprisonment, usually more strictly than the prior framework decisions. The latest directives not only define the extent of imprisonment but also the maximum level of fines against legal persons. Most of the directives also expanded the range of aggravating circumstances. Although the legal harmonisation competence under Article 83(1) TFEU is limited to the adoption of minimum rules of definition of criminal offences and sanctions, the legislative practice clearly shows that the EU legislator interprets its authority broadly compared to the strict grammatical wording of the Treaty and often includes other issues in the scope of regulation in addition to factual elements and sanctions (e.g. statutory limitation period, jurisdiction).

In this context, it is important to point out that the growth of the legal harmonisation activity of the European Union and the excessive criminalisation and repression cannot be considered a negative tendency, since common EU norms and regulations are necessary to ensure effective fight against cross-border criminality. The real problem is that the strengthening repression and the expansion of criminalisation could lead to

the violation of the regulation of the Treaty, since the provisions of the criminal law directives not always fully comply with the regulatory requirements set out by Article 83(1) TFEU. Furthermore, an excessive and growing criminal legislation could also lead to the possible violation or jeopardy of the different criminal law principles (e.g. *ultima ratio* principle, subsidiarity principle, legality principle etc.) laid down in the Manifesto on European Criminal Policy¹⁰³ and the criminal policy initiatives of the European institutions.¹⁰⁴ These two important aspects should be kept in mind by the European legislator during the adoption of criminal law directives.

Although it was not analysed in detail, it shall be briefly mentioned that the increasing criminal legislation of the European Union gives huge tasks to the national legislators too. The provisions of the criminal law directives shall be implemented to the national criminal laws and national legislators shall ensure that their national regulation is always in compliance with the EU requirements. In the recent years, for example, several criminal offences in Hungarian Criminal Code¹⁰⁵ (e.g. terrorism-related offences in 2017, trafficking in human being and forced labour in 2020 or money laundering in 2021) was modified significantly because of the implementation of the EU directives. With the continuous and even growing criminal law activity of the EU, we are convinced that this tendency will continue or even intensify in the future.

¹⁰³ European Criminal Policy Initiative, 2009, pp. 707-716.

¹⁰⁴ See for example: Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations [16542/2/09, REV 2, 27.11.2009], Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM(2011) 573 final, 20.9.2011], Resolution of the European Parliament of 22 May 2012 on an EU approach to criminal law [2010/2310(INI)] – P7_TA(2012) 208, 22.5.2012]

¹⁰⁵ Act C of 2012 on the Criminal Code

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