

## **INTRODUCTORY PART ON THE CONVENTION AND THE COURT**

### **COUNCIL OF EUROPE**

The Council of Europe is an international political organisation established in 1949, with an aim of promoting democracy, rule of law and human rights and fundamental freedoms. It now has 47 member states with some 800 million citizens. All the member states are parties to the European Convention of Human Rights, as ratification of the Convention is one of the conditions for entering the organisation. The best known body of the Council of Europe is the European Court on Human Rights.

### **THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

The European Convention is the first Council of Europe Convention aimed at protecting human rights, drafted in 1950 to pursue its aim of the maintenance and further realisation of human rights and fundamental freedoms. It entered into force on 3 September 1953. All the member states of the Council of Europe have ratified the Convention.

There are 14 Protocols to the Convention; some expanding the rights to be protected (Nos. 1, 4, 6, 7, 12 and 13), and some amending the framework of the convention system. The most important of those amending the system is Protocol 11, which superseded the previous one. This Protocol abolished the Commission, allowing individuals to apply directly to the Court, which was given compulsory jurisdiction, and it altered the latter's structure. The protocol also abolished the judicial functions of the Committee of Ministers.

Also important is Protocol 14 which aims to further improve the efficiency of the Court. It led to reforms in three areas: the Court's filtering capacity was reinforced to deal with clearly inadmissible applications, new admissibility criteria were introduced for cases where the applicant has not suffered a significant disadvantage, and measures were introduced to deal more effectively with repetitive cases. Further, a new mechanism was introduced to assist the enforcement of judgments (procedure for non-enforcement) and the EU accession to the Convention was allowed.

Protocols adding rights require unanimous ratification by member states before coming into force, while concerning procedure and institutional framework require a certain number of states to sign before coming into force.

### **THE CONVENTION RIGHTS**

#### **Enumerated rights**

The Convention provides for civil and political rights and freedoms only, with the exception of the right to form trade unions implicit in Article 11, the right to peaceful enjoyment of property and the right to education provided for in Articles 1 and 2 of

the Protocol No 1. The Convention contains the following rights: the right to life (Article 2); prohibition of torture (Article 3); prohibition of slavery and forced labour (Article 4); the right to personal liberty and security (Article 5); the right to a fair trial (Article 6); no punishment without law (Article 7); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to a domestic remedy (Article 13); and the right to non-discrimination in the enjoyment of the Convention rights (Article 14).

Protocol No 1 adds the right to peaceful enjoyment of property, the right to education and the right to regular, free and fair elections. Protocol 4 adds the prohibition of the imprisonment for breach of a contract, the right to freely move within a country once lawfully there and for a right to leave any country, prohibition of the expulsion of nationals and the right of an individual to enter a country of his or her nationality, and the prohibition of the collective expulsion of foreigners. Protocol 6 requires parties to restrict the application of the death penalty to times of war or ‘imminent threat of war’, while Protocol 13 prohibits the death penalty all together. Protocol 7 provides for a right to fair procedures for lawfully resident foreigners facing expulsion, the right to appeal in criminal matters, compensation for the victims of miscarriages of justice, prohibits the re-trial of anyone who has already been finally acquitted or convicted of a particular offence and provides for equality between spouses. Protocol 12 provides for a general non-discrimination right.

### **Categories of rights**

Rights conferred by the Convention (and its Protocols) are not absolute. All but four rights (the prohibitions of torture, slavery and retroactive application of criminal law, and of expulsion of nationals) may be restricted under certain circumstances. Certain rights are subject to what may be termed ‘express definitional restrictions’ limiting either their content (like Article 2 which contains exceptions to the prohibition of deprivation of life by state agents) or the circumstances in which they apply (like Article 5 which contains a closed list of circumstances in which the deprivation of liberty will not violate Article 5); certain rights contain implied limitations (like the right to access to court inherent in Article 6(1) which may be subject to limitations, such as court fees and limitation periods, provided that the essence of the right is not impaired); and certain rights contain what can be termed ‘general public interests limitations’, allowing states to interfere with rights in pursuit of other legitimate purposes, primarily of a collective nature (examples of which are listed in a non-exhaustive manner), provided that interference is in accordance with law and necessary in democratic society. The best known examples of the last category are Articles 8 to 11. The difference between the first two categories (so-called limited rights) and the last category of rights (the so-called qualified rights) is in the fact that qualified rights require case by case judgment as to whether priority is to be given to individual right or communal interest.

### **Derogation of rights**

All rights, except those under Arts 2, 3, 4 and 7, may be **suspended/derogated** from in war or other public emergency threatening the life of nation (Article 15 of the

Convention). An exception to the prohibition of derogation from Article 2 concerns deaths resulting from lawful acts of war.

## **THE EUROPEAN COURT FOR HUMAN RIGHTS**

The Court is an international court established by the Convention in 1959. Since entry into force of Protocol No 11 to that Convention on 1 November 1998 it has the sole responsibility for the enforcement of the European Convention on Human Rights, the function previously shared by the Commission and the Committee of Ministers. It is a full time court with 47 judges. The Convention requires that judges are of high moral character and to have qualifications suitable for high judicial office, or be a jurisconsult of recognised competence. Judges are elected by majority vote in the Parliamentary Assembly from the three candidates each contracting state nominates, for a non-renewable 9 year term. The judges perform their duties in an individual capacity and have no institutional or other ties with the contracting state on behalf of whom they were elected.

The Court's jurisdiction is to examine inter-state cases, applications by individuals against contracting states, and give advisory opinions on legal questions concerning the interpretation of the Convention when requested by the Committee of Ministers. Applications by individuals constitute the majority of cases heard by the Court. Judges sit in the Committee of three judges, Chambers of seven judges and a Grand Chamber of 17 judges to perform jurisdictional functions.

A single judge can reject plainly inadmissible applications, but may not examine applications against the state in respect of which he or she was elected. The three judge committee is empowered to declare applications admissible and decide on the merits of the case if it was clearly well founded and on the basis of well established case-law. The seven judge committee decides on the merits of the case in all other cases, except where the jurisdiction is relinquished to the Grand Chamber. The Grand Chamber can hear the case which raises serious questions of interpretation and application of the Convention, a serious issue of general importance, or which may depart from previous case-law, if all parties to the case agree to the Chamber of the Court relinquishing jurisdiction to the Grand Chamber. A panel of five judges decides whether the Grand Chamber accepts the referral.

The Grand Chamber can also re-hear a case decided by the Chamber, if the Panel accepts the request. The request can be submitted by any party to the case within a period of three months from the date of the judgment of the Chamber.

## **ADMISSIBILITY CRITERIA**

Applications by individuals against contracting states, alleging that the state violates their rights under Convention, can be made by any person, non-governmental organisation or group of individuals. In order to be examined on the merits, they have to meet **criteria of admissibility** as provided for by Article 35 and amended by Article 12 of Protocol No 12.

The case have to be compatible with the Convention *ratione materiae* (the right argued has to be protected under the Convention), *ratione temporis* (the violation has to have occurred prior to the entry into force of the Convention unless it is a continuous violation) or *ratione personae* (the state against which the applicant is submitted has to be a party to the Convention). Further, prior to the lodging of the application with the Court, all available and effective remedies have to be exhausted, and the application has to be submitted within 6 months since the delivery of the final decision. If there are no effective remedies, the 6 month rule starts to run from the date when the violation occurred or when the applicant realised that the remedies are not effective. Further, the applicant cannot be anonymous, substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. Finally the application will be considered inadmissible if it is manifestly ill-founded, or constitutes an abuse of the right of individual application; or the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

## EXECUTION OF JUDGMENTS

The Contracting parties undertake to abide by the final judgments of the Court in the cases to which they are parties (Article 46, paragraph 1). Judgements by the Chamber of the Court become final three months after it has been issued, unless a reference to the Grand Chamber has been made. If the panel of the Grand Chamber rejects the request for referral the judgement of the Chamber of the Court becomes final. The Grand Chamber judgment is final.

The Convention entrusts the Committee of Ministers (inter-governmental body which formally consist of 46 Ministers of Foreign Affairs who are usually replaces by the states' representatives to the Council of Europe) with the supervision of Court judgments, as well as the terms of the friendly settlements. The Committee of Ministers is assisted by the Department for the Execution of Judgments of the Court (established within the Directorate General of Human Rights and Legal Affairs).

Most judgments only declare the violations established, leaving to the states, under the supervision of the Committee of Ministers, to define the required execution measures. However, the judgments concerned by the pilot judgment procedure (the judgment that addresses a structural problem which affect a great number of people), the Court makes certain recommendations with respect to execution.

There are two types of required implementation measures: **individual measures**, aimed to achieve, as far as possible, *restitutio in integrum* for the applicant; and general measures, aimed at preventing future similar violations. Individual measures, in addition to paying just satisfaction (material and or moral damage) and legal expenses, may consist in the granting of a residence permit, the reopening of a judicial procedure and/or the erasure of a conviction from the criminal records. **General**

**measures** include notably constitutional changes or legislative amendments, changes in the case-law of the national courts, as well as practical measures, such as the recruitment of judges or refurbishing obsolete prison facilities. The efficiency of domestic remedies is an important element of general measures.

## **THE COURT'S INTERPRETATIVE PRINCIPLES**

The Court's approach to the interpretation of the Convention is determined by two key characteristics: the subsidiary nature of the Convention system as an international judicial supervisory mechanism operating in a multicultural context; and the special character of the Convention as a human rights instrument aimed at the effective protection of universal human rights. These characteristics are given effect in the principle of subsidiarity, which has led to the development of the doctrine of the margin of appreciation, and the principle of effectiveness, which has led to the development of the theory of autonomous concepts and an evolutive (dynamic) and integrated approach to interpretation. In addition to these two principles, the principles of balancing and proportionality have a prominent role in the Court's interpretation of the Convention. The interpretative principles and the specific doctrines and approaches that developed from them are all interconnected. The Court's dynamic and integrated approach to interpretation has been constrained by its sometimes excessive deference to the state's margin of appreciation, which has on the other hand been constrained by the principle of proportionality.

### **The principle of subsidiarity**

The principle of subsidiarity, which is reflected in Articles 1, 13 and 35 of the Convention, means both that the states have the obligation to secure the Convention rights within their domestic sphere and that they must be given the opportunity to redress any individual violations of the Convention rights before they are brought before an international tribunal. The principle thus refers to a procedural priority of domestic over international enforcement of human rights.

The principle was, however, given a more extensive meaning by the Convention organs, which have advocated the idea that national authorities have a normative priority over international authorities. In other words, the Convention organs have held that state organs have a greater legitimacy or are better placed than an international body to decide on human rights issues 'due to their direct and continuous contact with vital forces of their society', which led to the development of the doctrine of the margin of appreciation.

### **The margin of appreciation**

The term margin of appreciation refers to the space of discretion that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the Convention. In addition to the principle of subsidiarity, the democratic principle of separation of powers (and the values of cultural diversity have been invoked as justifications for the development of the doctrine of margin of appreciation.

The doctrine of the margin of appreciation has not been applied in a consistent manner. Sometimes the Court adopts it simply to defer to the judgment of the national authorities and sometimes it relies on their judgment heavily but not exclusively. Finally, sometimes the Court only refers to the margin of appreciation after undertaking the review, in a conclusion on whether the right was violated.

The doctrine of the margin of appreciation was first developed in the context of Article 15 (the derogation clause). The Court has been reluctant to review whether derogation of the Convention rights is justified, on the basis that national authorities are 'better placed' to assess the exigencies of particular situation. Outside of this context, the doctrine has been applied most often in assessing the necessity of interference with the qualified rights, as well as Article 14 (non-discrimination norm), and in assessing the existence and the scope of positive obligations. In other words, the doctrine has been applied whenever there is a balancing of interests. In addition, the doctrine has been applied in interpreting certain vague Convention terms such as 'persons of unsound mind' in Article 5(1)(e) (right to liberty and security), as well as in cases involving the discretion of national authorities in an assessment of facts, such as an assessment of evidence in the context of Article 6 (right to a fair trial) of the Convention.

The width of the margin of appreciation depends on a number of factors: the nature of the right in question; the nature of the activities in question and their importance for the individual; the nature of the aims pursued and whether they concern general social and economic policies; the nature of the duty; the text of the Convention; the surrounding circumstances; and the existence of common grounds among member states or in comparative or international law. The margin is generally narrower in the following circumstances: where the right is fundamental for democracy and the rule of law (such as freedom of expression, freedom from discrimination on the basis of sex and race, and the right to respect the most fundamental aspects of private life, such as physical and moral integrity); and where there is consensus on the issue.

On the other hand, it is generally wider when property rights are at issue; when the restrictions pursue the aims of the protection of national security, morality or religious feelings of others; where socio-economic policies, including planning policies are at issue; where positive obligations that would impose significant burdens on the community are at issue; and where there is a lack of consensus on the issue. The most relevant factor seems to be the existence or non-existence of consensus.

## **Consensus**

Consensus is one of the main interpretative tools of the Court connected both to the doctrine of the margin of appreciation and evolutive interpretation. In deciding what present-day developments require in terms of interpreting Convention rights and accordingly whether the margin given to the state should be narrow or wide, the Court generally looks at whether consensus exists on the issue in question. However, what constitutes consensus is not defined in a consistent manner. Most often the Court looks at the practices of the member states to determine the existence of consensus. Where the Court finds divergence in approaches among member states, it usually leaves the state a wide margin of appreciation and finds no violation of the

Convention. However, sometimes the Court looks at progressive developments in comparative and international law as an indication of consensus, or refers to the 'evolution of social attitudes'. Finally, in some cases it simply states that there is no consensus without analysing the practices of either member states or international law.

### **The principle of effectiveness, evolutive approach, autonomous concepts**

The principle of the effectiveness of the Convention means that the Convention protects rights that are not 'theoretical and illusory' but are 'practical and effective'. This principle has influenced the Court's approach to the application of the general rules of international law on treaty interpretation contained in the Vienna Convention on the Law of Treaties. While these rules are relevant in interpreting the Convention, they are not applied strictly, due to the special character of the Convention as a human rights instrument. Therefore, teleological interpretation is given precedence over grammatical or contextual interpretation, and *travaux préparatoires* are largely irrelevant in interpreting the Convention, as the Convention is to be interpreted in an evolutive manner. The Convention is considered a 'living instrument' to be interpreted in light of "present-day conditions".

Moreover, the Convention terms have autonomous meaning. In interpreting the meaning of the Convention's concepts, definitions in national law have only relative value and constitute no more than a starting point. The general principles of the member states are, however, taken into consideration. Often the Court refers to other international (human rights) instruments to interpret the meaning of Convention terms, in particular where there are specific international instruments that protect in a more detailed way rights also protected by the Convention.

### **Integrated approach to interpretation**

Recognising that 'whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature', the Convention organs have incorporated many rights which are usually classified as economic and social rights into the Convention, mostly through the development of positive obligations and through a wide interpretation of Article 8 rights. For example, prohibitions on employment (in the private sphere) and dismissal from a job (on account of being former KGB officers); non-reimbursement of the costs of gender re-assignment surgery; environmental hazards and other threats to health; standard of health care; and provision of family welfare have all been seen as within the scope of Article 8 (argued in conjunction with Article 14).

### **Positive obligations**

Positive obligations, seen implicit in Article 1 of the Convention and justified by the principle of effectiveness, are those that require the states to take action, while obligation not to take steps to infringe rights has been termed negative obligations. While negative obligations concern relationships between the individual and the state, positive obligations concern measures both in the sphere of relationship between

individual and state, and between individuals themselves. In respect of relationships between individuals themselves, the responsibility of the state arises when it fails to exercise due diligence to prevent, investigate, punish and redress violations of the Convention provisions by the private individuals.

The Court held that there is no strict distinction between negative and positive obligations and that it would apply the same methodology in assessing whether there is a breach of state obligations regardless of what kind of obligation is at stake: in both contexts regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole; in both contexts the states enjoy a certain margin of appreciation.

Positive obligations under the Convention include: the obligation to set up the legal framework necessary to ensure the right in question (particularities of which differ in respect to different rights) backed by effective machinery to implement the legal framework (which may include the obligation of educating and training of enforcement personnel); the obligation to undertake all necessary steps to prevent violations (including protective measures in certain circumstances in respect of certain rights and provision of information); the obligation to investigate (and punish, where applicable) alleged violations (also termed procedural obligations); and the obligation to remedy instances of alleged violations.

Positive obligations have been found first and most commonly under Article 8 (right to respect for family and private life, home and correspondence). Article 8 has experienced the broadest interpretation in respect of the scope of state obligations. Many of them are imposed in social, economic and environmental sphere, but states are generally given a wide margin of appreciation in these spheres.

### **Balancing and the principle of proportionality**

Balancing aims at reconciling the individual's rights and the community interests. It is primarily applied in cases of interpretation of the so-called qualified rights, but comes into play also in respect of expressly and inherently limited rights. In addition, balancing is used in assessing justification under Article 14 (prohibition of discrimination). Finally, it is used when assessing the existence and the scope of positive obligations.

The principle of proportionality serves to limit the restrictions of rights for communal interests. The principle of proportionality requires that the objective of a communal aim or interest must be sufficiently important to justify the restriction of the right and that the measure of limitation must be suitable and no more than necessary to achieve the interest in question.

The Court uses different variants of the test for different contexts. Generally, the test assesses the consequences of the restriction (in particular, whether the essence of rights has been violated), the availability of less restrictive alternatives, and procedural fairness in relation to the implementation of the challenged measure. The test is usually applied in a strict manner in the context of the requirement that the challenged measure is necessary in democratic society in Articles 8-11. In these contexts the Court looks at whether the measure was 'proportionate with the



legitimate aim pursued', or whether there was 'a pressing social need' for the measure or whether reasons for the measure were 'relevant and sufficient'. The Court applies a less strict test of proportionality in assessing restrictions on property rights or in assessing the existence of the scope of the positive obligations; it looks at whether 'there was a reasonable relationship of proportionality between the means and ends'; or 'whether a fair balance was struck between community and individual's interests.' The first criterion is also applied in assessing the justification under Article 14.

The strictness of assessment is influenced by the width of the margin of appreciation which the Court gives to the states. The principle of proportionality has hence been described as 'the other side of the margin of appreciation.' When the Court proclaims a wide margin of appreciation it applies only a lenient test of proportionality and defers to the state's assessment of the balance between individual's and community interests.