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# THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS A TOOL OF PROTECTION OF INDIVIDUAL LABOUR RIGHTS

TESI DI DOTTORATO

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*"Nations prosper in the global economy…by building their institutional advantages on a floor of fundamental human rights.."*

*Sir Bob Hepple*[1]

## Introduction

In recent years there has been substantial debate over the interconnection between labour rights and human rights.[2] These debates were mainly conceptual in nature whilst international and regional human rights mechanisms, from a practical perspective, have so far been rather underexplored from the labour rights perspective.[3] My research, as set out in this paper, is largely inspired by a desire to explore how individual labour rights have been referred to in the human rights jurisprudence of the European Court of Human Rights (the Court or the ECtHR). The goal of my analysis is to highlight the Court's views on these rights for the benefit of practitioners working in this area, to show that human rights are not only "important ideological weapons in the development of labour law," [4] but can also be practical tools in the legal practice as well.

The aim is to demonstrate that Strasburg "is not that far"[5] from national labour courts. This international Court has now adopted binding legal positions in respect of discrimination in employment, wages, unfair dismissal, employee's privacy protection, occupational safety. Its legal positions have already changed certain aspects of the national labour laws of some members of the Council of Europe

[1] Bob Hepple, Rights At Work Global, European and British Perspectives, London Sweet & Maxwell, 2005, p. 6-7.
[2] Ewing, Keith David. "The Human Rights Act and Labour Law." Industrial Law Journal 27.4 (1998): 275-292.; H Collins, Theories of Rights as Justifications for Labour Law, In G Davidov and B Langillc (eds), The Idea of Labour Law (Oxford, OUP, 2011) 137; G Mundlak, 'Labor Rights and Human Rights: Why Don't the Two Tracks Meet?' (2012) 34 Comparative Labor Law and Policy Journal 237; L Compa, 'Solidarity and Human Rights' (2009) 18 New Labor Forum 38. 12; K Kolben, 'Labor Rights as Human Rights?' (2010) 50 (2) Virginia Journal of International Law.
[3] Ebert Franz Christian and Martin Oelz, Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts. ILO, 2012, p. 2.
[4] Hepple, Bob. "Future of Labour Law, The." Comp. Lab. LJ 17 (1995): 626.
[5] Lo Faro, Responsabilità e sanzioni per sciopero illegittimo: cambia qualcosa in Italia dopo Laval?, in Giornale di diritto del lavoro e delle relazioni industriali, 2011, n. 3, p. 419

(CoE). The fascinating evolutionary character of the European Convention of Human Rights (ECHR) makes me argue its growing applicability for the protection of wages and of occupational safety.

I have chosen in this paper to focus on substantive individual labour rights (also referred to as "rights at work" in this paper) as it is the least researched area of the ECtHR's jurisprudence. These rights include fundamental employment rights such as the right for wages, for protection from unfair dismissal, from discrimination and the right to occupational safety at work. Substantive individual labour rights for the purposes of this research also comprise civil liberties that should be recognised or protected at the workplace, such as the right to freedom of religion, of expression and the right to respect for private life.

Procedural rights, collective labour rights or rights related to social security are intentionally not considered in this thesis. This is partly because famous cases such as *Demir and Baikara v. Turkey* or *R.M.T. v. UK* brought the attention of labour scholars to how the ECtHR interprets collective labour rights.[6] The ECtHR's case law on social security has also been researched in depth by others in a systematic way.[7] However, where relevant, I will refer to certain ECtHR cases on social security or to the protection of trade unions where they illustrate important insights into the ECtHR's approach to social rights in general.

**Objectives of research**

This research has seven objectives, as follows:

[6] See, for example, Ewing, Keith D., and John Hendy, The dramatic implications of Demir and Baykara. Industrial Law Journal 39.1 (2010), pp. 2-51; Isabelle Van Hiel, The Right to Form and Join Trade Unions Protected by Article 11 ECHR In: Filip Dorssemont, Klaus Lörcher, Isabelle Schömann, editors. The European Convention on Human Rights and the employment relation. Oxford: Hart Publishing, 2013, pp. 287-308; Dorssemont Filip, How the European Court of Human Rights gave us Enerji to cope with Laval and Viking. In: M. A. Moreau, editor. Before and After the Economic Crisis: What Implications for the European Social Model? Edward Elgar Publishing, 2011, p.217.

[7] Heredero Ana Gómez, Social security as a human right: the protection afforded by the European Convention on Human Rights. Vol. 88. Council of Europe, 2007; Cousin Mel, The European Convention on Human Rights and Social Security Law. Intersentia, 2008; Kapuy Klaus, Pieters Danny, Zaglmayer Bernhard, Social Security Cases in Europe: The European Court of Human Rights. Intersentia, 2007; Bossuyt M., Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations. Human Rights Law Journal, 28 (2007), pp. 321-332.

1. To set out the history of the ECtHR's approach to rights at work and to explain the expansion of the European Convention on Human Rights upon labour law matters;
2. To investigate the "margin of appreciation" granted by the ECtHR to States in respect of protection of rights at work;
3. To determine the ECtHR's legal positions on discrimination in employment and establish whether they might be used as a source of development of antidiscrimination legislation in Russia;
4. To consider how the ECtHR perceives forced labour and what positive obligations are imposed on States in this sphere;
5. To discover the ECtHR's approach to the employee's rights to a private life, freedoms of religion, expression and association, with a particular focus on cases about unfair dismissals;
6. To analyse cases on wage protection and on occupational safety and to determine the potential of the ECHR in these fields;
7. To assess the impact of the ECtHR's judgments upon the protection of rights at work.

**Structure of work**

The structure of the present thesis is determined by the objectives of research. The thesis comprises four parts, each devised in Chapters which are further organised in sections and subsections. Every chapter sets out brief conclusions.

Part I provides research on theories presently dealing with the history, tools and philosophic justification of the integration of social and labour rights in the ECHR. It includes analysis of the ECtHR's perception of the margin of appreciation, the balancing of rights and of the proportionality test as far as these concepts are used in the adjudication of "employment law" cases.

The remaining three parts are dedicated to the jurisprudence of the ECtHR on protection of the rights at work. My division of the case law into three parts reflects the ECtHR's first cases on "genuine" ECHR rights which are explicitly

relevant to the protection of the rights at work. Accordingly, Part II explores the ECtHR's approach to the prohibition of forced labour (article 4) and discrimination (article 14)[8]. Part III draws together my research on case law relating to the protection of civil liberties at work; specifically in the areas of the protection of privacy, the right to respect for private life and of the freedoms of religion and expression, including more minor references to freedom of association. Particular focus is drawn to cases about unfair dismissals.

Part IV explores the jurisprudence of the ECtHR on protection of wages and occupational safety at the workplace. These issues were initially outside the scope of the ECHR; however, the evolutionary interpretation of its norms allowed the ECtHR to adopt particular approaches to the relevant rights of employees, which are researched in two chapters. Each of them comprise sections setting out the author's reflections on how the ECtHR's interpretation of the ECHR may be formulated in respect of protection from psychosocial risks at work, and in respect of the right to a decent wage.

In Conclusions the most important positions of the ECtHR in respect of the protection of individual labour rights are synthesised to emphasise their current and potential impact on the labour laws of the members of the CoE.

**Methodology**

The methodology used in this dissertation comprises both doctrinal and empirical legal research. Each chapter, dealing with certain aspects of Strasburg case-law, is based on an empirical analysis of international law, jurisprudence and scientific literature.

The cases used for the research are available on the official site of Strasburg database – HUDOC. [9]

The search for relevant cases was mainly restricted to cases considered in the light of article 14 (prohibition of discrimination), article 4 (prohibition of forced

[8] References to articles in this paper are to the European Convention on Human Rights, unless otherwise specified.
[9] http://hudoc.echr.coe.int/

labour), article 8 (the right for the respect of private life), article 9 (the freedom of thought, conscience and religion), article 10 (freedom of expression), and article 1 of Protocol 1 to the ECHR (right to property). The cases were selected with the help of text search in relation to the relevant terms, i.e., entering such key words as "employment", "employee", "dismissal", "Occupational disease", "wage", and some others. Selected cases often contained references to earlier case law of the ECtHR or of the European Commission of Human Rights, which led to those references being added to the cases I looked at. Greater weight was given to final judgments of the ECtHR, in particular to the judgments of the Grand Chamber. Decisions of the ECtHR and of the former European Commission of Human Rights (collectively referred to in this paper as the "**Strasburg bodies**") were also analysed and at times provided a particularly interesting insight on the protection of the rights at work.

The research in this paper is based on the analysis of 334 cases, considered by the Strasburg bodies in the last 43 years (from 1963 until September 2015). The cases were considered chronologically in order to establish evolutionary trends in the ECtHR's reasoning and its interconnection with the policy changes in European countries. In certain cases countries' reports on their implementation of the ECtHR's judgments have been referred to in order to assess their impact upon the protection of the rights at work at national level. Certain international law and domestic cases complemented the foundational research referred to above.

Legal literature, mainly in English (but also in French, Italian and Russian), has been surveyed in some detail and provided helpful frameworks for the research on Strasburg case law.

## Part I. The integration of labour rights in the European Convention on Human Rights

This part is devoted to the evolution of the ECHR, and highlights the widening of the scope of protected rights and the emergence of labour law cases before the ECtHR. In order to understand this expansion of the ECHR, which has been vividly described by commentators as an "awakening of the sleeping beauty",[1] there is a need to trace the history of the Convention. It is also necessary to explore the legal concepts elaborated by the ECtHR for its justification of "evolutive" interpretation and the use of these concepts in cases concerning labour rights. The ECtHR's approach to the cases concerning the protection of individual labour rights will be researched through investigating the concepts of the margin of appreciation, balancing and proportionality as those concepts have been used by the ECtHR in adjudicating cases.

### Chapter 1. History of the Convention: a long way to European quasi-constitutional Court

*1.1.Drafting of the ECHR*

*1.1.1 Dispute on definition of rights*
*1.1.2. Dispute on the list of rights*
*1.1.3. Dispute on establishment of the process of supervision and the right for individual petition*

*1.2. Development of the Convention system*
*1.3. Accession of the EU to the Council of Europe*

In this chapter the fundamental link between the ECHR and the protection of labour rights will be established, starting from the research of premises of social rights protection found in the original drafting of the ECHR. The development of the Conventional system will be traced, focusing on its role in the enlarged Council of Europe (CoE) after the accession of post-communist countries. In conclusion

[1] This epithet is usually used describing the rise of the ECtHR's authority in the 1970's; Jochen Frowein, first used this term in 1984, and it has now been adopted by a number of other scholars. See, Jochen Frowein, European Integration Through Fundamental Rights, University of Michigan Journal of Law Reform, No. 5, 1984, p. 8; Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights. Oxford University Press. New York, 2010. P. 277.

some reflections about the accession of the European Union ("**EU**") to the Council of Europe will be formulated.

### 1.1. Drafting of the ECHR

It is common to say that the ECHR was designed as an instrument of protection from totalitarianism, being drafted shortly after the fall of Nazi Germany against the background of post-war enlargement of totalitarian Soviet states.[2] As the Ex-President of the European Court noted, "The Convention was an innovative response, perhaps even revolutionary, to genocide, atrocities and monstrosities of the Second World War and the period that preceded it".[3] Since the Nuremberg judgments had established a new concept of international responsibility and consequently a new concept of national sovereignty, it was considered necessary to establish effective international guarantees for human rights.[4]

The fundamental human rights, listed solemnly in the Universal Declaration of Human Rights in 1948, needed some mechanism by which they could be enforced. By 1949 it had become rather evident to international society that International Covenant, which had to represent the international guarantee of human rights, would be very long in coming (in that time it was not yet clear that the rights would be divided into two separate Instruments[5]). The adoption of the European Convention on Human Rights by the countries of the Council of Europe was a way of implementing the UDHR pending the finalisation of the ICCPR and the ICESCR.

In hindsight, it is obvious that the ten founding countries which comprised the CoE in 1949 would represent a more homogenous group of countries than

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[2] As W. Churchill put it in a speech in Strasburg on 12 August 1949, "We have to… protect ourselves against any risk of being overrun, crushed by whatever form of totalitarian tyranny" Available at: http://www.coe.int/aboutcoe/index.asp?page=peresFondateurs&l=en(accessed 01.10.2014).

[3] L. Wildhaber, De L'évolution Des Idées Sur Les Missions De La Cour Européenne Des Droits De L'homme in La Promotion de la Justice, Des Droits de L'homme Et Du Règlement Des Conflits Par Le Droit International edited by Marcelo Gustavo Kohen. Martinus Nijhoff Publishers, 2007. P. 644.

[4] Gordon L. Weil, The European convention on human rights: background, development and prospects. A.W. Sythoff – Leyden, 1963. P. 22.

[5] For example, USSR and Syria opposed the idea of placing economic, social, and cultural rights in a separate instrument. See Whelan Daniel J. Indivisible Human Rights: A History. University of Pennsylvania Press, 2011. P. 75

eventually expanded numbers of the members of the UNO. Thus they could more easily reach consensus on what human rights were worthy of international recognition and protection, particularly taking into account that the political and civil rights concerned were already fixed in their domestic legislations.

This is supported bythe Preamble of the ECHR, which states expressly that: "the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

Drafting of the Convention began shortly after the creation of the Council of Europe in 1948. It was not an easy process as even in this "homogenous" circle of countries there were different views on the due scope of the future convention, on the mechanism of protection and the possibility of restricting national sovereignty. The main points of dispute were the following: 1. the definition of rights; 2. the list of rights; 3. the process of supervision and the right for individual petition. The discussion around these points of controversy could contribute to the understanding of the roots for future expansion of the ECHRand therefore deserves closer examination.

### 1.1.2 Dispute on definition of rights

According to the Papers of the First Session of the Committee of Ministers[6] held in Strasburg in 1949, the proposal to define each right was opposed by some representatives who argued that the rights mentioned were already "abundantly dealt with."[7] The French representative, M. Teitgen, thought that mere enumeration of a statement of principles such as in the UDHR, could be easily enough enforced by the European Court.[8] In contrast, and based primarily on their experience in drawing up constitutions for ex-colonies, the British favoured the precise definition of the rights to be included.

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[6] Papers of the First Session of the Committee of Ministers. 1949. Strasbourg. Available at: http://www.coe.int/t/dgal/dit/ilcd/archives/selection/cm/1949Aug.pdf (accessed 01.11.2014).
[7] See the opinion of the French representative M. Schuman. Ibid, p. 34.
[8] Gordon L. Weil, see supra note 4, P. 28.

The final text of the ECHR ultimately does not provide definitions for each of the Human Rights. This left the Strasburg bodies with significant powers of interpretation which have, with the years, become the driving force of the evolution of the Convention. It may be presumed that the power of interpretation granted to the ECtHR was not intentional. It seems more probable that the rights were not defined as their meanings were already very familiar to the legal system of European states and were, as one party surmised, "already protected thoroughly".[9] As fairly noted former Vice-President of the European Commission of Human Rights J. A. Frowein: "The countries did not expect that the European Convention would go further that their internal system".[10] Evidently the final version of the Convention, which leaves to the ECtHR the power to interpret each right, is one the secrets of the Court's success. The ability to expand the protection upon certain individual labour rights emerged in case-law only thanks to the possibility of particularly broad interpretations, for example, of articles 3, 8, 11 and art. 1 to the Protocol N 1.

### 1.1.4. Dispute on the list of rights

It is remarkable that even at the stage of preparatory work there were ideas to create a "complete code of all the freedoms and fundamental rights, and all the so-called social freedoms and rights".[11] The Convention was perceived by some members of the drafting committee as a "guarantee for further development of social justice in Europe"[12] although it was initially aimed at protecting basic civil and political rights.

The idea to include economic or social rights was in the air but it was rejected. One of the fathers of the Convention, Sir David Maxwell-Fyfe, found these rights to be "too controversial and difficult of enforcement even in the changing state of social and international development in Europe". In his view, their inclusion could

[9] Ed Bates, see supra note 1, p. 114.
[10] Frowein J.A. The transformation of the constitutional law through the ECHR. Isr.L.Rev. Vol. 41, no 3, 2008, p. 490.
[11] These are words said by Pierre-Henri Teitgen while presenting the Draft of the ECHR on the 19.08.1949, cited from Ed Bates, see supra note 1, p. 59.
[12] Words of the Socialist representative cited in Gordon L. Weil, see supra note 4, p. 12.

jeopardise the wider acceptance of the ECHR.[13] This is true; the ECHR could not be ratified by member States if it included social matters which required dictating the spending of particular states' budgets or other issues which were considered by countries in a very different way. The "a-la-carte" concept of the European Social Charter and the process of its creation and ratification confirmed the impossibility of fixing social rights in the ECHR in the 1950's.[14]

The approach of the drafters to social rights was vividly expressed by Teitgen: "Certainly, professional freedoms and social rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union, and then to co-ordinate our economies, before undertaking the generalisation of social democracy?"[15] It is curious to note that Teitgen was one of the judges of the ECtHR in 1978 which considered the case *Tyrer v. The United Kingdom*, where for the first time the European Convention was pronounced to be a "living instrument".[16] This approach later permitted the significant widening of the scope of rights guaranteed by the ECHR, including also the "professional and social rights" as mentioned by Teitgen during the drafting process.

### 1.1.5. Dispute on establishment of the process of supervision and the right for individual petition

The structure, the powers of relevant bodies and how supervision would be exercised was another area of controversy. The authors of the Conventions completely overestimated the willingness of certain states to create a human rights

[13] See Collected Edition of the "Travaux Préparatoires" of the European ECHR on Human Rights: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949. Council of Europe. BRILL, 1975. P. 116.

[14] On the particularity of the ESC, see Khaliq, U. and Churchill, R. The European Committee on Social Sights: putting flesh on the bare bones of the European Social Charter. In: Socio-Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law edited by Langford, M. New York and Cambridge: Cambridge University Press, 2009. Pp. 428-452.

[15] Teitgen Report, TP Vol I at 218, cited from Ed Bates, see supra note 1, p. 65.

[16] ECtHR, Tyrer v. The United Kingdom (5856/72)25.04. 1978, para 31. See also: Letsas, George, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: http://ssrn.com/abstract=2021836 (accessed 20.09.2014).

instrument that threatened their sovereignty; in 1949-1950 the governments of those states had little desire to see an instrument that could, as they saw it, meddle in internal affairs in any way.[17]

The threat to the national sovereignty was (and still is) the most difficult aspect of the ECHR for all member states – old and new. Understandably, states were more willing to adopt rights that were already fixed in their respective national law but saw a danger in the possibility of external control over domestic legislation. This is why initially only the possibility of interstate claims was provided for in the European Convention. The states were sure that this procedure would be used in very rare cases due to stable diplomatic relations between the European countries. The right for individual claims and the acceptance of the jurisdiction of the European Court of Human rights were only set out as optional clauses in the ECHR.[18]

The adoption of these optional clauses was a very slow process; most of the countries used at the beginning a "short-term" adherence to these clauses as testing the system and monitoring the activities of the European Commission of Human Rights. The Commission was at that stage the most important player as only single cases were brought before the ECtHR which was established in 1959. Gradually, the consideration of cases by the Commission gained confidenceof the states to the Conventional mechanism and finally all members of the CoE accepted the right of individual petition.[19]

The further acceptance of optional clauses by all member states is to the credit of the Commission, which acted very cautiously, knowing that every mistake it made could bury the bright ideas of the ECHR and transform it to a "paper tiger".

## 1.2. Development of the Convention system

The acceptance of optional clauses opened the new page in the history of the

[17] Ed Bates, see supra note 1, p. 77.
[18] See more on the acceptance of optional clauses in Ed Bates, see supra note 1, p. 105-107, 133-139.
[19] Lecture of the member of the European commission of human rights Henry G. Schermers, Protocol 11 to the European ECHR on Human Rights, available at: http://europainstitut.de/fileadmin/schriften/317.pdf (accessed 20.10.2014).

ECtHR. This acceptance allowed violations of human rights to be dealt with in a very bold way. The popularity of the ECtHR grew with the years; gaining authority on both European and world law stages[20] and, as noted Ed Bated, "[the ECtHR] became more willing to interpret the Convention as a type of European Bill of Rights relevant to contemporary Europe"[21]. The changes brought to the European Convention on Human Rights by Protocol 11[22] created new permanent Court, abolishing the two-tiereded system alongwith the Commission. The ECHR has started to acquir a "truly constitutional character for the whole European continent".[23]

These reforms were particularly important in the context of the CoE expanding to includenew member states, such as Ukraine, Russia, Georgia or Azerbaijan, as these states had a very different history, understanding and perception of human rights compared with the European countries which were the initial adopters of the ECHR. The ECtHR now has a "missionary function",[24] which is to bring the light of human rights to the most "obscure" places of the continent. This missionary function is important in protecting labour rights, even if these rights are not directly mentioned in the ECHR. For example, in *Danilenkov and other v. Russia,*[25] the ECtHR required the State to create effective systems to protect trade union members from discrimination, thus demonstrating the values of a true democratic society and teaching Russia to implement laws and principles which were alien for the legal system of the country for the immediately preceding 70 years.

## 1.3. Accession of the EU to the Council of Europe

[20] See on the use of the Court's case law by Inter-American court of human rights Gerald L. Neuman, Import, Export, and Regional Consent in the Inter-American Court of Human Rights, The European Journal of International Law (2008), Vol. 19 No. 1, 101–123.

[21] Ed Bates, see supra note, p. 151.

[22] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, adopted 11.05.1994, entered in force 1.11.1998.

[23] Paul Mahoney, "The European Convention On Royal Rights: Royalty, Aristocracy And The European Convention On Human Rights" in La Promotion de la Justice, Des Droits de L'homme Et Du Règlement Des Conflits Par Le Droit International edited by Marcelo Gustavo Kohen. Martinus Nijhoff Publishers, 2007. P. 341.

[24] A W B Simpson. The ECHR: the First half Century'. 2004. University of Chicago Fulton Lecture Series. P. 12 Available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1017&context=fulton_lectures (accessed 30.10.2014).

[25] ECtHR, Danilenkov and others v. Russia (67336/01) 30/07/2009.

The accession of the EU to the CoE might be another step in the development of the Convention system of human rights protection which could have a tangible impact on the protection of labour rights in the EU. The problematic aspects of the accession and of the subsequent expansion of the ECHR over the existing EU institution and laws have already been described by numerous scholars.[26] Most have expressed a hope that accession would raise the status of labour rights within the EU legal order, contribute to the development of anti-discrimination protection[27] and speculated that it might be possible to argue that the decisions of the Court of Justice of the European Union in *Viking* and *Laval* infringe ECHR rights.[28] During the years of negotiations between the EU and the CoE it was difficult to imagine that the Court of Justice of the European Union (CJEU) would be an obstacle to the process of integration. The recent opinion of the CJEU has revealed the main non-technical problem of this process.[29] An overt race for power on the part of the CJEU shows that human rights are not treated as a fundamental legal value but are rather treated as being a subsidiary "thing" to the autonomy of the European legal system.[30] As it is unlikely that the ECtHR would grant the EU special Bosphorus-type deference after accession,[31] the rulings of the CJEU itself could be the subject of ECtHR scrutiny. Therefore, even labour law cases between the EU as employer and employees, which had been rejected by the Strasburg

[26] Rick Lawson, A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention on Human Rights in "The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 47-60; Tobias Lock, EU Accession to the ECHR: Implications for Judicial Review in Strasbourg. European Law Review, Issue 6, 2010. P. 777-798.

[27] Nicole Busby, Rebecca Zahn, The EU and the ECHR: Collective and Non-discrimination Labour Rights at a Crossroad? International journal of comparative labour law and industrial relations 2/2014, p.153-174; Niklas Bruun, Prohibition of discrimination: article 14 European Convention on Human Rights in "The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 377; Olivier De Schutter, The Prohibition Of Discrimination Under European Human Rights Law Relevance For EU Racial And Employment Equality Directives. European Commission. 2005, p. 52-53.

[28] J. Fudge, Constitutionalizing Labour Rights in Europe, in The Legal Protection of Human Rights: Sceptical Essays, edited by T. Campbell, K. Ewing & A. Tompkins, Oxford: Oxford University Press, 2011, p. 263; Phil Sypris, The Treaty of Lisbon: Much Ado…But about What? Ind. L.J. (2008) 37 (3), p. 219-235; Vilija Velyvyte, The Right to Strike in the EU after Accession to the ECHR: A Practical Assessment, In "Viking, Laval and Beyond" edited by Mark Freedland, Jeremias Prassl. Bloomsbury Publishing, 2014, p. 75-94.

[29] Opinion 2/13 of the CJEU, adopted 18 December 2014.

[30] Ibid, para. 179-200.

[31] Olivier de Schutter, Bosphorus PostAccession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention, In V. Kosta, N. Skoutaris and V. Tzevelekos (eds), The Accession of the EU to the European Convention on Human Rights, Hart Publishing, 2013, p. 177.

Court earlier,[32] should be considered as admissible if accession takes place.

The reluctance of the CJEU to be bound by the ECtHR's decisions was supported by reference to the autonomy of the EU. The Luxemburg Court stated that the ECHR may affect its powers only if there is no adverse effect on the autonomy of the EU legal order and it must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.[33] One might wonder what is the sense of accession if the legal positions of the ECtHR will not be considered binding for the EU? The arguments of rare defenders of this view, calling for the concerns of the CJEU to be accommodated and to revise the Agreement on the accession of the European Union to the ECHR[34] are not satisfactory. The references to constitutional values in cases concerning the ECtHR's authority become more strident when its decisions are uncomfortable for national governments.[35] Regrettably, the opinion of the CJEU is along the same lines. Its unwillingness to become a "junior" court[36] risks drastically distortion of the initial will to bind the EU institutions to the provisions of the ECHR but also risks the withdrawal from the ECHR of countries which are more concerned with "sovereignty" than with human rights.

This opinion of the CJEU protracts the process of integrating the EU with the ECHR; the CJEU's remarks render the contents of any future agreement on accession rather unpredictable. Therefore, I will refrain from commenting on the

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[32] ECtHR, Connolly v 15 Member States of the European Union (73274/01) inadmissible 09/12/2008. See more in Lock, Tobias, Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights (February 25, 2010). Human Rights Law Review, Vol. 10, pp. 529-545, 2010. Available at SSRN:http://ssrn.com/abstract=1603937 (accessed 12.04.2015)

[33] Opinion 2/13 of the CJEU, adopted 18 December 2014, para 183-184.

[34] Halberstam, Daniel, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (February 20, 2015). University of Michigan Public Law Research Paper No. 439. Available at SSRN: http://ssrn.com/abstract=2567591(accessed 13.04.2015).

[35] See, for example, the reaction of the Russian authorities to the judgment in Markin case, or the British reaction to cases on prisoners' right to vote.

[36] See the words of UK Lord Chancellor and Minister of Justice, Christopher Grayling, European Scrutiny Committee 30 th report, 21 January 2015, cited from Sionaidh Douglas-Scott, Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam. http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/#.VSuho_msVqU (accessed 10.04.2015)

possible impact of ECtHR legal positions on EU labour law for the rest of this paper, as all these reflections risk being too hypothetical.

Concluding the historical research, the question of the justification of extending the ECHR will be analysed. The ECtHR justifies it by referring to the "live character" of the ECHR and by stating that there is no "water-tight division" separating economic and social rights from the field covered by the ECHR.[37] Therefore the theory of indivisible human rights and the concept of the "live" character of the ECHR are fundamental for the protection of labour rights under the ECHR and would be researched further.

[37] ECtHR, Airey v. Ireland (6289/73) 09/10/1979, para. 26.

## Chapter 2. Integration of labour rights into the ECHR



The fascinating history of how the ECHR developed over time provides a unique insight into how an international instrument originally designed to protect classical political and civil rights was expanded, to protect certain social and economic rights. In this chapter, the research will focus on the philosophic roots of the expansion of the ECHR on labour rights, analyzing the capabilities theory of Amartya Sen and the interpretation of the ECHR as a "living instrument".

Further the ECtHR's perception of the margin of appreciation, granted to its subject States as far as protection of the rights at work is concerned, will be researched and the application of the principle of proportionality in the adjudication of ECHR employment cases will be investigated.

### 2.1. Indivisibility of human rights and intergrated approach to the interpretation of the ECHR

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in June 1993, proclaims solemnly: "The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[38]

As scholars note, the aim of this principle of indivisibility is to prevent governments from claiming to defend human rights by "cherry-picking" from the list of rights,[39] and to ensure the treatment of human rights as an interdependent and indivisible whole, rather than a menu from which one may freely select (or choose not to select).[40]

This principle has, however, largely failed in practice. Although it is widely acknowledged that the basic social and economic rights are "indivisible from the enjoyment of civil and political liberties,"[41] there is still a significant gap between the level of efficiency of two monitoring systems in particular on the level of the CoE. Economic and social rights are stipulated in the European Social Charter, which, in contrast with the European Convention on Human Rights, does not provide a mechanism for individual applications.[42] This evident shortcoming led the Secretary-General of the CoE Walter Schwimmer, who compared the effects of ECHR and of the European Social Charter, to question rhetorically whether social rights are a less important category of human rights or whether they are even human rights at all.[43]

It must be noted that there were attempts to include certain economic and social rights in the ECHR, which would have provided an efficient mechanism of protection for those rights equal to the protection afforded to civil and political

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[38] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. Available at: http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (accessed 20.11.2014).

[39] Françoise Bouchet-Saulnier, Droits de l'homme, droit humanitaire et justice internationale, Acte Sud 2002, pp. 23 and 27.

[40] Donnelly Jack, Universal Human Rights in Theory and Practice, Cornell University Press, 2013, p. 28.

[41] Indivisible Human Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty. Human Rights Watch, 1992, P. 76

[42] The same arguments may be found in: Ida Elisabeth Koch, Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights. Martinus Nijhoff Publishers, 2009, p. 324.

[43] The speech of the Secretary General of the CoE Walter Schwimmer in Reforming the European Convention on Human Rights: A Work in Progress: a Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR, CoE, 2009. P. 31

rights. The initiative was eventually rejected by the Committee of Ministers who concluded that the preparation of such a protocol was neither desirable nor expedient.[44] The Airey case[45], which was mentioned above was a kind of catalyst for practical acknowledgement of the indivisibility of human rights. The ECtHR for the first time in a decision used the integrated approach[46] to the ECHR in order to overcome the initial focus of the ECHR upon political and civil rights to the exclusion of social and economic rights.[47]

In the Strasbourg jurisprudence the integration of rights indicates the ECtHR uncovering new facets of existing rights (for example, the right to manifest one's religion by wearing a religious symbol at work;[48] or the right to appeal against unfair dismissal on political grounds;[49] or the right to strike in solidarity,[50]) and incorporates new rights into the original text of the ECHR (for example, the right to access information concerning risks the employee is exposed to;[51] or the right to be reinstated in case of unfair dismissal[52]).

Philosophical roots of the integrated approach might be found in Sen's concept of freedom.[53] The research of Virginia Montavalou showed that the theory of capabilities may serve as a justification for the integrated approach[54] . An analysis of Strasburg case law on social matters leads us to conclude that the ECtHR's integrated approach is in fact in many aspects consistent with Sen's views on the

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[44] Koch, see supra note 42, p. 321.

[45] ECtHR, Airey v. Ireland (6289/73) 09/10/1979.

[46] The integrated approach was first mentioned by C. Scott in 1989, referring to the idea of the "permeability" of human rights norms, see Scott, Craig. "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights." Osgoode Hall Law Journal 27.3 (1989) : 769-878. Cited from M. Magdalena Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. Intersentia. 2003, p. 53.

[47] The Court is rarely unanimous on this matter, for example in the recent case RMT v UK , Judges Ziemele, Hirvelä and Bianku emphasised in their Joint Concurring Opinion that the States Parties to the Convention have not given the Court the mandate to address the issues concerning their economic and social policies. ECtHR, National Union Of Rail, Maritime And Transport Workers v. The United Kingdom (31045/10) 08/04/2014.

[48] ECtHR, Eweida and Others v. the United Kingdom (N 48420/10)15.1.2013

[49] ECtHR, Redfearn v United Kingdom, (47335/06) 6.11.2012

[50] ECtHR, The National Union Of Rail, Maritime And Transport Workers v. The United Kingdom (31045/10) 08/04/2014, para 86.

[51] ECtHR, Brincat and others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24 July 2014.

[52] ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 9.01.2013.

[53] It is curious that in Sen's motherland – India – the right for just and humane conditions of work was integrated with the 'right to livelihood'. See Ben Saul, David Kinley, Jaqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary. Oxford University Press, 2014. P. 280.

[54] See Virginia Mantouvalou. Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation. Human Rights Law Review 13:1, p. 549-551.

concept of freedom and the European Convention is used by the ECtHR as an instrument to protect "the real capacity for human beings to lead lives which we have reason to value".[55]

Already in 1979, Sen stated that the framework of human rights misses "some notion of "basic capabilities".[56] Basic capabilities are understood as "the opportunity to achieve valuable combinations of human functioning".[57] Sen rejects the conceptual differences between blocks of political/civil and economic/social rights,[58] and argues the necessity of protection of all the rights that affect a person's ability to function properly. Sen's attention was always centered to the practical implementation of human rights; to the protection of their validity.[59] In his famous book "Development As Freedom", Sen noted that the notion of freedom "involves both the processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances".[60]

This approach may be clearly seen in the Airley case, in whichthe applicant, who did not have money to pay for legal representation and therefore was unable to claim for divorce, claimed that the State failed to protect her right to a fair trial. The respondent State argued that the applicant had the right to appear before the relevant judicial body without being represented by a lawyer. The ECtHRconsidered whether the applicant was in fact capable of obtaining a divorce without legal representation. Taking into account the complexity of the proceedings before the relevant judicial body and the "emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court"[61] the ECtHR judged that it was improbable that an applicant could effectively present her own case in circumstances such as these. The ECtHR noted

[55] Brian A Langille, Core Labour Rights – The True Story (Reply to Alston) European Journal of International Law, Vol. 16, No. 3, 2005, p. 432.
[56] A. Sen, Tanner Lecture: Equality of What? Stanford University, 1979, available at: http://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf (accessed 23.11.2014).
[57] A. Sen, Elements of a Theory of Human Rights. Philosophy & Public Affairs (2004) Volume 32, Issue 4, P. 332
[58] Ibid, p. 345-348.
[59] A. Sen, Europa e il mondo - Quale sviluppo nel prossimo futuro? Lettera internazionale 2005, 84, p. 9
[60] A. Sen, Development as Freedom. First Anchor Books Edition, 2000. P. 17.
[61] ECtHR, Airey v. Ireland, para. 24.

that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective," and found that the applicant's right for fair trial had been violated because although the applicant had the legal right to represent herself before the divorce court, she was not in reality capable of representing herself properly and the State had done nothing to remedy the situation.

Although Sen refrains from listing the basic capabilities,[62] it does not seem outside the realms of possibility to suggest that the ability to properly argue your case before a court might be one of those capabilities. Sen does not list a definitive list of what he considers to be basic capabilities because he argues that the creation of a "fixed list [of capabilities], emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why."[63]

Sen proposes open public reasoning to be central for the understanding of human rights, and supposes that this is the way to definitively settle disputes about coverage and content.[64] This is another important point for the justification of the integrated approach of the ECtHR. The expansion of the ECHR and its coverage of certain labour rights go hand in hand with the development of human rights protection in European countries. The ECtHR is always very attentive to recent trends in human rights' protection on both national and international levels. When the ECtHR finds that the majority of European countries have achieved consensus in an approach to a certan right, it takes it as a sign to introduce new rights into its interpretation of the ECHR or to reveal new "facets" of already existing rights. This argument can be illustrated with its decision in the *K. Markin v. Russia* case, where the ECtHR, having undertaken a comparative analysis of the contemporaneous European experience, found that art. 8 (in conjunction with art. 14) provided the right for paternity leave without discrimination. Another example

[62] M. Nussbaum created a list of central human functional capabilities, which in her view "gives the basis for determining a decent social minimum in a variety of areas". See Nussbaum, M. Women and Human Development. The Capabilities Approach. Cambridge University Press, 2000, p. 79. Available at: http://genderbudgeting.files.wordpress.com/2012/12/nussbaum_women_capabilityapproach2000.pdf (accesed 27.11.2014).

[63] Sen, A. 'Capabilities, lists, and public reason: continuing the conversation', Feminist Economics (2004), 10(3), 77-80.

[64] A. Sen, Elements of a Theory of Human Rights, Philosophy & Public Affairs (2004)Volume 32, Issue 4, P. 322

can be found in *Sorensen and Rasmussen v. Denmark,*[65] where the ECtHR held that Article 11 of the ECHR contains a "negative right of association or, put in other words, a right not to be forced to join an association" and found that the practice of concluding closed-shop agreements violated the freedom of association. In that case much attention was drawn to thelegislation of European countries, the provisions of international instruments and expressed views of the European Committee of Social Rights.[66]

This case is a useful illustration of how the ECtHR can rely on, using Sen's words, "open public reasoning" to support its conclusions. As a result, the negative aspect of the freedom of association was finally integrated to the article 11, in spite the fact that the provision banning compulsory membership in associations was deliberately excluded from the text of the ECHR during the drafting process.[67]

In work prepared for the ILO, Sen focused on the necessity of elaborating basic rights, whether they were legislated or not, as being essential to decent society.[68] Using the integratrative approach, the ECtHR seems to elaborate these basic rights which have roots in the text of the original ECHR, as illustrated by the following examples:

(i) *Demir and Baikara v. Turkey*[69] and *Enerji Yapi-Yol Sen v. Turkey*[70] recognises the rights to collective bargaining and to strike;

(ii) *Brincat and other v. Malta* is an example of the ECtHR interpreting art. 8 as providing employees with the right to receive information about working conditions;[71]

(iii) In *R.Sz. v. Hungary*[72] the ECtHR set a rule of wage protection against excessive taxation.

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[65] ECtHR, Sorensen and Rasmussen v. Denmark (52562/99 52620/99) 11/01/2006.
[66] As if the ECtHR was following Sen's advice "not to confine the domain of public reasoning to a given society only", see A. Sen, Elements of a Theory of Human Rights, P. 349.
[67] Gordon L. Weil, see supra note 4. P. 68.
[68] A. Sen, Work and rights. International Labour Review, Vol. 139 (2000), No. 2 p. 122.
[69] ECtHR, Demir and Baykara v. Turkey [GC] (34503/97) 12/11/2008.
[70] ECtHR, Enerji Yapi-Yol Sen c. Turquie (68959/01), 21/04/2009
[71] ECtHR, Brincat and others v. Malta (60908/11 et al) 24.07.2014
[72] ECtHR, R.Sz. v. Hungary (41838/11) 02/07/2013, see also Á.A. v. Hungary (22193/11)23/09/2014, P.G. v. Hungary (18229/11) 23.09.2014.

(iv) Finally, in numerous cases the ECtHR has underlined the importance of protection from discrimination in employment and social security relation.[73]

This is a very brief review of basic labour rights which emerges in examining ECtHR jurisprudence and its use of the integrative approach. There is a clear ommission regarding the right to work. The ECtHR expressly underlined the absence of this right in several judgments.[74] However, this omission cannot be interpreted as the ECtHR's reluctance to acknowledge the basic or fundamental character of the right to work. The integrative approach has limits of application within the ECHR. It is not easy to outline these limits in the ECtHR's jurisprudence. The right to work could be incorporated into article 8 by interpreting it as saying that work is an inherent part of private life. As Sen said: "Employment can be an element of self-respect, and also of the other people's respect towards a person".[75] The ECtHR itself once held that "in the course of their working lives .. the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world".[76]

Therefore, there are both conceptual and jurisprudential premises for integrating right for work into the European ECHR. What keeps the ECtHR from deducing this right? A possible answer is that the right to work is a complex socio-economic right that requires much from the State and touches upon such "pain points" as employment policy, protection from unemployment, creating of new workplaces etc. At present, the relevant European states have differing views on these matters, the integration of the right to work to the right for respect for private life would be artificial, unless reached naturally as a result of the domestic development of labour and social security legislations in those states.

These deliberations lead us to the idea that European consensus on issues of

[73] See for example, ECtHR, Thlimmenos v. Greece [GC] (No. 34369/97), 6 April 2000, Danilenkov and others v. Russia (67336/01) 30/07/2009, Andrejeva v. Latvia, (55707/00) 18/02/2009.
[74] See EctHR, Panfile v. Romania (13902/11) 20/03/2012, Sobczyk v. Poland ( 25693/94, 27387/95) 26/10/2000, Torri And Others v. Italy (11838/07 2302/07) 24/01/2012.
[75] A. Sen Emploi, Institutions et technologie: Quelques problèmes de politique générale, Revue international de travail. vol. 135 (1996), no 3-4 P. 488.
[76] ECtHR, Niemietz v. Germany (13710/88) 16/12/1992, par. 29.

human rights acts as a certain limit of application of the integrative approach. Where consensus has been established, the ECtHR can be bolder in protecting those rights even in the absence of there being direct provisions about them in the ECHR.[77]

Concluding the analysis of the integrative approach, it must be said that it is the only effective answer to factual "divisibility" of human rights. Even if it "does not by magic dissolve the boundaries between the two sets of rights"[78] it has created one more tool (and the most efficient one) for the protection of certain labour rights which have "nearness or proximity" [79] to the ECHR.

## 2.2. ECHR as a "living instrument"

It was already noted above that the perception of the ECHR as a "living instrument" was the key for widening the scope of rights originally guaranteed by the ECHR. The ECtHR's jurisprudence shows that this approach to the ECHR continues to bear fruit. For example, in the recent case of *R.M.T v. UK*[80], the ECtHR concluded that the right to secondary strike, although absent from the text of the ECHR itself, was "an accessory aspect of trade union activity",[81] protected under article 11.

The words "living instrument" were used by the EctHR for the first time *Tyrer v. the United Kingdom*,[82] where the ECtHR underlined the importance of interpreting the ECHR in light of contemporaneous conditions, taking into account the then-current development and commonly accepted standards in the concerned sphere. This was a starting point for the "extensive use of evolutive interpretation".[83] This method, even without being directly mentioned in the majority of the cases, largely

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[77] See, for example the ECtHR's arguments in Markin v. Russia [GC] (30078/06) 22/03/2012 , para 99, for the opposite example where the absence of consensus lead to refusal to find violation, see Stec and others v. UK (65731/01, 65900/01) 12/04/2006, para. 64.

[78] Koch, see supra, note 42, p. 280.

[79] Ibid.

[80] ECtHR, The National Union Of Rail, Maritime And Transport Workers v. The United Kingdom (31045/10) 08/04/2014

[81] Ibid, para. 87.

[82] ECtHR, Tyrer v. the United Kingdom (5856/72) 25.04.1978, para 31. See also: Letsas, George, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: http://ssrn.com/abstract=2021836 (accessed 20.09.2014).

[83] George Letsas, The Truth in Autonomous Concepts: How To Interpret the ECHR, EJIL 15 (2004) P. 299

determined the development of the human rights protection under the ECHR.

Scholars note that the application of this concept means that the interpretations of the ECtHR's decisions must be made having regard to the evolving values in European societies and to the new human rights problems brought about by advances in science and technology which could not have been imagined back in 1950.[84] These adjustments, for instance, lead the ECtHR to expand the protection of private life to take into account rights regarding electronic correspondence and the use of Internet at work;[85] to argue the necessity of applying contemporary protective measures as far as occupational health was concerned.[86]

The roots of this concept might be found both in the text of the ECHR, which was intended as "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"[87] and in the approach of the European judges to the interpretation of the ECHR. Judge Sorensen in 1975 proclaimed the ECHR to be a "living legal instrument" and emphasised the need to take into account current circumstances of life by using an evolutive interpretation method.[88] The Justice of the Supreme Court of the United Kingdom suggests that the expression 'living instrument' is reminiscent of the expression "[a] living tree capable of growth and expansion within its natural limits", used by Canadian judge Lord Sankey in 1930.[89]

[84] Matti Pellonpaa, Continuity And Change In The Case-Law Of The European Court Of Human Rights in "La Promotion de la Justice, Des Droits de L'homme Et Du Règlement Des Conflits Par Le Droit International" edited by Marcelo Gustavo Kohen. Martinus Nijhoff Publishers, 2007. P. 409.
[85] ECtHR, Copland v. the United Kingdom (62617/00) 03/04/2007
[86] ECtHR, Vilnes and Others v. Norway (52806/09 22703/10) 05/12/2013.
[87] Preamble to the ECHR.
[88] Sorensen M., Do the rights and freedoms set forth in in the ECHR in 1950 have the same significance in 1975? In Forth ECHR Colloquy, Rome, 1975, p. 86-106.
[89] Brenda Marjorie Hale Justice of the Supreme Court of the United Kingdom. Beanstalk or living instrument? How tall can the European Convention on Human Rights grow? Lecture at Grasham college 16.06.2011.

The evolutive approach to interpretation has never been applied unanimously by the judges of the ECtHR. Moreover, the approach has been consistently criticised by the representatives of State-members and some leading scholars as being illegitimate and leading to unpredictable interpretations of the text of the ECHR which are contrary to the initial will of the States.[90]

Some judges of the ECtHR have emphasised the impossibility of implementing important international obligations when they are not defined sufficiently to enable the States to know exactly what would be involved,[91]and to the fact that the evolutive approach is at odds with the principle of legal certainty.[92] Judge Pinheiro Farinha noted: "The ECtHR has jurisdiction not to re-draft the Convention but to apply it. Only the High Contracting Parties can alter the contents of the obligations assumed".[93]

Former judge of the ECtHR, Franz Matscher, stated that the ECtHR has reached the limits of what can be regarded as treaty interpretation in the legal sense and at times has perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making.[94]

However, in spite of the critics and criticisms of the "lack of clarity"[95] with the approach, the ECtHR still interprets each right in accordance with various contemporaneous trends, together with relevant legal and social developments in Europe.[96] This approach has been indispensable in the sphere of protecting labour

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[90] See, for example the speech of the British Prime-Minister J. Cameron (http://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full) or the article of the president of the Russian Constitutional Court V. Zorkin, The limits of pliability (Predel ustupchivosti) Rossyskaya gazeta, 29.10.2010, available at : http://www.rg.ru/2010/10/29/zorkin.html, accessed 07.10.2013. Bellamy, Richard, The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights, European Journal of International Law, Issue Vol. 25 (2014) No. 4; Lord Hoffman, European Human Rights – A Force for Good or a Threat to Democracy? Lecture at the Dickson Poon School of Law, King's College London 17 June 2014, available at: http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Theat-to-Democracy-17-June-2014.pdf (accessed 20.08.2014).

[91] ECtHR, Golder v. The United Kingdom (4451/70) 21/02/1975. Separate opinion of Judge Fitzmaurice, para 30.

[92] Joint Concurring Opinion of Judges Villiger, Nussberger and De Gaetano in Lucky Dev v. Sweden (7356/10) 27/11/2014.

[93] Partly Dissenting Opinion Of Judge Pinheiro Farinha in Marckx v. Belgium (6833/74) 13/06/1979, para. 4.

[94] Judge Franz Matscher, Methods of Interpretation of the Convention, in "The European System for the Protection of Human Rights", R.St. J. Macdonald et al. ed., Martinus Nijhoff Publishers, 1993. P. 69-70.

[95] ECtHR, Concurring Opinion Of Judge Ziemele in O'Keeffe v. Ireland (35810/09) 28/01/2014, para. 10.

[96] Foighel I, 'Reflections of a former Judge of the European Court of Human Rights', in S Lagoutte et al (eds), Human Rights in Turmoil, (Leiden: Brill, 2007) P. 277

rights as many of the rights and freedoms are defined in the ECHR in "too general terms to be fully self executing".[97] Scholars suppose that the lack of precision in the terms of the ECHR leads to the emergence of the "creative legislative element" in the ECtHR's power of interpretation, comparable to that of the judiciary in common law countries.[98]

Understanding of the evolutive interpretation of the ECHR is possible through an analysis of the limits of its application and its sources. The ECtHR has faced the necessity of delimiting the use of the evolutive interpretation of the ECHR. In *Johnston and others v. Ireland* it underlined that "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset, this is particularly so here, where the omission was deliberate".[99] However, as we will see further, this statement did not prevent the ECtHR to conclude, for example, the right not to join trade union as being inherent to article 11, although that negative right was deliberately excluded from the text in the drafting process.[100]

Another limit might be found in the acknowledgement of the rule that any interpretation must not place an impossible or disproportionate burden on the States. This rule concerns the imposition of the positive obligations on the States to ensure the protection of ECHR rights.[101] For example, in *Brincat and others v. Malta*, [102] the ECtHR referred to this rule in the interpretation of the scope of the State's obligation to ensure the protection of the lives of employees.

The search for common standards, a "constant thread running through the case law of the Court" is another limit of the application of the evolutive interpretation of the ECHR.[103] Common standards in human rights protection are both the limits and the sources of such interpretations. They limit the ECtHR in being too

[97] H. Waldock, "The Effectiveness of the System Set up by the European Convention on Human Rights", HRLJ (1980) 1, p. 9.
[98] Ibid.
[99] ECtHR, Johnston and others v. Ireland (9697/82) 18/12/1986, para. 53.
[100] ECtHR, Sorrensen and Rassmussen v. Denmark [GC] (52562/99 52620/99) 11/01/2006.
[101] ECtHR, Koval and others v. Ukraine (22429/05) 15/11/2012, para. 73, between labour law cases –Vilnes and others v. Norway (52806/09 22703/10) 05/12/2013, para. 220.
[102] ECtHR, Brincat and others v. Malta (60908/11 et al) 24.07.2014, para. 101;
[103] Sir Nicholas Bratza, Living instrument or dead letter - the future of the ECHR. European Human rights Law Review, issue 2 (2014), p. 124.

"expansive" where common standards cannot be found on the one hand, and on the other, provide the ECtHR with evidence of the development of foreign law (with emphasis on European law), and of the relevant international instruments.

### 2.2.1. The use of other international instruments and opinions of other international bodies

The possibility to refer to other international instruments has particular importance for the ECtHR's ability to make decisions about the protection of labour rights, given that in recognising the possibility of protecting those rights the ECtHR inevitably faces the lack of entirely appropriate provisions within the ECHR itself. The general basis for the ability to refer to other international instruments in its deliberations was acknowledged in *Cudak v. Lithuania*: "The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account".[104] The Vienna Convention on the Law of Treaties (VCoLT) fixed the possibility to refer to "other relevant rules of international law" for the interpretation of international treaty (article 31.3 (C)). The direct reference to this discretion can be found in numerous labour law cases.[105] An analysis of the ECtHR's jurisprudence shows that the ECtHR resorted to art. 31.3 of the VCoLT as a means to support either an expansive or a restrictive reading of the ECHR when substantive issues of fundamental importance for the protection of human rights have presented themselves.[106]

[104] ECtHR, Cudak v. Lithuania (no. 15869/02), 23 March 2010 (par. 56)
[105] ECtHR, R.M.T. v. The UK (31045/10) 08/04/2014, para. 76; Demir and Baikara v. Turkey, para. 65, Cudak v. Lithuania, para. 56.
[106] Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights. Oxford University press. 2010. P. 59.

Magdalena Forowicz, author of profound research on the consideration of international law by the ECtHR, noted that the ECtHR finds itself at the apex of two diametrically different judicial paradigms; an open paradigm characterised by a high level of judicial activism and unhindered references to international law; and the closed paradigm, marked by judicial restraint and few references to international law.[107]

The most vivid application of the "open paradigm" is represented by the *Demir and Baikara* case. In the Grand Chamber judgement the ECtHR directly stated the following:

> *The Court, in defining the meaning of terms and notions in the text of the Convention,* ***can and must*** *take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. …In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.*[108]

The ECtHR further referred to the norms of the European Social charter, which were not ratified by Turkey, and concluded that the right for collective bargaining was 'an essential element' of the right to freedom of association. This approach triggered a wave of criticism both from judges of the ECtHR and scholars. It was said to be inconsistent with approaches taken by other international tribunals[109] and contrary to the VCoLT.[110]

Judge Wojtyczek in the Concurring Opinion to the judgement in *R.M.T. v. UK* noted:

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[107] Magdalena Forowicz, see supra note 106, p. 4.
[108] ECtHR, Demir and Baikara v. Turkey, para. 85-86.
[109] Ragnar Nordeide, Demir & Baykara v. Turkey - European Court of Human Rights judgment on rights of trade union formation and of collective bargaining, American journal of international law, 2009 (3) 103, p. 572
[110] L. Wildhaber, A. Hjartarson, S. Donnely, No consensus on consensus? The practice of the European court of human rights, Human Rights Law Journal, Vol. 33, No. 7-12. P. 252

*The fact that a treaty rule is not binding on at least one Contracting State is an argument against any kind of theological re-interpretation of the Convention in accordance with this rule. In my view, it is illegitimate to transform treaty rules that bind only some members of the Council of Europe into an element of the Convention for the Protection of Human Rights and Fundamental Freedoms, unless unequivocal rules of treaty interpretation require otherwise. In any case, invoking arguments such as a "continuous evolution in the norms and principles applied in international law" or a "strong international trend" usually discloses the fact that there are no strong arguments based on international law to support the chosen interpretation.*[111]

In fact, the indirect application of norms which a relevant state refuses to ratify evidently cannot be justified in comprehensible legal terms. It must be noted that the *Demir and Baikara* decision remains the only example of such a questionable approach to labour law cases. It seems that the ECtHR was too bold in applying international law, based generally on the consent of States, in such an "innovative" way. As the decision in *R.M.T. v. UK* shows, the ECtHR itself realized that this approach might lead to contradictions and confusion and noted: "The Court would stress that its jurisdiction is limited to the Convention. It has no competence to assess the respondent State's compliance with the relevant standards of the ILO or the European Social Charter, the latter containing a more specific and exacting norm regarding industrial action."[112]

The ECtHR thus seems to have steped back from its "Demir and Baikara methodology,"[113] returning to classical interpretative use of other international instruments based on the VCoLT.

There are frequent references to ratified ILO Conventions and the ESC throughout ECtHR labour law cases. These documents mirror the development in the protection of labour rights and enable the ECtHR to fill certain gaps in the text

[111] Concurring opinion of the judge Wojtyczek, The R.M.T. v. United Kingdom (31045/10) 08/04/2014.
[112] ECtHR, The National union of rail, maritime and transport workers v. UK (31045/10)08/04/2014, para. 106.
[113] See more on this method in Klaus Lorcher, The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up in The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 3-47.

of the ECHR.[114]

For example, it is acknowledged in the Strasbourg jurisprudence that the term "forced or compulsory labour", left without definition in art. 4 of the ECHR, is defined in the light of the ILO Convention No. 29 concerning forced or compulsory labour.[115]

The lack of definition of the right to the freedom of association makes the ECtHR refer to the relevant provisions of the ILO Conventions, the ESC and the opinions of ILO bodies and the European Committee of Social Rights.[116] The analysis of these resources, for instance, made the ECtHR conclude the existence of "core"[117] and "additional" collective rights.[118]

These international resources aid the ECtHR in its interpretion work, including in relation to the possible restriction of the freedom of association, set out in part 2 of art. 11. For example, in the recent case *Tymoshenko and others v. Ukraine*[119] the ECtHR had to ascertain whether the "interests of national security or public safety, or the protection of health or morals or the rights and freedoms of others" might justify the prohibition of strikes by pilots of a private company. The ECtHR used references to the provisions of ILO Conventions and the European Social Charter in order to show that the derogative clause must be read in a restrictive way.[120]

It is curious to note that the notion of private life was interpreted by the ECtHR relying on the provisions of the Articles 1 & 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights. In *Sidabras*

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[114] See more on earlier references of the ECtHR to the ILO and ESC standards in J. G. Merrills, The Development of International Law by the European Court of Human Rights. Manchester University Press, 1988. P. 202-203.

[115] ECtHR, Van Der Mussele v. Belgium (8919/80) 23/11/1983, Siliadin v. France (73316/01) 26/07/2005, Stummer v. Austria (37452/02) 07/07/2011, Graziani-Weiss v. Austria ( 31950/06) 18.10.2011.

[116] ECtHR, Trade Union Of The Police In The Slovak Republic And Others v. Slovakia (11828/08) 25/09/2012, para. 53, Vörður Ólafsson v. Iceland (20161/06) 27/04/2010, para. 38, Associated Society Of Locomotive Engineers And Firemen (ASLEF) v. The United Kingdom (11002/05) 27/02/2007, para. 67, ECtHR, Veniamin Tymoshenko and others v. Ukraine (48408/12) 02/10/2014

[117] The right for collective bargaining, the negative freedom of association, see Demir and Baikara, Sorensen and Rasmussen v. Denmark [GC] (52562/99 52620/99) 11/01/2006.

[118] For example, the right for the solidarity strike, see ECtHR, R.M.T. v. the UK (31045/10) 08/04/2014. In regard to the right to strike the ECtHR, noting that it was recognized by the International Labour Organisation's supervisory bodies as intrinsic corollary of the right to organize protected by ILO Convention C87, acknowledged its' non-absolute status in the context of the ECHR. See Enerji Yapi-Yol Sen c. Turquie (68959/01) 21/04/2009, para. 24, 32.

[119] ECtHR, Veniamin Tymoshenko And Others v. Ukraine (48408/12) 02/10/2014.

[120] Ibid, para 32-49.

*and Dziautas v. Lithuania*,[121] which concerned the restrictions in employment for former KGB officers, the ECtHR found that "a far-reaching ban on taking up private sector employment does affect "private life"[122]. The ECtHR attached "particular weight" in this respect to the text of international instruments and reiterated that there was no watertight division separating the sphere of social and economic rights from the field covered by the ECHR. The wide interpretation of the right for private life opened the way to numerous applications claiming that unfair dismissal was in breach of the ECHR.[123]

Examples of the influence of international instruments on the protection of labour rights by the ECtHR demonstrate that the reference to the ILO Conventions and the European Social Charter is a significant source of further development of the protection of the labour rights under the ECHR. It permits the ECtHR to interpret the ECHR in "harmony with other rules of international law of which it forms part"[124] and to effectively widen the scope of the ECHR.

### 2.2.2. The use of comparative research as the basis of reasoning

Comparative research helps the ECtHR to determine whether a matter is dealt with consistently by member states and establishes the consensus among them, which in turn narrows the margin of appreciation in each particular case. References to domestic legislation legitimise the ECtHR's interpretative approach, which allows its decisions to be more easily accepted by Contracting states.[125] Therefore, two main ends might be achieved through comparative analysis – first, harmonisation of the ECHR interpretation with national legislations; and secondly, the enhancement of the authority of the ECtHR's decisions in the member states.

**▪European consensus**

The establishment of the European consensus is usually a sign for narrowing the margin of appreciation in a particular case[126] and means a greater scrutiny of the

[121] ECtHR, Sidabras and Dziautas v. Lithuania (55480/00 59330/00) 27/07/2004.
[122] Ibid, para. 31, 32, 47
[123] ECtHR, İhsan Ay v. Turkey (34288/04)21.01.2014, Oleksandr Volkov v. Ukraine (21722/11) 9.01.2013, Pay v UK (32792/05) 16.09.2008 (inadmissible); Schüth v. Germany (1620/03) 23.9.2010.
[124] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010, para. 274.
[125] Magdalena Forowicz, see supra note 106, p. 9.
[126] ECtHR, Fernández Martínez v. Spain (56030/07)12/06/2014, para. 125.

realisation of the State's positive or negative obligations under the ECHR. The finding of consensus is a very controversial point as even in the cases where it is directly established the ECtHR did not refer to all the members of the CoE. For example, in *Markin v. Russia*,[127] ECtHR found "European consensus" on the question of men's entitlement to the parental leave even though only 23 countries out of 47 CoE members were mentioned in the study relied on by the EctHR in that case.[128]

Eva Brems is right to call the European consensus as "a rebuttable presumption in favor of the solution adopted by the majority of the Contracting Parties".[129] Taking into account that the ECtHR is operating on the international stage, where obligations of the States depend on their consent to be bound by those obligations, this approach is highly debatable. Judge Wojtyczek has pointed that when a majority of States adopts a higher standard of protection of a right, it is not (in itself) a sufficient argument for imposing this standard on the minority of States which rejects it.[130] Scholars also criticise this approach as "unsystematic and unscientific"[131] and lacking legal standards of application in a fair and predictable way.[132]

However this approach also has positive facets as well. It permits the ECtHR to render the ECHR open to the changes of the modern world and imbue it with a truly "living" character as it creates an "important link between common European values and the ECtHR's decision-making". [133] Turning to the use of the European consensus approach in labour law cases it must be noted, that in the majority of

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[127] ECtHR, Konstantin Markin v. Russia (30078/06) Chamber judgement 07/10/2010, para. 28-29.

[128] Bilyaria Petkova noted that the ECtHR in contrast with its historical approach now tends to find European consensus if the particular legal trend among fewer Member States can be established. See Bilyaria Petkova, The Notion of Consensus as a Route to Democratic Adjudication? Cambridge Yearbook of European Legal Studies, Vol 14 2011-2012 (663-697), p. 682.

[129] Eva Brems, Human Rights: Universality and Diversity. Martinus Nijhoff Publishers, 2001, p. 420.

[130] Concurring Opinion of Judge Wojtyczek, R.M.T. v. UK (31045/10) 08/04/2014, para. 9.

[131] Aileen McHarg, Reconciling Human Rights and the Public Interest Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, 62 Mod L. Rev., 671,687 (1999);

[132] Brauch, Jeffrey A., The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law (2005). Columbia Journal of European Law, Vol. 11, 2005. P. 145

[133] Kanstantsin Dzchtsiaro, Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy in The European Court of Human Rights and its Discontents: Turning Criticism Into Strength, edited by Spyridōn I. Phlogaitēs, Tom Zwart, Julie Fraser. Edward Elgar Publishing, 2013, p. 122.

cases where a reference to the European consensus can be found,[134] the ECtHR has also established the lack of consensus and left to the states a wide margin of appreciation. For example, the states were granted a wide margin of appreciation in relation to the regulation of solidarity strikes in *R.M.T. v. UK*[135] and in relation to the creation of trade unions by employees of a church in *Sindicatul "Păstorul cel bun" v. Romania*.[136]

The establishment of the European consensus might influence the interpretation of the ECHR only if the right in question is not explicitly fixed in the ECHR. For example in the case ADEFDROMIL v. France,[137] which concerned the right of military personnel to form or join a trade union, the ECtHR ignored the respondent's arguments relying on the lack of consensus in this area of law. The ECtHR rejected the European consensus approach in its reasonings in this case, as the right to form and join trade unions was already clearly expressed in article 11. The "restrictions" of this right, mentioned in the second part of article 11 in regard of servicemen, cannot "impair the essence of the right to organise".[138]

Comparative research of national approaches to the protection of a particular right is important in the labour law cases. It permits the ECtHR to determine certain trends and to follow them in its judgments, thus ensuring the dynamic interpretation of the ECHR. For example, in *Sorensen and Rasmussen v. Denmark*,[139] comparative research on the admissibility of closed-shop agreements in member states showed that "such agreements are not an essential means for securing the interests of trade unions and their members and that due weight must be given to the right of individuals to join a union of their own choosing without fear of prejudice to their livelihood". The emergence of this trend enabled the ECtHR to overrule the original idea of the drafters of the ECHR in relation to article 11: according to the "Travaux Préparatoires", it was considered undesirable

[134] EctHR, R.M.T. v. The UK, Martínez Fernández v. Spain (56030/07) 12/06/2014, Sindicatul "Păstorul Cel Bun" V. Romania (2330/09)9/07/2013, Stummer v. Austria (37452/02) 07/07/2011
[135] EctHR, R.M.T. v. UK(31045/10) 08/04/2014
[136]ECtHR, Sindicatul "Păstorul Cel Bun" V. Romania (2330/09)9/07/2013
[137] ECtHR, ADEFDROMIL c. France (32191/09) 02/10/2014
[138]Ibid, para. 43.
[139] ECtHR, Sorensen and Rasmussen v. Denmark (52562/99 52620/99) 11/01/2006, para. 70.

to introduce into the ECHR a rule under which 'no one may be compelled to belong to an association' because of the difficulties raised by the 'closed-shop system' in certain countries.[140]

In the earlier case of *Young, James and Webster v. The United Kingdom*, the ECtHR, considering the practice of closed-shop agreements, did not use any references to comparative studies and refrained from reviewing the closed-shop system as it related to the ECHR.[141] Therefore it can be argued that the reference to comparative study is used as a justification of enlarging of the ECHR's scope and overruling of previous jurisprudence. The same use may be found in *Markin v. Russia*,[142] where the decision in *Petrovic v. Austria*[143] was held to be outdated. For another example, see *Christine Goodwin v. The United Kingdom,*[144] by which an earlier decision on the protection of the rights of transsexuals were overruled.[145]

One scholar noted that in connection with changes affecting European society, the ECtHR has a mandate to redirect European human rights law.[146] The contrasting approaches highlighted above show that the ECtHR does not redirect the European human rights law itself, but ascertains the trend of redirection which becomes apparent from comparative research of national legislations or an analysis of the relevant international instruments.

### 2.3. Margin of appreciation, balancing and proportionality test

*The concept of the 'margin of appreciation' has become as slippery and elusive as an eel.*[147]

*Lord Lester*

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[140] Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", vol. IV, p. 262, cited in Young, James and Webster v. The United Kingdom (7601/76 7806/77) 13/08/1981, para. 51.

[141] ECtHR, Young, James and Webster v. The United Kingdom, para. 53.

[142] ECtHR, Konstantin Markin v. Russia (30078/06) Chamber judgement 07/10/2010

[143] ECtHR, Petrovic v. Austria (20458/92) 27/03/1998.

[144] ECtHR, Christine Goodwin v. The United Kingdom (28957/95) 11/07/2002, para. 86.

[145] ECtHR, Sheffield and Horsham v. The United Kingdom (22985/93 23390/94) 30/07/1998, para. 58.

[146] Marton Varju, Transition as a Concept of European Human Rights Law, European human rights law review 2009(2) P. 172

[147] Lord Lester of Herne Hill, QC, "The European Convention on Human Rights in the New Architecture of Europe: General Report", Proceedings of the 8th International Colloquy on the European Convention on Human Rights (Council of Europe) (1995), p. 227 at pp. 236-37 cited from Paul Mahoney, THE Doctrine Of The Margin Of Appreciation Under The European Convention On Human Rights: Its Legitimacy In Theory And Application In Practice. Human Rights Law Journal, 2001, Vol. 19, No. 1, p. 1.

### 2.3.1. The margin of appreciation

The margin of appreciation is the most unclear and controversial concept used by the ECtHR. The aims of this part are to understand the role of the margin of appreciation for the protection of labour rights, and to reveal its interconnection with the process of balancing rights and with the proportionality test.

The margin of appreciation emerged in the jurisprudence of the European Commission of Human Rights ("**Commission**") in the "*Cyprus cases*" (1958) and later in the Commission's presentations to the ECtHR in the *Lawless case* (1961).[148] Its roots can be found in continental administrative law.[149] The concept first appeared on the international scene in 1949, mentioned in proposals made by the European Movement in the debate about the kind of transnational human rights institutions, processes and norms which should be created in post-war Europe.[150] During the past 60 years, this concept has become one of the most important tools of the ECtHR.[151]

The importance of the concept of the margin of appreciation was recently acknowledged in Protocol 15 to the ECHR. This protocol, if ratified, will add to the Preamble a reference to the margin of appreciation and the subsidiary role of the ECtHR. The Brighton Declaration defines the margin of appreciation in the following way:

> *[T]he States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. The margin of appreciation reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions…The margin of appreciation*

[148] Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence Martinus Nijhoff Publishers, 1996, p. 16.

[149] See about the origins of the concept Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality. Oxford University Press, 2012, p. 3-4.

[150] Steven Greer, The interpretation of the European Convention on human rights: Universal principle or margin of appreciation? UCL Human Rights Review, 2010 [vol. 3], p. 3, available at: https://www.ucl.ac.uk/human-rights/research/ucl-hrr/docs/hrreviewissue3/greer (accessed 20.01.2015).

[151] The text search fulfilled on the official site of the ECtHR found 1744 cases where the margin of appreciation was mentioned out of 43756 cases present in the database. See http://hudoc.echr.coe.int/ (accessed 11.12.2014).

*goes hand in hand with supervision under the Convention system.*[152]

According to the ECtHR's case law, such supervision concerns both the aim of the measure challenged and its "necessity", and covers not only the basic legislation but also the decision applying it.[153]

In other words, the States are free to choose the way of implementation, but this freedom has limits which cannot be clearly articulated as it "depends on the circumstances of the case and the rights and freedoms engaged".[154]

The words of Lord Lester in this Part's epigraph are illustrative of the concerns of numerous scholars about the ECtHR's use of the concept of the margin of appreciation. In fact, there is no single concept of the margin of appreciation as it is used by the ECtHR.[155] Taking into account the fact that the ECtHR mentions the margin of appreciation in very different contexts, as well as sometimes using it as a mere "rhetorical device,"[156] it is impossible to find a unified approach to the concept within ECtHR jurisprudence. Scholars note that judges sometimes appear to be applying different standards of necessity according to their view of the merits of the case, expressed in terms of a varying margin of appreciation.[157] Articulations of this concept vary from "the lattitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies"[158] to a "pseudo-technical way of referring to the discretion which the Strasbourg institutions have decided the Convention permits national authorities to

[152] Brighton Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights on 19 and 20 April 2012, para. 11.
[153] ECtHR, Handyside v. The United Kingdom (5493/72) 07/12/1976 para 49.
[154] As outlined in para. 11 of the Brighton Declaration and in the Draft Explanatory report to Protocol 15 (DH-GDR (2012) R2 Addendum IV, paragraph 9).
[155] Some scholars say that there is no concept at all. See Sébastien van Drooghenbroeck, La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux. Publications Fac St Louis, 2001, p. 485.
[156] Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Intersentia, 2002. P. 128-129.
[157] See McHarg, Aileen, Reconciling human rights and the public interest: conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights. The Modern Law Review 62.5 (1999): 671-696. Available at: http://www.elibrary.humanrightshouse.org/library/doc1/7_EC_on_HR_and_its_mechanism_of_HR_protection/general_section/articles_and_books/1097381.pdf (accessed 20.03.2015).
[158] H. C. Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence Martinus Nijhoff Publishers, 1996, p. 13

exercise in certain circumstances".[159]

There is a long list of literature on the subject and very little consistency across that literature.[160] Scholars point to the lack of transparency;[161] the unpredictability of the application of this doctrine which questions the legitimacy of the ECtHR; [162] and the fact that it threatens the rule of law.[163] Judges of the ECtHR themselves find this concept to be a "perennial source of discussion and dissent"[164] and even call on abandoning it.[165]

However, the concept has not been abandoned, and with the passage of time, the ECtHR appears to be giving it more attention, underlining the subsidiary nature of the ECtHR. In order to understand how the concept of the margin of appreciation (if such a concept exists) works in labour law cases there is a need to systematise the use of "several legal techniques"[166] in the ECtHR's jurisprudence in general. There might be different approaches to the systematisation. Certain scholars entertain two concepts of the margin of appreciation; the "substantive" concept, which is used to address the relationship between individual freedoms and collective goals; and the "structural" concept, used to address the limits or intensity of the review of the ECtHR in view of its status as an international tribunal.[167] Another commentator presumes the existence of two types of margins of

[159] Steven C. Greer, The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights, Council of Europe, 2000 p. 32.

[160] D. Galetta Il principio di proporzionalità dellwomo, fra principio di necessarietà nella convenzione europea dei diritti e dottrina del margine di apprezzamento statale: riflessioni generali su contenuti e rilevanza effettiva del principio, Riv. Ital. Dir. Pubbl. Comunitario – 1999, p. 743-771, George Letsas, Two Concepts of the Margin of Appreciation, Oxford Journal of Legal Studies, Vol. 26, No. 4 (2006), pp. 705-732, Jeroen Schokkenbroek The Basis, Nature And Application Of The Margin-Of-Appreciation Doctrine In The Case-Law Of The European Court Of Human Rights, HRLJ (1998) [Vol. 19, No. 1, p. 30-36; Yutaka Arai-Takahashi, The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry in Constituting Europe: The European Court of Human Rights in a National, European and Global Context edited by A. Føllesdal, B. Peters, G.Ulfstein. Cambridge University Press, 2013.

[161] Jeroen Schokkenbroek, The Basis, Nature, and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, Human Rights Law Journal (1998) 19, p. 30.

[162] C. Zoethout, Margin of appreciation, violation and (in)compatibility: why the ECtHR might consider using an alternative mode of adjudication, European Public Law, (vol. 20, no. 2, 2014) pp. 309-330.

[163] Brauch, Jeffrey A., The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law (2005). Columbia Journal of European Law, Vol. 11, 2005. P. 117

[164] Words used by the President of the European Court of Human Rights Dean Spielmann in the lecture "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review"? available at: http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf (accessed 20.10.2014).

[165] Partly Dissenting Opinion of the Judge De Meyer in Z v. Finland (22009/93) 25/02/1997, para. 4.

[166] Eva Brems, see supra note 129, p. 361.

[167] Letsas George, Two Concepts of the Margin of Appreciation, Oxford Journal of Legal Studies, Vol. 26, No. 4 (2006), pp. 705-732.

appreciation; one, as a balancing test between the rights of the individual and collective interests; and two, as a result of the restrictive interpretation of rights.[168]

As noted by Merrils, the concept of the margin of appreciation has been developed on a case-by-case basis,[169] with the result that the ECtHR jurisprudence is the primary source from which one may understand the concept. The ECtHR has reiterated that the application of the margin of appreciation depends on the rights concerned; however, the analysis of case-law leads us to the conclusion that it depends even more on the obligations concerned. According to the ECtHR's traditional approach, the State has a negative obligation not to interfere with the rights fixed in the ECHR and an inherent, positive obligation to ensure the effective protection of rights.[170] The classification of the ECtHR's application of the margin of appreciation might be based upon this division.[171]

Where negative obligations are concerned, there is no margin of appreciation unless the article of the ECHR specifies conditions of possible interference with the right.[172] In these cases the margin of appreciation means the freedom of the state to estimate what may be a "pressing social need" or what is "necessary in democratic society" and also gives them a certain freedom in balancing competing rights, a kind of interpretative freedom. A judge once noted that states do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint.[173] This remark, including its reference to administrative self-restraint,

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[168] Giulio Itzcovich, One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case, Human Rights Law Review 13:2. P. 303.

[169] J. G. Merrills, The Development of International Law by the European Court of Human Rights. Manchester University Press, 1988, p. 136.

[170] Mowbray A. R., The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, Hart, 2004, p. 151.

[171] Close classification was proposed in U. Kilkeli, Ye.A. Chefranova, Yevropeyskaya Konventsiya O Zashchite Prav Cheloveka I Osnovnykh Svobod Stat'ya 8. Pravo na uvazheniye chastnoy i semeynoy zhizni, zhilishcha i korrespondentsii. Pretsedenty i kommentarii.( ECHR, Article 8: Precedents and comments). Rossiyskaya Akademiya Pravosudiya, Moscow, 2001. P. 7; P. Mahoney already proposed that the Nature of the Duty Incumbent on the State is one of the factors of determining the scope of the margin of appreciation, see P. Mahouney, Marvellous richness of diversity or invidious cultural relativism? Human Rights Law Journal(1998) Vol. 19, No. 1, p. 5;

[172] This point was acknowledged, for instance in the report, prepared for the Brighton conference, see: Report of the Committee on Legal Affairs and Human Rights for the Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Doc. 13093, Reference 3931 of 21 January 2013Available at: http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19542&Language=en (accessed 20.10.2014).

[173] Dissenting opinion of Judge Martens in ECtHR, Cossey v. the United Kingdom (10843/84) 27/09/1990.

represents the role the margin of appreciation can play in matters relating to negative obligations.

Where positive obligations are at stake the margin of appreciation granted to states represents a discretion to choose an appropriate way of implementing the ECHR, in other words, the freedom to act.[174] This use of the margin of appreciation is generally acknowledged to be a broad one.[175]

Different applications of the margin of appreciation in cases depending on whether positive or negative obligations of the States are concerned can be traced in judgments of the ECtHR on labour law matters. For example, in *Brincat and others v. Malta*[176] or *Vilnes and others v. Norway,*[177] the ECtHR considered the death of workers under article 2 in light of the positive obligation of the State to ensure effective protection of the right to life. It acknowledged that the State should be granted the benefit of a margin of appreciation in its choice of what particular measures it chose to implement in order to provide effective deterrence against threats to the applicants' right to life.[178] In *Danilenkov and others v. Russia*, the ECtHR considered the failure of the State to ensure the protection of trade union members from discrimination. Noting that the State has a certain margin of appreciation in how it would secure this right for the applicants, the ECtHR underlined that the protection of the freedom of association under art. 11 should also involve the protection against discrimination.[179] Thus the positive obligations of the State under article 11 were complemented with the protection from discrimination. This interpretation led to certain restrictions on the State's reliance on the margin of appreciation in the sphere of protection of freedom of association, as it removes the State's discretion to choose whether to adopt antidiscrimination measures.

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[174] The court numerously stated that "where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation", see ECtHR, Kolyadenko and Others v. Russia, ( 17423/05) 28/02/2012, para. 157-161, Fadeeva v. Russia (55723/00) 09/06/2005, para. 96.

[175] See ECtHR, Gaskin v. The United Kingdom (10454/83) 07/07/1989, para. 40.

[176] ECtHR, Brincat and others v. Malta (60908/11, 62110/11, 62129/11, 62312/11, 62338/11) 24/07/2014.

[177] ECtHR, Vilnes and others v. Norway (52806/09 22703/10) 05/12/2013.

[178] ECtHR, Vilnes and other v. Norway, para. 202, Brincat and others v. Malta, para. 101.

[179] ECtHR, Danilenkov and others v. Russia (67336/01) 30/07/2009, para 123.

As far as negative obligations are concerned, the ECtHR's jurisprudence on arts. 8, 9, 10 and11 provides numerous examples of the margin of appreciation as the freedom to interpret possible restrictions of the rights to respect for private life, to freedom of religion, expression and association, which are stipulated in the second parts to these articles. According to the ECHR States cannot not interfere with the concerned rights unless the proposed interference would be in accordance with the law and satisfy the requirement of necessity.

Therefore, the ECtHR refers to the concept of the margin of appreciation only if the State's interference is prescribed by law; it would otherwise consider the interference as being incompatible with the ECHR and an unlawful act. For example, in case *Volkov v. Ukraine*[180] the ECtHR did not accept the State's submissions in relation to the margin of appreciation in considering the lawfulness of the interference with the applicant's right to have respect of private life, as this interference was considered by the ECtHR as being incompatible with the relevant domestic law. In another case which concerned negative obligations of the State under article 11, the ECtHR also did not accept the State's attempt to rely on the margin of appreciation as the banning of strike, which was challenged by the applicants, was not "prescribed by law."[181]

Therefore, the need to delineate the margin of appreciation to be allowed to a state emerges when the interference to a ECHR right is prescribed by the state's domestic law. In those circumstances, the ECtHR has to decide whether the interference can be justified by the exceptions permitted by the second parts of the relevant ECHR articles. According to articles 8, 9, 10, and 11, the interference can be justified if it is necessary in a democratic society and corresponds to the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. These general allowances are also supplemented in ways specific to some of the sections, i.e., to protect "the economic wellbeing of the country" in article 8; "for maintaining the authority and

[180] The case concerning unfair dismissal of the judge of the Supreme Court, ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 9.01.2013, para. 186.
[181] ECtHR, Veniamin Tymoshenko and Others v. Ukraine (48408/12) 02.10.2014, para. 79-85.

impartiality of the judiciary" in article 10; for "prevention of disorder or crime" in article1. The States are granted a certain margin of appreciation in determining these conditions and how the need for interference with a right might be manifested.[182] The ECtHR is empowered to give the final ruling on whether a 'restriction' is reconcilable with the freedoms protected by the ECHR and whether the margin of appreciation was respected.[183]

In the "labour law" jurisprudence the ECtHR refers to two possible scopes of the margin of appreciation– the wide margin and the limited one. The wide margin is traditionally applied in relation to matters concerning general social and economic policy.[184] The organisation of the labour market and the adoption of domestic labour laws flow from the economic and social policies of states; therefore, the margin of appreciation should be wider where matters of labour rights are concerned.[185] In certain cases on the protection of trade union rights, the ECtHR has emphasised the wide margin of appreciation in determining how "the freedom of trade unions to protect the occupational interests of their members may be secured".[186] Along with stating a wide margin of appreciation in the cases concerning labour rights the ECtHR also acknowledges certain exceptions from this rule, allowing a more limited[187] or narrow margin of appreciation in several cases.

**Factors influencing the scope of the margin of appreciation**

Scholars propose numerous factors which might reduce the margin of

[182] See for instance, ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009, para. 82, Urcan v. Turkey (23018/04) 17/07/2008, Karacay v. Turkey (6615/03)27/03/2007, Tüm Haber Sen and Çinar v. Turkey (28602/) 21/02/2006, Kaya et Seyhan v. Turkey (30946/04)15/09/2009, Eğitim Ve Bilim Emekçileri Sendikasi v. Turkey (20641/05) 25/09/2012, para. 62, Barraco c. France (31684/05) 05/03/2009, para. 42, ASLEF v. The United Kingdom (11002/05) 27/02/2007, para. 46, 52.

[183] ECtHR, Ceylan v. Turkey (23556/94) 08/07/1999, para.32, Eğitim Ve Bilim Emekçileri Sendikasi v. Turkey (20641/05) 25/09/2012, para. 68, Rekvényi v. Hungary [GC] (25390/94) 20/05/1999, para. 42.

[184] See ECtHR, R.Sz. v. Hungary (41838/11)| 02/07/2013, para. 38, Koufaki et Adedy c. Grèce (57665/12 57657/12) 07/05/2013, para. 31; Stec and Others v. UK (Nos. 65731/01 and 65900/01), 12 April 2006, para. 52

[185] Judge Lorenzen noted that the Court has consistently held that the Contracting States enjoy a wide margin of appreciation in the field of labour market relations, see ECtHR, Sorensen and Rasmussen v. Denmark, (52562/99 52620/99) 1/01/2006, Dissenting opinion of judge Lorenzen, Para. 4

[186] ECtHR, Sorensen and Rasmussen v. Denmark, (52562/99 52620/99) 1/01/2006, para 58; Vörður Ólafsson v. Iceland (20161/06) 27/04/2010, para. 75; Schettini and Others v. Italy (29529/95) admissibility decision 09/11/2000.

[187] This title is especially questionable as the Court repeats from case to case that the margin of appreciation is never unlimited, see, for instance, Handyside v. The United Kingdom (5493/72) 07/12/1976, para 49, Galstyan v. Armenia (26986/03)15/11/2007, para. 114, Nosov and others v. Russia (9117/04 10441/04) 20/02/2014, para. 56.

appreciation;[188] including: the state of European consensus over the right concerned; the importance of the right at stake; the text of the ECHR; surrounding circumstances; the reference to other conventions, the existence of a particular local situation, etc. The ECtHR itself has stated that the scope of the margin of appreciation varies according to various factors, including the relevant circumstances, the subject matter and the background of the case.[189] These criteria might be used for further classification of the factors which determine the scope of the margin of appreciation allowed to the states. Research on the application of the margin of appreciation in labour law cases shows that under each of these criteria several factors may be found.

Within the criterion which the ECtHR refers to as **"circumstances of the case"**, the *applicant's vulnerability* plays a role in setting the scope of the margin of appreciation of the state.[190]

This concept of vulnerability appears in the ECtHR's case law on discrimination. Assessing whether the difference of treatment was justified, the ECtHR identified a number of particularly vulnerable groups – for instance, the Roma, homosexuals, persons with mental disabilities – which had suffered a history of prejudice and social exclusion, in respect of which the State had a narrower margin of appreciation.[191]

In the labour law cases heard by the ECtHR, at least one example highlighting consideration of the applicant's vulnerability can be found: the *I.B. v. Greece*[192]. The applicant argued before the ECtHR that his dismissal on the grounds of being HIV-positive was in breach of the European ECHR. The ECtHR stated that the State's margin of appreciation was substantially narrower in relation to this

[188] Karen Reid, A Practitioner's Guide to the European Convention on Human Rights, Sweet & Maxwell, 2011, p. 60; Brems Eva, The margin of appreciation doctrine in the case-law of the European Court of Human Rights. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 56 (1996), p. 256; P. Mahouney, see supra note 23; Jeroen Schokkenbroek, The Basis, Nature And Application Of The Margin-Of-Appreciation Doctrine In The Case-Law Of The European Court Of Human Rights, Human Rights Law Journal (1998) Vol. 19, No. 1 p. 31-32.

[189] This approach emerged in cases on discrimination, however, it might be used for any other labour law cases. See Konstantin Markin v. Russia, para. 100.

[190] About the concept of vulnerability in the ECtHR's case-law see Lourdes Peroni, Alexandra Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law//Int J Constitutional Law (2013) 11 (4): 1056-1085.

[191] ECtHR, Kiyutin v. Russia (2700/10) 10/03/2011, para 48.

[192] ECtHR, I.B. v. Greece (552/10) 03/10/2013, para. 78.

particularly vulnerable group of society which had suffered considerable discrimination in the past. It consequently found the State in violation of the ECHR.

Turning to the **"subject matter"** criterion, several factors that influence the margin of appreciation of the State may be found in the ECtHR's case law. First, *the nature of the right* is one of the most important factors. For example, in cases concerning the military service of applicants the ECtHR held that the States had a narrower margin of appreciation as far as the respect for private and family life was concerned. It found restrictions (dismissal of service men in the cases of *Lustig-Prean and Beckett v. The UK,*[193] and refusal to grant parental leave in *K. Markin v Russia*[194]) unjustified.

Another factor is *whether the interference strikes at the core rights.* This point is especially important in relation to the protection of collective labour rights, as the ECHR directly expresses the right to join trade union but does not establish any particular rights of such unions. Therefore, the ECtHR, through interpreting the ECHR in light of the relevant international law (*Demir and Baikara* being the most helpful illustration of this approach), deduces certain rights from the right for the freedom of association, determines the importance of the acknowledged right, which is not provided in the text of the Convention and delineates the margin of the appreciation of the states accordingly to the importance of this right.

In *R.M.T. v. UK* the ECtHR stated:

> *"If a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade union freedom are concerned".*[195]

[193] ECtHR, Lustig-Prean and Beckett v. UK (31417/96 32377/96) 27/09/1999, para. 87.
[194] ECtHR, Konstantin Markin v. Russia (30078/06) 22/03/2012.
[195] ECtHR, R.M.T. v UK, para 87.

This approach was applied by the ECtHR in *Sorrensen and Rassmussen v. Denmark*, when the core character of the negative right to join a trade union was established, reducing the margin of appreciation of the states in this field. [196] In *R.M.T. v. The UK*[197] the recognition of the secondary character of the right to secondary strike solidarity lead to the acknowledgement of a wide margin of appreciate for the states in regulating this right.

*The necessity to balance different rights* protected by the ECHR is another factor influencing the margin of appreciation of the states. The complex problem of balancing rights is inherent in the majority of labour law cases. In such cases, taking into account subsidiary role of the ECtHR, the State has to choose adequate means to make this interference proportionate to the aim pursued and is granted a wide margin of appreciation for that.

This approach, for instance, lead the ECtHR to conclude that the non-renewal of a contract with the teacher of a Catholic school, because he publicly supported the movement for optional celibacy of Catholic priests, was not in breach of ECHR as the State did not overstep its wide margin of appreciation in balancing church autonomy with the right to the freedom of expression.[198]

The **"background criterion"** is represented by such factors as the European consensus on the regulation of a certain right or the existence of a special regime of regulation of rights.

*The European consensus* as a factor influencing the scope of the margin of appreciation of the state is raised in many labour law cases.[199] The ECtHR emphasised that the margin of appreciation should be reduced[200] if consensus has been established. In cases where the comparative research reveals a lack of

[196] ECtHR, Sorrensen and Rassmussen v. Denmark [GC] (52562/99 52620/99) 11/01/2006, para 58.
[197] ECtHR, R.M.T. v the UK, para 88.
[198] ECtHR, Fernández Martínez v. Spain[GC] (56030/07) 12/06/2014, see also SINDICATUL "Păstorul Cel Bun" v. Romania (2330/09) 09/07/2013, concerning the right of church employees to form a trade union.
[199] See more in Cavanaugh, K, Policing the Margins: Rights Protection and the European Court of Human Rights, EHRLR (2006), p. 422,423.
[200] See ECtHR, K. Markin v. Russia [GC] (30078/06) 22/03/2012.

consensus the margin of appreciation remains wide.[201] The cases *R.M.T v UK*[202] and *Sindicatul "Păstorul Cel Bun" v. Romania*,[203] referred to in the previous paragraph, are the most illustrative examples of the influence of European consensus on the scope of the margin of appreciation.

A *special regime of the regulation of rights* in relation to certain employees is another background factor determining the scope of the margin of appreciation. The possible exeptions to the protection of the rights to respect for private life, to freedom of expression, religion and association, provided in the second parts of the articles 8, 9, 10 and 11, can be interpreted as acknowledging the special regime of protection of rights at work in respect of the members of the armed forces, of the police or of the administration of the State. Relevant provisions expressly permit the possibility of restrictions of their rights to the freedom of association, and, indirectly, of the rights guaranteed by articles 8, 9 and 10 of the ECHR.

In certain labour law cases the ECtHR, in estimating the margin of appreciation of the States, uses the words "special context" in relation to those cases. For example, in cases on military service, it was held that the special context of military service leaves a wide margin of appreciation to the states in determining its conditions. In cases on the dismissal of judges, the use of the term "special context" allowed the ECtHR to conclude that a wide scope of the margin of appreciation should be applied as far as the right for judges to express their religious beliefs was concerned.[204]

However, a narrower margin of appreciation in relation to judges' rights to freedom of expression was found in cases which raise important matters of public interest, "which should be open to free debate in a democratic society".[205] Therefore, the margin of appreciation – even in cases concerning applicants with a "special regime of rights" – might be narrowed if the concerned

[201] ECtHR, Schüth v. Germany (1620/03) 23/09/2010, para. 56, Gustafsson v. Sweden [GC] (15573/89) 25/04/1996, para 45, see also non-labour law case, however, very illustrative - Lautsi and others v. Italy [GC] (30814/06) 18/03/2011, para. 70.
[202] ECtHR, National union of rail, maritime and transport workers v. The United Kingdom (31045/10) 08/04/2014, para. 86
[203] ECtHR, Sindicatul "Păstorul cel bun" v. Romania (2330/09)9/07/2013
[204] ECtHR, Pitkevich v. Russia (47936/99) inadmissible 08/02/2001.
[205] ECtHR,Kudeshkina v. Russia (29492/05) 26/02/2009, para. 94.

right has what the Court considers to be crucial importance for democratic society.

The factors reducing the margin of appreciation allowed to states lead to the necessity of states to provide "very weighty reasons for imposing the restrictions in question."[206] The "weight" of the reasons for interference is thoroughly balanced by the ECtHR with the requirements of the protection of the individual's fundamental rights.[207]

Flexibility of the the margin of appreciation is an important aspect of this tool. French scholars note: "It is almost unrealistic to assume that it is absolutely necessary to outline a priori the contours of the margin of appreciation afforded to States".[208] By applying the concept with flexibility, the ECtHR is able to reconcile conflicting supranational and national interests to achieve greater acceptance of its decisions.[209]

The classification of the use of the margin of appreciation in labour law cases represented in this paragraph, was based on the main idea of fundamental diversity of cases concerning violations of positive obligations of the state and the negative ones. However there are cases where the nature of obligation cannot be well defined. The ECtHR held that where the boundaries between the State's positive and negative obligations do not lend themselves to precise definition, the applicable principles are nonetheless similar - regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.[210] Therefore, the balancing and proportionality tests are frequently-used tools for determining the margin of appreciation of the State in cases where the nature of the obligation at stake cannot be revealed.[211]

### 2.3.2. The Proportionality test

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[206] ECtHR, I.B. v. Greece, see supta note 179, para 79.

[207] ECtHR, Evaldsson And Others v. Sweden (75252/01)13/02/2007Para. 55

[208] A.D. Olinga et C. Picheral, La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour Européenne des droits de l'Homme ». R.T.D.H. 1995, p. 567. Available at: http://www.rtdh.eu/pdf/1995567.pdf (accessed 20.11.2014).

[209] Giulio Itzcovich, One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case Human Rights Law Review 2013:2, p. 295.

[210] See ECtHR, Sorensen and Rasmussen v. Denmark [GC] (52562/99 52620/99) 11/01/2006.

[211] On the critics of this approach see Matthias Klatt, Moritz Meister, The Constitutional Structure of Proportionality, Oxford University Press, 2012, p.p. 87- 108. The authors argue that positive obligations have a disjunctive structure that differs from the alternative structure of negative obligations, and this difference must lead to the application of different proportionality tests.

Proportionality[212] is often referred to as the "general principle in the Convention system".[213] The principle of proportionality has been named by scholars as the "other side"[214] or "contrepoids"[215] of the margin of appreciation, and similar criticisms that the principle "lack[s] conceptual clarity" has been expressed.[216]

Proportionality is implicitly mentioned in the references to "necessity in democratic society" in articles 8-11of the ECHR. According to the Strasbourg case law, interference can only be justified if it is proportionate to the legitimate aim being pursued. Proportionality in its turn might be found if the rights at stake (or private rights and interests of the state) were fairly balanced.[217]

Before turning to balancing rights there is a need to understand the ECtHR's approach to interpreting the term "necessity in democratic society".

**▪Necessary in democratic society**

It was already mentioned that articles 8,9,10 and 11 of the ECHR are the main articlesserving as the basis of claiming the protection of certain labour rights. All of these articles have a common structure, where the second parts contain possible derogation clauses. Therefore, the right for the respect of private life, freedom of thought, conscience and religion, freedom of expression and association might be subject to limitations which are necessary in a democratic society in the interests of the state (society), as varies from article to article.

The analysis of labour law cases heard by the ECtHR under these articles of the ECHR lead us to presume the existence two types of necessity test: one is "complete" and consists of several steps; another is "simplified" . In relation to the "complete" test, the Court addresses the following issues:

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[212] On the history of this principle see Martin Luteran, Towards Proportionality as a Proportion Between Means and Ends in Law and Outsiders: Norms, Processes and 'Othering' in the 21st Century, edited by Cian C Murphy, Penny Green. Bloomsbury Publishing, 2011. P. 8-10.

[213] Pieter van Dijk, Godefridus J. H. Hoof, G. J. H. Van Hoof, Theory and Practice of the European Convention on Human Rights, Martinus Nijhoff Publishers, 1998. P. 81-82.

[214] Mowbray, Alastair, A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights (June 2010). Human Rights Law Review, Vol. 10, Issue 2, pp. 289-317, 2010. Available at SSRN:http://ssrn.com/abstract=1617540 (accessed 20.11.2014)

[215] Sébastien van Drooghenbroeck, La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux. Publications Fac St Louis, 2001. P. 485

[216] For example, Jonas Christoffersen, Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, BRILL, 2009. P. 1.

[217] ECtHR, Marchenko v. Ukraine (4063/04) 19/02/2009, para. 44.

1) Is there a pressing social need for some restriction of the ECHR?
2) If so, does the particular restriction correspond to this need?
3) If so, is it a proportionate response to that need?
4) In any case, are the reasons presented by the authorities, relevant and sufficient?[218]

The simplified necessity test to determining whether the interferencewas necessary in democratic society is often used when conflict between private interests is at stake. In such cases the ECtHR focuses on balancing the different rights, without answering other questions.[219] When State interests are concerned the ECtHR uses a more complete test, answering whether there was a pressing social need;[220] if interference was proportionate to the legitimate aim pursued;[221] and looks for relevant and sufficient reasons to justify the interference.[222]

To prove a pressing social need it must be demonstrated to the ECtHR's satisfaction that the realisation of rights under the ECHR represents a sufficiently imminent threat to the State or to a democratic society.[223] This point is especially important for the protection of labour rights of civil servants (collective labour rights in particular), as respondent states justify the interference by reference to there being a pressing social need. The ECtHR has in numerous cases acknowledged that the civil service of the applicant does not automatically justify the restrictions of ECHR rights; the State must still prove the existence of the need

[218] C. Murzea, The European court of human rights and its theories of interprepreting the European convention on human rights, Bulletin of the Transilvania, Vol. 5 (54) No. 1 – 2012, P. 145, available at: http://webbut.unitbv.ro/BU2012/Series%20VII/BULETIN%20VII%20PDF/18_MURZEA_BUT-1%202012.pdf

[219] See, for example, Obst v. Germany (425/03) 23/09/2010, para. 52, Siebenhaar v. Germany (18136/02) 03/02/2011.

[220] ECtHR, Wille v. Liechtenstein[GC] (28396/95) 28/10/1999, para. 61, Fernández Martínez v. Spain[GC] (56030/07) 12/06/2014, para. 124, Smith and Grady v. The United Kingdom (33985/96, 33986/96) 27/09/1999, para. 87-89.

[221] ECtHR, Lustig-Prean and Beckett v. UK (31417/96 32377/96) 27/09/1999, para. 80, see also Pay v. United Kingdom (32792/05) inadmissible 16/09/2008

[222] See ECtHR, Enerji Yapi-Yol Sen c. Turquie (68959/01) 21/04/2009, para. 32,33, Fuentes Bobo c. Espagne (39293/98) 29/02/2000, para. 44, Palomo Sánchez and others v. Spain [GC] (28955/06 et al) 12/09/2011, para. 63.

[223] ECtHR, Tüm Haber Sen and Çinar v. Turkey (28602/) 21/02/2006, para. 40, Sindicatul "Păstorul Cel Bun" v. Romania, para 69.

for the interference.[224]

According to the case law which has developed on this area, the interference with rights, set out in the ECHR, might be justified under the derogation provisions of the articles 8-10 if it pursued a legitimate aim. Analysis of the labour law jurisprudence demonstrates that the following aims have been previously acknowledged as legitimate in the cases of labour rights violations: defending State democracy;[225] the need to overcome economic hardships;[226] ensuring the loyalty of those charged with safeguarding the public interest;[227] maintaining the independence of the judiciary and the credibility of their decisions;[228] preserving the autonomy of religious communities;[229] protection of health;[230] etc. The list of the aims cannot be formulated exhaustively as evidently the scope of the State activities is very wide.

### 2.3.3. The balancing exercise

The analysis of proportionality of the interference is interconnected with striking a "fair balance" between the interests of the applicant and the community (or the rights of others). The nature of this interconnection can be controversial. The ECtHR often concludes that the requirement of proportionality and of the 'fair balance' have the same meaning.[231] In *James and others v. The UK*,[232] the ECtHR stated that "the requirement of the reasonable relationship of proportionality between the means employed and the aim sought to be realised … was expressed in other terms ... by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the

[224] ECtHR, Sidabras And Dziautas v. Lithuania (55480/00 59330/00)27/07/2004; Engel And Others v. The Netherlands ((Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 8 June 1976, Smith and Grady v UK (33985/96 33986/96 ) 27/09/1999, Volkmer v Germany (39799/98) 22 November 2001
[225] ECtHR, Vogt v. Germany (17851/91) 26.09.1995
[226] ECtHR, Koufaki Et Adedy c. Grèce (57665/12 57657/12) 07/05/2013, para. 38.
[227] ECtHR, Naidin c. Roumanie (38162/07) 21/10/2014, para. 61.
[228] ECtHR, Pitkevich v. Russia, Özpinar v. Turkey (20999/04) 19-10-2010
[229] ECtHR, Siebenhaar v. Germany (18136/02) 03-02-2011, Martínez Fernández v. Spain (56030/07) 12/06/2014, Sindicatul "Păstorul cel bun" v. Romania (2330/09)9/07/2013.
[230] ECtHR, I.B. v. Greece (552/10) 03/10/2013
[231] See, for example, ECtHR, Evaldsson and Others v. Sweden (75252/01) 13/02/2007 para. 55, Koufaki et Adedy c. Grèce (57665/12 57657/12) 07/05/2013, para. 32; see also Martin Luteran, supra note 186, p. 5.
[232] ECtHR, James and Others v. The United Kingdom (8793/79) 21/02/1986.

protection of the individual's fundamental rights".[233] Scholars are divided on the connection between proportionality and balancing; there are scholars who distinguish the concept of proportionality from the balancing concept,[234] and others who tend to talk about them synonomously.[235]

The labour law jurisprudence of the ECtHR demonstrates that the process of balancing is the basis of the proportionality test and is another problematic issue in the jurisprudence of the ECtHR. The ECtHR's approach to balancing rights is developed on a case-by-case basis and the jurisprudence doesn't provide "a coherent set of tests for determining when rights prevail over the public interest or vice versa".[236] In the ECtHR's judgments the concept of balancing is often referred to without being explained. Scholars note that this silence reflects the impossibility of measuring incommensurable values by introducing a mechanistic, quantitative common metric.[237] Still, the principle of legal certainty requires a certain level of predictability in the ECtHR's reasoning and therefore a reliable framework of balancing rights.

The concept of balancing is criticised by leading philosophers of law. Reflecting on the possibility of balancing collective interests versus private ones, Ronald Dworkin argues that balancing state interests and individual rights is a false idea which might be appropriate only in the situation of competing claims of rights.[238] In his view, the precedence of the demands of the majority of the law-abiding community might undermine the whole point of recognising human rights

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[233] Ibid, para. 50.

[234] J. Christoffersen, for example, supposes that positive obligations are subject to balancing under Article 8 § 1, whereas negative obligations are subjected to a proportionality appraisal under Article 8 §, see Jonas Christoffersen, p. 194, see also B.Goold, L. Lazarus and G. Swiney, 'Public Protection, Proportionality, and the Search for Balance' (1007) 10(7) Ministry of Justice Research Series, and Martin Luteran, Towards Proportionality as a Proportion Between Means and Ends in Law and Outsiders: Norms, Processes and 'Othering' in the 21st Century, edited by Cian C Murphy, Penny Green. Bloomsbury Publishing, 2011. P. 4-23.

[235] See, for example, Harris O'Boyle and Warbrick. Law of the European Convention on Human Rights. 2nd edn. Oxford: Oxford University Press. 2009, p. 10; Jeremy Mcbride, Proportionality and the European Convention on Human Rights In: The Principle of Proportionality in the Laws of Europe, edited by Evelyn Ellis. Hart Publishing, 1999, p. 24; Stavros Tsakyrakis, Proportionality: An Assault On Human Rights? Jean Monnet Working Paper 09/08, available at: http://www.jeanmonnetprogram.org/papers/08/080901.pdf (accessed 03.12.2014).

[236] Aileen McHarg, Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, The Modem Law Review (1999) vol. 62, p. 695.

[237] Stavros Tsakyrakis, Proportionality: An Assault On Human Rights? Jean Monnet Working Paper 09/08, available at: http://www.jeanmonnetprogram.org/papers/08/080901.pdf (accessed 03.12.2014)

[238] Ronald Dworkin, Taking Rights Seriously, Harvard University Press, 1978. P. 198, 199.

and it is tantamount to declaring that there are no such things.[239] In relation to collective interests, Dworkin emphasises two fundamental ideas of human rights protection – the "vague but powerful" idea of human dignity; and political equity which must be a kind of limitation for the possible interference with private rights for the sake of collective interests.

Habermas criticised the concept of balancing from another point of view. In his view, the concept of balancing deprives rights of "strict priority" and the "the danger of irrational rulings" might emerge as there are no rational standards for balancing.[240]

Olivier De Shuttler and Eva Brems also see dangers in the balancing metaphor. One danger is in the way violations are presented before the ECtHR, as in the case of competing rights "they do not come before the judge in an equal manner". [241] Brems goes on to observe that the right that is invoked by the applicant receives the most attention, because the question to be answered by the judge is whether or not this right was violated.[242] Where the private rights are in conflict with state interests – another problem might arise as the "weight" of the State interest, compared with that of the individual right-holder, will necessarily appear considerable.[243]

In spite of Dworkin's and Habermas's precautions about the danger of balancing, this concept is applied in the adjudication of cases under articles 8, 9, 10, 11 and article 1 of Protocol 1 to the ECHR. These norms of the ECHR are structured in a way that makes this process indispensible. In the majority of cases the ECtHR seems to evade the dangers of "subjectivity" in the perception of rights. Its balancing of the state and private interests is guided by a broad reading of rights and a restrictive reading of derogations. However, in certain cases the ECtHR gave

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[239] Ibid.

[240] Habermas, Jürgen. Between Facts and Norms. Cambridge: Polity. 1996. P. 256, 259.

[241] See E Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 Human Rights Quarterly 305.

[242] Ibid..

[243] Olivier De Schutter, Human Rights in Employment Relationships: Contracts as Power in The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 131.

greater weight to the importance of the state interest at stake and the role of the balancing excesise was diminished. Cases on austerity measures are especially illustrative in this context.

These cases were considered under article 1 to Protocol 1 of the ECHR. The ECtHR had to consider whether the reduction of pensions and wages was proportionate to the aim of overcoming economic hardships. It used the notion of "excessive burden" as a test of proportionality. Proportionality, as the ECtHR stated, could not be found "if the person had to undergo individual and excessive burden."[244]

This approach seems to be clear and comprehensible, as it underlines the importance of taking into account the personal circumstances of the applicant in striking a fair balance. However, the notion of excessive burden was used by the ECtHR in a superficial way without any analysis of the consequences of the interference for particular applicant, without estimating his needs and expenses.

The ECtHR used in cases such as these a kind of simplified "quantitative" test of proportionality for revealing whether the interests of the state and the right of applicants were fairly balanced. In cases where reductions were above the level of 50% - it was considered as an excessive burden and the interference was found disproportionate to the aim pursued.[245] In the majority of cases the level of reduction was lower than 50% and the interference was held to be proportionate.[246] This approach to balancing demonstrates the evident emphasis on the importance of the state interests and undermines the significance of the balancing metaphor.

My research of the labour law cases heard under articles 8, 9, 10 and 11 and in which the ECtHR applied a balancing process, revealed that the following matters might be balanced by the ECtHR: interests of the state against private interests;[247]

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[244] ECtHR, Koufaki Et Adedy c. Grèce (57665/12 57657/12)07/05/2013, para. 32.

[245] ECtHR, R.Sz. v. Hungary (41838/11) 02/07/2013, Á.A. v. Hungary (no. 22193/11), P.G. v. Hungary (no. 18229/11) 23.09.2014, Stefanetti and Others v. Italy (21838/10 et al) 15.4.2014

[246] ECtHR, Da Silva Carvalho Rico v. Portugal (13341/14) 24.09.2015; Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02.03.2012, Da Conceição Mateus v. Portugal and Santos Januário v. Portugal (62235/12, 57725/12) 08/10/2013, Panfile v. Romania (13902/11) 20/03/2012, Khoniakina v. Georgia (17767/08) 19/06/2012, Maggio and others v. Italy (46286/09 et al) 31/05/2011.

[247] ECtHR, Koufaki and Adedy v. Greece (57665/12 57657/12) 07/05/2013, ECtHR, Vogt v. Germany (17851/91) 26.09.1995

one Convention right against another in the private law discourse;[248] and the gravity of the imposed disciplinary sanction considering the offence committed by the applicant.[249]

The process of balancing is influenced by the factors that determine the scope of the margin of appreciation (as the nature of the right, circumstances of the case, international consensus etc.).[250] However, it is impossible to create a coherent legal theory on the balancing of rights, and make an exhaustive systematisation of factors, simply by considering the decisions of the ECtHR.

In the context of labour law cases the application of the proportionality test and the balancing concept have their own peculiarities as these cases sometimes concern both the vertical and horizontal applications of the ECHR. As far as horizontal application is concerned, the ECtHR has to verify if the national courts have stuck a fair balance between competing rights.[251] In cases of the vertical application of the ECHR (for example, where the state acts as an employer) the proportionality test becomes more complex. The interference itself and the lack of due protection of the allegedly-violated right by the national court becomes subject to the ECtHR's scrutiny.[252]

Concluding this analysis on theoretical concepts used by the ECtHR in adjudicating labour law cases, it is worth noting that in spite of the ECtHR's sometimes conflicting and ambiguous application of the margin of appreciation, the principle of proportionality or balancing of rights, these concepts still contribute significantly to the protection of individual and collective labour rights and deserved their designation as "the invisible articles"[253] of the ECHR. The ECtHR develops protection of the rights at work nterpreting the value of labour

[248] ECtHR, Eweida and Others v. the United Kingdom (48420/10)15.1.2013; Obst v. Germany (425/03), 23 September 2010; Palomo Sánchez And Others v. Spain (28955/06)12/09/2011.
[249] ECtHR, Kudeshkina v. Russia (29492/05) 26-02-2009; Pay v. The United Kingdom (32792/05) 16/09/2008.
[250] See on factors that determine the balance in Jeremy Mcbride, Proportionality and the European Convention on Human Rights In: The Principle of Proportionality in the Laws of Europe, edited by Evelyn Ellis. Hart Publishing, 1999, p. 24-25.
[251] ECtHR, I.B. v. Greece (552/10) 03/10/2013.
[252] See, for example, cases on the dismissal of judges Baka v. Hungary (application no. 20261/12) 27.05.2014, Kudeshkina v. Russia (29492/05) 26/02/2009.
[253] A W B Simpson. The ECHR: the First half Century'. 2004. University of Chicago Fulton Lecture Series. P. 10 Available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1017&context=fulton_lectures (accessed 30.10.2014).

rights as relative values, which, as noted prof. Caruso, through the principle of proportionality (but also of equality and legal certainty) are susceptible to being balanced with other goals.[254]

This approach is intended to achieve a better functioning of the system of protecting social-economic rights where the development of labour rights is interconnected with economic growth and the rise of private sector business.

**Conclusions**

The broadening of the scope of the ECHR through the integration of certain social rights has been criticised by member states and led to "vitriolic" fury directed against the judges of the ECtHR".[255] Prominent scholars pointed that the ECtHR was considering itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.[256]

The criticism is understandable; the ECtHR was usually reluctant to interfere with social matters ; preferring togrant the states a wide margin of appreciation in the sphere of general social and economic policy. It often abstained from judging in favour of the applicants in case of pension or wage cuts due to austerity measures;[257] of the rights to housing;[258] the rights of disabled persons;[259] or of the right to work.[260] However, the most important issues of economic and social policies (such as discrimination, occupational safety, unfair dismissals, right for

[254] B. Caruso, New Trajectories of Labour Law In the European Crisis. The Italian Case. Working paper, Forthcoming in the Comparative Labour Law & Policy Journal, available at: http://www.labourlawresearch.net/sites/default/files/papers/New%20trajectories%20of%20labour%20law%20in%20the%20European%20crisis%20rev.pdf

[255] Sir Nicolas Bratza, 'The Relationship between the UK Courts and Strasbourg' (2011) EHRLR 505.

[256] Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009, available at: http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2013/hoffmann.pdf (accessed 20.01.2015).

[257] ECtHR, Da Silva Carvalho Rico v. Portugal (13341/14) 24.09.2015; Koufaki Et Adedy c. Grèce (57665/12 57657/12) 07/05/2013, Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02.03.2012, Da ConceiçãoMateus v. Portugal and Santos Januário v. Portugal (62235/12, 57725/12) 08/10/2013, Panfile v. Romania (13902/11) 20/03/2012, Khoniakina v. Georgia (17767/08) 19/06/2012, Maggio and others v. Italy (46286/09 et al) 31/05/2011.

[258] ECtHR, Chapman v. The United Kingdom (27238/95)18/01/2001, James And Others v. The United Kingdom (8793/79) 21/02/1986, Marzari v. Italy (36448/97) 04/05/1999

[259] ECtHR, Zehnalova and Zehnal v. The Czech Republic (38621/97) 14/05/2002, Botta v. Italy (21439/93) 24/02/1998, Farcaş v. Romania (application no. 32596/04)30.09.2010.

[260] ECtHR, Panfile v. Romania (13902/11) 20/03/2012, para. 18, Sobczyk v. Poland ( 25693/94and 27387/9510 February 2000; Dragan Cakalic v Croatia (17400/02)15 September 2003; Torri and Others v. Italy and Bucciarelli v. Italy (11838/07 and 12302/07) 24 January 2012.

wage) together with the issues concerning civil liberties at the workplace have become widely covered by the provisions of the ECHR.

The enlarging of the scope of the ECHR seems to adress the lack of authority of international bodies created to protect social and economic rights. By interpreting the ECHR in an evolving way, and by referring to other international documents as well as European consensus, the ECtHR has provided certain rights at work with due protection, considering employment cases in the light of fundamental human rights.

ECtHR jurisprudence on the protection of the rights at work shows that the scope of the margin of appreciation granted to states is limited and varies according to the circumstances, the subject matter and the background of the case. In addition, there are additional factors relevant to its use of the margin of appreciation including the applicant's vulnerability, the nature of the right, the European consensus on the matter, and the necessity to balance different rights.

The most important contribution of the ECtHR in this area is the introduction of the proportionality principle, which should be applied by national courts in consideration of employment cases in order to ensure due protection of human rights.

# Part II. The Prohibition of Forced or Compulsory Labour and Discrimination in Employment

The prohibition of forced and compulsory labour and of discrimination are united under this part as there are the provisions which have direct relevance to the employment law and stipulate the most important, core rules of the labour market.

## Chapter 1. The Prohibition of Slavery, Servitude, Forced or Compulsory Labour



The prohibition of forced labour is both a classical civil right and the fundamental labour right, as acknowledged by the ILO Declaration on Fundamental Principles and Rights at Work. Article 4 of the ECHR contains a non-derogable prohibition of slavery, servitude and forced or compulsory labour. It was dictated by the need to protect European society from the reiteration of the terrible experience of concentration camps and forced labour in war times and to ensure the protection of human dignity. The Italian representative in the Consultative assembly of the CoE explained the necessity of this prohibition by referring to "unbelievable encroachments on our rights: the loss of security of person; arbitrary arrest; forced labour; paralysis of the intelligence and the slow killing of culture". [1]

[1] See Preparatory work on article 4 of the Convention. Council of Europe. 1962. P. 3, Available at: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART4-DH(62)10-BIL1712017.PDF (accessed 01.02.2015).

According to the preparatory materials to the ECHR, the initial emphasis was placed on the prohibition of slavery and servitude. The first draft of the ECHR, presented by Teitgen in August 1949, did not mentioned forced or compulsory labour. The prohibition of these types of labour was proposed by the representative of the United Kingdom in February 1950, and was adopted under the influence of the Preliminary Draft of the International Covenant on Human Rights, adopted by the UN Commission on human rights in its fifth session (1949).[2]

Surprisingly, the ILO Convention on Forced Labour, adopted in 1930, was not mentioned by the representatives of the States while drafting article 4. However, the reference to this convention may be found in the annex to the Preparatory work on article 4 as the Secretariat of the Commission decided to append to this document the abstracts from the Commentary on the Drafts of the Covenant, prepared by the United Nations.[3]

The final text of article 4 of the ECHR prohibits slavery, servitude, forced and compulsory labour without defining these offences. Its provisions create both positive and negative obligations that states must comply with. Public powers not only have a negative obligation not to enslave; they also have a positive obligation to anticipate these behaviours; to try to eradicate them; and to sanction them whenever they occur.[4] In modern society, the positive obligation of the State to ensure the compliance of private individuals with these norms and to grant effective protection against coercion has gained particular importance. The assumption that slavery-like practices have been eliminated is far from real in the 21st century.[5] The concepts of slavery and servitude and the context of forced and compulsory labour have evolved over time[6] and have to now cover matters such as human trafficking and unpaid domestic work which occurs in the relations between

[2]Preparatory work on article 4 of the Convention. Council of Europe. 1962. Available at: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART4-DH(62)10-BIL1712017.PDF (accessed 01.02.2015).

[3] Appendix to the Preparatory work on article 4 of the Convention. Council of Europe. 1962, p. 17.

[4] Raul Canosa Usera, Prohibition of Slavery and Forced Labour: An Example of Integration of International Treaties (Commentary on Article 4). In: Javier García Roca, Pablo Santolaya, editors. Europe of Rights: A Compendium on the European Convention on Human Rights. Martinus Nijhoff Publishers, 2012. P. 95.

[5] Virginia Mantouvalou, Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers, Industrial Law Journal, Vol. 35, No.4, December 2006. P. 414.

[6] International Labour Conference, 89th Session. Stopping forced labour. 2001, para. 21

private persons.

According to an ILO report, the Developed Economies and European Union accounts for 1.5 million (7%) of forced labourers presently working in the world.[7] This has aptly been described as the "dark side of globalisation".[8] In the mid-1990s there was a wave of reported trafficking from West Africa, in particular from Ghana and Nigeria; to Italy, the Netherlands and other European countries. Trafficking of women from the Mahgreb and sub-Saharan African countries has also been reported in France.[9]

Therefore, in the 21st century the provisions of article 4 remain more relevant than ever, as international events undermine human dignity and destructively influence the labour market. Citing the new protocol to ILO Convention N29: "The suppression of forced or compulsory labour contributes to ensuring fair competition among employers as well as protection for workers".[10]

### 1.1. Slavery, servitude and human trafficking

The lack of a definition for slavery in the ECHR itself has been filled by reference to international instruments on human rights protection and the decisions of international bodies. In particular, the ECtHR has referred to the 1926 Slavery Convention which describes slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[11] Strasbourg bodies also refer to the legal positions taken by the International Criminal Tribunal for the Former Yugoslavia which concluded that the traditional concept of "slavery" has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership. Factors relevant to establishing whether an activity comprises a new form of slavery include the control of someone's freedom of movement; control of

[7] ILO Global Estimate of Forced Labour. ILO. 2012, p. 16.
[8] Daniel Roger Maul, The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present, Labor History Vol. 48, No. 4, November 2007, 477–500, p. 494.
[9] International Labour Conference, 89th Session. Stopping forced labour. 2001, para. 155.
[10] Introduction to the Protocol of 2014 to the Forced Labour Convention, 1930 adopted on the 103rd ILC session (11 Jun 2014).
[11] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010, para. 138.

their physical environment; psychological control; measures taken to prevent or deter escape; force; threat of force or coercion; duration; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality and forced labour.[12]

The ECtHR has never found a State to be in violation of the prohibition of slavery in article 4. However, in several cases heard under article 4 it has contributed to the legal understanding of this concept. In *Siladin v. France*, a case concerning the unpaid domestic work of an immigrant, the ECtHR noted that the "genuine right of legal ownership" and the "reducing of the applicant's status to an "object" are the main factors of the slavery under the meaning of both European Convention and the Slavery Convention 1926.[13] In *Bulynko v. Ukraine* the ECtHR referred to the voluntary character of performed work and the entitlement to payment as two factors which establish the absence of slavery.[14] In *Rantsev v. Russia and Cyprus*, considering whether slavery encompasses sex trafficking, it was noted that the trafficking of human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment. These traits of trafficking have much in common with the traits of slavery. However, the ECtHR refrained from concluding that trafficking constitutes "slavery". Instead, it concluded that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the ECHR.[15] This approach was criticised for its inherent contradictions, as the ECtHR did not narrow the scope of application to make trafficking synonymous with slavery, but instead expanded the scope of Article 4 beyond its textual boundaries.[16] The ECtHR was criticised for not engaging with the essential elements of what constituted trafficking (its methods, means, or the various lesser servitudes than slavery, including debt bondage and forced labour), thus

[12] Ibid, para. 143.
[13] ECtHR, Siliadin v. France (73316/01) 26/07/2005, para. 122.
[14] ECtHR, Bulynko v. Ukraine (74432/01) 21/06/2005, para. 22.
[15] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010
[16] Allain, Jean. "Rantsev v Cyprus and Russia: the European Court of Human Rights and trafficking as slavery." Human Rights Law Review (2010) 3, p. 555.

establishing a very narrow understanding of trafficking.[17]

However there are opposite opinions, which argue that bringing trafficking within the ambit of ECHR Article 4 will provide victims with its absolute protection, including being protected against deportation to a country where they may be at risk of suffering reprisals from their traffickers or being retrafficked.[18] Commentators also highly valued the contribution of the ECtHR to the development of "the human rights approach to trafficking" which they say "offered a ray of light at the end of the tunnel".[19] In fact, the ECtHR provided the States with a kind of guidance in order to come out of the tunnel. It emphasised the States' obligation to put in place a legislative and administrative framework to prohibit and punish trafficking.[20] The ECtHR also concluded that the states in cross-border trafficking cases were subject to a duty to cooperate effectively with the relevant authorities of the other states concerned in the investigation of events which occurred outside their territories.[21]

### 1.1.1. Definitions

The Strasbourg case law developed the understanding of the Convention prohibition against involuntary servitude. In the earlier case of *Van Droogenbroeck v. Belgium*, which concerned prison labour, "servitude" was described as a "particularly serious form of denial of freedom."[22] In addition to the obligation to perform certain services for others it includes the obligation for the "serf" to live on another person's property and the impossibility of altering his condition.[23]

In cases concerning the involuntary labour of illegal immigrants two common elements between slavery and being held in servitude can be established: a slave/serf cannot claim wages because the contract is illegal and she cannot report

[17] Ibid, p. 557.
[18] Chaudary, Saadiya. "Trafficking in Europe: An Analysis of the Effectiveness of European Law." Mich. J. Int'l L. 33 (2011), p. 85-86.
[19] Pati, Roza. "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus & Russia." Boston University International Law Journal 29.1 (2011).p. 141.
[20] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010, para. 285.
[21] Ibid, para. 289.
[22] ECtHR, Van Droogenbroeck v. Belgium (7906/77) 24/06/1982, Para. 78-80.
[23] Ibid.

abuse to the authorities for reasons such as for fear of deportation. She is treated like an object, rather than a subject of rights.[24] The main point of difference is the absence of evidence on the exercise of the right of ownership over the serf.

In *Siliadin v. France*, the ECtHR had to determine whether the situation of the applicant, an unpaid domestic worker,fell within the concept of involuntary servitude or slavery. It attached principal attention to the following circumstances:

- the duration of work (almost fifteen hours a day, seven days per week);
- the (in)voluntary nature of the work undertaken (the applicant was a minor, who had been brought to France by relatives and had not chosen to work for her "employers");
- the restriction of basic freedoms (the applicant had no freedom of movement and no free time, she had not been sent to school); and
- the ability to seek relief (as a minor, she had no resources and no means of living elsewhere other than in the home of her "employers", as her papers had been confiscated).

Deliberation on these factors led the ECtHR to conclude that although the applicant was clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, as her status was not reduced to an "object" of rights.[25] It was found that the applicant was held in servitude within the meaning of Article 4 of the ECHR. The reasoning of the ECtHR on this point has been criticised as being too narrow a reading of slavery.[26] The ECtHR was criticised for linking the ECHR prohibition on slavery to traditional chattel slavery and thereby requiring a "genuine right of legal ownership" before the right could be enlivened.[27] However, the difference between these notions is not of crucial importance for the purpose of protecting the victims

[24] Virginia Mantouvalou,The Right to Non-Exploitative Work in The Right to Work: Legal and Philosophical Perspectives, ed. Virginia Mantouvalou. Bloomsbury Publishing, 2015, p. 59.
[25] ECtHR, Siliadin v. France (73316/01) 26/07/2005, para. 122.
[26] Nicholson, Andrea. "Reflections on Siliadin v. France: slavery and legal definition." The International Journal of Human Rights 14.5 (2010), p. 705.
[27] See H. Cullen, Silihadin v. France: Positive Obligations under Article 4 of the European Convention Human Rights," (2006) 6 Human Rights Law Review 585, cited from Anne T. Gallagher, The International Law of Human Trafficking, Cambridge University Press, 2010, p. 187.

of slavery or involuntary servitude. In any case, as will be demonstrated further, the States are obliged to ensure effective protection and prompt investigation of such crimes.

Applications similar to *Siliadin* were considered by the ECtHR in *C.N. and V. v. France*[28] and *C.N. v. The United Kingdom*.[29] In the first case, the ECtHR observed that servitude corresponds with a special type of forced or compulsory labour and called it an "aggravated" forced or compulsory labour. The fundamental distinguishing feature between invluntary servitude and forced or compulsory labour within the meaning of Article 4 was found in the victims' belief that their condition was permanent and that the situation was unlikely to change. The ECtHR found that belief credible, considering the the applicants were illegal immigrants, the threats to denounce them to immigration authorities[30] and the real potential for them to be sent back to their home country where they would be exposed to dangers that could threaten their lives.[31]

### 1.1.2. Positive obligations of the States

In all of these cases on illegal domestic work, the ECtHR found that article 4 had been breached. The States were held liable as they failed to establish an effective system granting protection and remedy to the applicants in the circumstances of domestic servitude. It is interesting to note in this context that the new Protocol to the ILO Convention N 29[32] includes the obligation of states to ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation (article4-1). As of the date of writing this paper, this Protocol has been ratified only by Nigeria.[33] Therefore, the ECHR is the most efficient international instrument given its provisions are binding on all members of the CoE and the ECtHR's case law has established a set of positive

[28] ECtHR, C.N. and V. v. France (67724/09) 11/10/2012, para. 91.
[29] ECtHR, C.N. v. The United Kingdom (4239/08) 13/11/2012.
[30] Ibid, para. 80.
[31] ECtHR, C.N. and V. v. France (67724/09) 11/10/2012, para. 78.
[32] Protocol of 2014 to the Forced Labour Convention, 1930, adopted in Geneva 11 Jun 2014.
[33] See the ratification list on the Official site of ILO: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672 (accessed 27.05.2015)

obligations on member States in relation to the prohibition on slavery and involuntary servitude. The ECtHR has stated that the States must enact domestic law criminalising slavery, involuntary servitude and forced labour and to ensure the effective prosecution of such crimes.[34]

Commentators noticed that Article 4 of the ECHR also sets certain requirements as to the quality of the definitions of these crimes.[35] In *Siliadin* the ECtHR was dissatisfied with the definitions of slavery and servitude in French law as the ECtHR considered they were open to very differing interpretations from one court to another.[36] Above this the ECtHR required a certain quality of investigation of such crimes. Thus in the case of trafficking the ECtHR laid down the following standard which should be spread to slavery and servitude:

> *The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion. For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.*[37]

Thus the ECtHR developed its approach to the State's positive obligations under article 4, focusing on the promptness and efficiency of their implementation. Scholars have praised the ECtHR's contribution to right to be protected against slavery and being held in servitude. It was noted that the ECtHR has set a high

[34] ECtHR, Siliadin v. France (73316/01) 26/07/2005, para. 89, 112.
[35] See Vladislava Stoyanova, Article 4 of the ECHR and the Obligation of Criminalizing Slavery, Servitude, Forced Labour and Human Trafficking. Cambridge Journal of International and Comparative Law 3.2 (2014), p. 430.
[36] ECtHR, Siliadin v. France, para. 147.
[37] ECtHR, Rantsev v. Cyprus and Russia (25965/04) 07/01/2010, para. 288.

standard, reflected in the extent of the positive obligation it imposes on states.[38] The legal positions expressed in this judgment are hoped to become useful weapons in the armoury of lawyers representing victims of trafficking.[39]

## 1.2. Forced or compulsory labour

Article 4 of the ECHR states:

> *1. No one shall be held in slavery or servitude*
> *2. No one shall be required to perform forced or compulsory labour.*
> *3. For the purpose of this Article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the com-munity; (d) any work or service which forms part of normal civic obligations.*

### 1.2.1. Definition

The concepts of forced or compulsory labour are interpreted by the ECtHR based on the "guidelines" set out in the third part of article 4 of the ECHR (referred to below as article 4-3) and on the ILO Conventions. ILO Convention No. 29 on Forced or Compulsory Labour has been cited in all the cases considered to date under article 4-2 of the ECHR. According to this instrument the term forced or compulsory labour means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. ILO Convention No. 29 lists the types of work which are excluded from the term "forced and compulsory labour". This list provided in article 4-3 of the ECHR is largely analogous. However, in contrast with ILO

[38] Nicholson Andrea, Reflections on Siliadin v. France: slavery and legal definition. The International Journal of Human Rights 14.5 (2010), p. 715.
[39] Egan Suzanne, Protecting the victims of trafficking: problems and prospects. European Human Rights Law Review 1 (2008), p. 118.

instrument, the ECHR lacks the precision of the meaning of "emergency" used in this article.

The concepts of forced and compulsory labour are always mentioned together in the ECHR, in the ILO Conventions and are never divided in the jurisprudence of the ECtHR. Interpreting the word "labour" the ECtHR has noted that it included any work or service, both manual and intellectual.[40]

### 1.2.2. Elements of forced or compulsory labour

In the earlier case of *I. v. Norway* (called also *Iversen v. Norway*), the Commission stated that forced labour was comprised of two fundamental elements: first, the work or service is performed by the worker against his will; and, secondly, the work or service performed is unjust, oppressive, or involves avoidable hardship.[41] *Iversen* concerned a law passed in Norway in 1956 which provided that dentists could be required to work for a public dental clinic for a period of up to two years. The applicant, who was appointed to work in the northern area of Norway, claimed that this appointment breached the prohibition against forced or compulsory labour. The Commission declared the complaint manifestly ill-founded. The majority of the Commission held that there was no question of forced or compulsory labour, because the service to be rendered was exacted for a limited time, was properly remunerated and was in keeping with the profession chosen by Iversen, while the law in question had not been applied against him in an arbitrary or discriminatory manner.[42] Therefore the points of due remuneration, the temporary character of such work and its social importance made the Commission conclude that the applicant's work in the appointed area did not amount to compulsory labour.

The ECtHR's jurisprudence under article 4 of the ECHR provides much information on what is not considered as forced and compulsory labour as article was found not to be violated in any of the relevant cases. For instance, in *V.T. v.*

[40] ECtHR, Van der Mussele v. Belgium (8919/80) 23/11/1983, para. 33.
[41] EurCommHR, I. v Norway (1468/62) inadmissible 17/12/1963.
[42] Pieter van Dijk, Godefridus J. H. Hoof, Theory and Practice of the European Convention on Human Rights. Martinus Nijhoff Publishers, 1998. P. 337.

*France*, the ECtHR concluded that the imposition of an obligation to pay family-allowance-contribution on the person who was given aid to stop working as a prostitute, did not necessarily mean that she was forced by the conduct of the collecting agency to continue to work as a prostitute.[43]

### 1.2.3. Analysis of cases considered under article 4-3

- **Clause (a) of article 4-3**

According to clause (a) of article 4-3, any work required to be done in the ordinary course of detention imposed according to the provisions of article 5 of the ECHR (or during conditional release from such detention) would not constitute forced labour.

The reference to article 5 of the ECHR is especially important as this article establishes the rules of lawful detention. The logic of the drafters is evident: the work of a prisoner is not forced only if the imprisonment itself was lawful. In the famous "vagrancy" case[44] the ECtHR noted that not every breach of article 5 will automatically lead to the finding that of applicants' work in detention was "forced" in character. In this case, the Commission of Human Rights found that the work which the applicants were compelled to perform in detention was not justified under article 4as, in its opinion, there had been a breach of article 5-4. The ECtHR agreed with the Commission on the violation of article 5-4; however, it refrained from deducing a violation of article 4). The ECtHR interpreted article 4-3(a) as authorising work ordinarily required of individuals deprived of their liberty under article 5-1(e). As the violation of this provision was not found and the duty to work imposed on the three applicants had, in the ECtHR's view, not exceeded the "ordinary" limits within the meaning of article 4-3(a) of the ECHR, and the work they were required to undertake was aimed at their rehabilitation, the ECtHR concluded that the Belgian authorities did not fail to comply with the requirements

[43] ECtHR, V.T. v. France (37194/02) 11/09/2007.
[44] ECtHR, De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium (2832/66 et al) 18/06/1971

of article 4.[45] This case is a vivid example of the restrictive interpretation of article 4.

There is a curious difference between the formulation of the provision on prisoners' labour in the ECHR and in the ILO Convention No. 129. The text of the ECHR does not restrict the employment of prisoners in the private sector, which is explicitly prohibited by article 2-2(c) of the ILO Convention No. 29.[46] The European Commission on Human rights in its earlier jurisprudence on this provision had to refer to the reason of this striking difference. It could find no mention for this discrepancy in the preparatory works on the ECHR. The Commission was left to assume that the drafters, in omitting this clause, had regard to the huge range of prison labour systems prevailing in the European countries; the widespread use of prison labour in conjunction with private enterprise and to the difficulties of the ILO in its ability to reform prison labour systems; finally they had regard to the concerns which were arising even under the ILO Convention at the time as to whether it was really necessary and desirable to exclude the employment of prisoners in conjunction with private enterprise, particularly as it had appeared that such work offered more possibilities of professional training and readaptation that could justify the use of prisoners' labour.[47]

Based on these arguments, the Strasbourg bodies established jurisprudence confirming that low remuneration or the work of prisoners in the private sphere did not constitute a violation of article 4 of the ECHR.[48] For example, in the case *X. v. The Federal Republic of Germany*, the Commission declared inadmissible the application of the prisoner who claimed that he and other prisoners were forced to work 42 hours a week for private industries but had no right to wages at a time when those private industries paid normal wages to the Bavarian State for the work

[45] ECtHR, De Wilde, Ooms and Versyp ("Vagrancy") v Belgium (2832/66 et al) 18/06/1971, para. 88-90.
[46] The American convention on Human Rights, in contrast, excplicitly prohibits the use of prisoners' labour in private sector (art. 6).
[47] EurCommHR, Twenty-one detained persons v. Germany (3134/67 et al) inadmissible 06/04/1968.
[48] See Twenty-one detained persons v. Germany; EurCommHR, R. against the Federal Republic of Germany (1854/63) inadmissible 28.09.1964; V. against Austria (2066/63) inadmissible 17.12.1965.

done by the prisoners but the latter only received between 0.30 DM and 0.80 DM a day.[49]

In respect of prisoners' work, the Strasbourg bodies were reluctant to conclude that the absence of payment constituted a breach of article 4. In *Twenty-one Detained Persons v. Germany* the Commission observed that article 4 does not contain any provision concerning the remuneration of prisoners for their work. In recent cases the ECtHR tends to agree with the Commission, noting that the fact that work is unpaid did not in itself "prevent work of this kind from being regarded as "work required to be done in the ordinary course of detention" However, in *Zhelyazkov v. Bulgaria,*[50] the ECtHR referred to the "subsequent developments" in this sphere, reflecting, in particular, on the European Prison Rules 2006, which called for the equitable remuneration of the work of prisoners. This stance gave some hope that in cases concerning unpaid prison work which occurred after 2006, the ECtHR might acknowledge the evolving trends in prison work remuneration, and find a positive obligation on the part of states to remunerate appropriately the work of all detainees in all circumstances.

This hope was dispelled by the decision in *Floroiu v. Romania*.[51] The applicant complained that he had not been paid for the work he had done while in prison. Romanian legislation provided that prisoners could either carry out paid work or, in the case of tasks involving the day-to-day running of the prison, prisoners could undertake unpaid work in exchange for a reduction of their sentence. As the applicant decided to opt for the latter and his sentence was accordingly reduced, the ECtHR concluded that the work he had carried out had not been entirely unremunerated and refused to find that there was a violation of article 4. It can therefore be seen that the ECtHR grants a particularly wide margin of appreciation to the states in cases dealing with the remuneration of prisoners. From the point of view of a labour scholar, such an approach to remuneration is hardly justifiable; in any case a minimum wage should be granted. Such an approach would be in line

[49] EurCommHR, X. v. The Federal Republic of Germany (2413/65) inadmissible 16/12/1966.
[50] ECtHR, Zhelyazkov v. Bulgaria (11332/04) 09/10/2012, para. 36.
[51] ECtHR, Floroiu v. Romania (15303/10) 12/03/2013.

with the relevant Recommendation of the Committee of Ministers to member states on the European Prison Rules.[52]

In the recent case of *Stummer v. Austria*[53] the ECtHR examined a new facet of the notion of forced labour. The applicant had worked in prison for 28 years without affiliation to the old-age pension system. He argued that such work, performed without such an affiliation, could no longer be regarded as work required to be done in the ordinary course of detention and thus violated article 4 of the ECHR. The ECtHR did not agree with the applicant's interpretation of Article 4 and concluded that the obligatory work he had performed as a prisoner, without being affiliated to the old-age pension system, had to be regarded as "work required to be done in the ordinary course of detention" within the meaning of article 4-3(a) of the ECHR and did not therefore constitute forced or compulsory labour.

The Stummer judgment has been hailed by commentators as an "unfortunate development in the evolution of the case law under Article 4,"[54] particularly in light of the contrary way in which social policies in Europe are developing. Judge F. Tulkiens in the partly dissenting opinion noted that more than forty years have passed since such applications by prisoners were ruled inadmissible and prison law – which at that time was virtually non-existent – had developed considerably during the intervening period. Tulkiens J emphasised that prisons have gradually been opened up to fundamental rights as the European Prison Rules emphasise the need for equitable remuneration for prisoners and concluded that in the light of current standards in the field of social security, prison work without affiliation to the old-age pension system cannot constitute work which is understood to be "normally required" in detention.[55]

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[52] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted 11.01.2006, para. 26.10. Available at: https://wcd.coe.int/ViewDoc.jsp?id=955747#P6_138 (accessed 20.07.2015).

[53] ECtHR, Stummer v. Austria (37452/02) 07/07/2011.

[54] Virginia Mantouvalou, The Prohibition of Slavery, Servitude and Forced and Compulsory Labour under Article 4 ECHR in "The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 153.

[55] ECtHR, Stumer v. Austria (37452/02) 07/07/2011, Partly Dissenting Opinion Of Judge Tulkens, para. 8

This judgment was referred to in a later similar case – *Floroiu v. Romania*,[56] mentioned earlier above. There, the applicant claimed that in violation of article 4 he had been required to perform tasks which were difficult, unpleasant and badly paid, during a total of twenty-five years in prison without being affiliated to the old-age pension system. The ECtHR did not see any particular grounds for departing from its conclusions expressed in the Stummer case.

By refusing on this further occasion to apply a "living interpretation" to article 4, the ECtHR effectively confirmed its reluctance to interfere with the social policies of the states and according to its traditions[57] acknowledged a wide margin of appreciation as far as general measures of economic or social strategy are concerned.[58]

- **Clause (b) of article 4-3**

Article 4-3(b) states that any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service do not fall under the category of forced labour.

**Interpretation of military service**

In the recent case of *Cheetos v. Greece*[59] the ECtHR noted that this provision is formulated differently from ILO Convention No. 29, which only provides an exception in relation to compulsory military service. The applicant, an army officer, argued that the obligation to pay a fee to the State in order to resign before the end of his period of service constituted forced labour. Therefore, this case was a significant opportunity for the ECtHR to delimit specifically the exceptions covered by article 4-3(b). The ECtHR referred to the European Social Charter, the ILO Convention No. 29 and Recommendation CM/Rec (2010) 4 of the Committee of Ministers to member states on human rights of members of the armed forces. Basied on these international instruments the ECtHR concluded that in accordance

[56] ECtHR, Floroiu v. Romania (15303/10)12/03/2013.
[57] ECtHR, Stec and Others v. UK (65731/01 and 65900/01) 12/04/2006, para. 52
[58] ECtHR, Stummer v. Austria (37452/02) 07/07/2011, para. 88,89.
[59] ECtHR, Chitos v. Greece (51637/12) 04/06/2015.

with the object and purpose of the ECHR, the provision of the article 4-3(b) should be read as covering only compulsory military service.[60]

This finding permited the ECtHR to consider a new facet of forced labour. The ECtHR firstly pointed that the State's desire to secure a return on its investment in the training of army officers justified prohibiting their resignation from the forces for a specified period and to subject them to paying a fee in order to cover the subsistence and training costs.[61] Then it went on to consider the proportionality of the obligation to pay a fee in the sum of 109,527 euros. The ECtHR noted that the applicant was not given the option to pay this sum in instalments, even though he had had an appeal pending before the Court of Audit and noted that significant interest for late payment had been charged. Therefore, the violation of article 4-2(b) was determined by the shortcomings of the State's procedure for buying back the remaining years of service. This judgment is very important as inteprets article 4-2(b) in a narrow way, excluding from it contractual military service, and introduces the principle of proportionality in the relationship between the State and a military officer who wishes to resign before the established term.

**Conscientious objections to military service**

In earlier case law the Commission was of the view that article 4-2(b) left it open to the states as to whether they wished to recognise conscientious objectors and, if they did, to provide some substitute service that conscientious objectors could carry out in place of military service. It followed that even in cases of conscientious objections to military service based on religious beliefs, which is protected under article 9 of the ECHR, article 4 did not prevent a State which had not recognised a right for conscientious objections from punishing those who refused to do military service on the grounds of being a conscientious objector.[62]

[60] ECtHR, Chitos v. Greece (51637/12) 04/06/2015, para. 87.
[61] Ibid, para. 94.
[62] EurCommHR, Grandrath v. Germany ( 2299/64) 12 December 1966; G.Z. v. Autriche ( 5591/72) inadmissible 2 April 1973; Conscientious objectors v. Denmark (7565/76) inadmissible 7 March 1977; A. v. Switzerland the Commission (10640/83) inadmissible, 9 May 1984

The Chamber of the ECtHR relied on this interpretation in the case of *Bayatyan v. Armenia*.[63] The applicant who was convicted for refusing to perform military service claimed the violation of articles 4 and 9. He argued that the absence of an opportunityfor conscientious objectors to to perform alternative service to military service violated the ECHR. The applicant asked the ECtHR to interpret the relevant provisions of article 4 in an innovative way, departing from the previous case law with regard to significant shifts in the recognition of the rights for conscientious objection to military service in Europe. The Chamber was reluctant to integrate the right for conscientious objections into the ECHR. It placed greater emphasis on the fact that the drafters clearly left the choice of recognising conscientious objectors to each Contracting Party. It also noted that at the material time this right was not fixed in Armenian legislation. Based on these findings, the Chamber concluded that the absence of an opportunity to perform alternative civilian service in Armenia did not constitute the violation of articles 4 and 9 of the ECHR. It must be noted that the ECtHR's reasoning was not accepted by conscientious objectors and their supporters.[64]

The Grand Chamber, considering this case on 7 July 2011, shifted from the previous approach of examining conscientious objection cases under article 4 together with article 9. Its view was that such an approach did not reflect the true purpose and meaning of article 4. The reference to the travaux préparatoires made the ECtHR presume that the sole purpose article 4-3(b) was to provide a further elucidation of the notion of "forced or compulsory labour" and therefore in itself it neither recognised nor excluded a right to conscientious objection. On these grounds it considered the case in light of article 9, which protects the right to freedom of religion and conscience, and found the violation of that article instead.

This Grand Chamber judgment is a vivid example of an applicant requesting a living interpretation of the ECHR. It also illustrates the impact of domestic trends in human rights protection and of other international instruments upon the

[63] ECtHR, Bayatyan v. Armenia (23459/03) 27/10/2009

[64] Özgür Heval Çınar, The Right to Conscientious Objection to Military Service and Turkey's Obligations under International Human Rights Law. Palgrave Macmillan, 2014. P. 76.

ECtHR's reasoning. The Grand Chamber noted that at the time of the alleged interference only five member States did not provide for the possibility of claiming conscientious objector status.[65] It emphasised that the respondent State also incorporated such norms after the beginning of the proceedings in the ECtHR.

The ECtHR's reasoning that it was necessary to retrospectively apply the evolved right is curious. It referred to the changes in the perception of similar norms of the International Covenant on Civil and Political Rights by the Human Rights Committee, which considered in 1993 that a right to conscientious objection could be derived from Article 18 of the ICCPR.[66] The approach of the European Union and of the CoE to this problem was also mentioned as an additional argument for recognition of the right for conscientious objection. It was emphasised that the recognition of such a right was a precondition for admission of new member States into the CoE and therefore that Armenia should have been aware of the shift in the interpretation of article 9.[67]

This Grand Chamber judgment, which was called historical by scholars,[68] is remarkable as it brought Strasbourg case law in line with international standards on this point, expanded article 9 rights[69] and at the same time restricted the application of article 4-3(b). Legal positions expressed in this judgment must be be interpreted as integrating the right for conscientious objection and consequently of the positive obligation of the State to provide the opportunity to perform alternative civilian service. In fact, in the later case of *Savda v. Turkey,*[70] the ECtHR explicitly recognised the positive obligation of the State to establish effective and accessible procedures by which the status of conscientious objector could be recognised.[71]

**▪ Clause (c) of article 4-3**

[65] ECtHR, Bayatyan v. Armenia, para. 103.
[66] Ibid, para. 105.
[67] Ibid, para. 50.
[68] Muzny Petr, Bayatyan v Armenia: The Grand Chamber Renders a Grand Judgment. Human Rights Law Review 12.1 (2012), p. 135.
[69] Calo Zachary R., Constructing the Secular: Law and Religion Jurisprudence in Europe and the United States. Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 94 (2014). Available at: http://cadmus.eui.eu/bitstream/handle/1814/32792/RSCAS_2014_94.pdf?sequence=1 (accessed 25.05.2015).
[70] ECtHR, Savda c. Turquie (42730/05) 12/06/2012.
[71] ECtHR, Savda c. Turquie (42730/05) 12/06/2012, para. 99.

Article 4-3(c) states that any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community would not constitute forced labour. In the ECtHR jurisprudence there is only one case dealing with this provision. The case of *S. v. Germany*[72] concerned an applicant with hunting rights who was required by the State to participate in a program of protection against rabies, which required the gassing of all fox-holes as a measure of controlling against epidemics. The Commission stated that the type of activity required from the applicant was within the scope permitted by the provisions of article 4-3 and held the application manifestly ill-founded.

▪ **Clause (d) of article 4-3**

According to clause 4-3(d) any work or service which forms part of normal civic obligations are not considered to be forced labour. The ECtHR noted that the understanding of civic obligations must be grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs.[73]

These ideas were discussed by the ECtHR in relation to the imposition of the obligation to serve on a jury in *Zarb Adami v. Malta*.[74] In *Karlheinz Schmidt v. Germany,*[75] the ECtHR considered that compulsory fire service such as existed in some German regions was one of the "normal civic obligations".

Considering cases under this provision the ECtHR bases its analysis on two main factors. First, whether the work falls outside the ambit of an applicant's normal professional activities and usual work; and secondly, whether the work required of the applicant imposed a disproportionate burden.

Answering the first question, the ECtHR considered the nature of the applicant's professional work and concludes if the imposed work was of the same character. For example, in *Steindel v. Germany*[76] the Court stated that making a private ophthalmologist participate in an emergency-service scheme organised by a public

[72] ECtHR, S. v. Germany (9686/82) inadmissible 04/10/1984
[73] ECtHR, Van der Mussele v. Belgium (8919/80) 23/11/1983, para. 38.
[74] ECtHR, Zarb Adami v. Malta ( 17209)20/06/2006.
[75] ECtHR, Karlheinz Schmidt v. Germany (13580/88) 18/07/1994
[76] ECtHR, Steindel v. Germany (29878/07)14/09/2010

body was to require him to perform work that fell within the applicant's usual professional activities. Therefore, the scope of the professional activities of doctors is perceived in a very broad manner. In *Kovalova v Czech Republic*[77] the ECtHR found that the applicant's obligation to represent the interests of her deceased's husband's company in tax proceedings was based on an idea of general interest and was within the framework of "normal civic obligations".

In several cases the ECtHR has had to consider the civic obligation of lawyers. In 1972 the complaints of an Austrian lawyer about free legal aid had been declared admissible by the Commission, on the ground that "these complaints raise issues of a complex nature" and could not therefore be declared manifestly ill-founded.[78] These cases led to a friendly settlement, so that the merits of the parties' arguments have not been pronounced on.[79]

In X. and Y. v. Federal Republic of Germany[80] the ECtHR considered whether the absence of advance in payment for the work of a state-appointed lawyer amounted to forced labour. The lack of pre-payment was considered as a non-decisive factor in the determination of forced labour, as the States were free to establish their system of remuneration of lawyers. It is interesting to note that the ECtHR interpreted article 4 in the light of the right for fair trial and the right for legal aid. The Court referred to Article 6-3(c) and reasoned that, since in the ECHR the right to free legal aid has been recognised, the obligation for a lawyer to give legal aid in a concrete case cannot constitute forced or compulsory labour in the sense of article 4-2 of the ECHR. Commentators have noted that this conclusion lacks logical approach. The right to legal aid per se does not say anything about the way in which the authorities must give effect to this right and does not necessarily imply that this should be done via an obligation for lawyers to give such legal aid under conditions to be laid down by the authorities.[81] In fact, the submissions made

[77] ECtHR, Kovalova v. The Czech Republic (57319/00) inadmissible 30/11/2004
[78] ECtHR, Gussenbauer v. Austria (4897/71 and 5219/7) 14/07/1972
[79] Cited from Di Pieter van Dijk, Godefridus J. H. Hoof, G. J. H. Van Hoof, Theory and Practice of the European Convention on Human Rights. Martinus Nijhoff Publishers, 1998. P. 338.
[80] ECtHR, X. and Y. v. Federal Republic of Germany (7641/76) 11/12/1976.
[81] Di Pieter van Dijk, Godefridus J. H. Hoof,G. J. H. Van Hoof, Theory and Practice of the European Convention on Human Rights. Martinus Nijhoff Publishers, 1998. P. 339.

by one party's reference to article 6 in the context of the application on forced labour seems to be a very artificial and poor argument.

In the later case of *Van der Mussel v. Belgium,*[82] the ECtHR had to decide on the same issue of unpaid lawyer's work. The applicant complained that article 4-2 had been violated by the failure to pay him for his work as a pupil advocate and because if he refused to work in that capacity he would be liable to sanctions. The ECtHR applied the two-stage test referred to in the cases discussed above and considered the following matters:

- The services to be rendered did not fall outside the ambit of the normal activities of an advocate;
- The student had voluntarily chosen the profession of advocate with knowledge of the practice complained of;[83]
- There was a compensatory factor in the advantages attaching to the profession, including the exclusive right of audience and of representation enjoyed by advocates;
- The services in question contributed to the applicant's professional training and gave him the opportunity to enlarge his experience and to increase his reputation.
- The burden imposed on the applicant was not disproportionate as sufficient time remained for performance of his paid work.[84]

Having regard to the generally prevailing standards in democratic societies, the ECtHR decided that in this case there was no compulsory labour for the purposes of article 4-2 of the ECHR.

In that case as well as in the more recent *Graziani-Weiss v. Austria*,[85] concerning the appointment of the applicant lawyer as a legal guardian against his will and without payment, the ECtHR tended to interpret the civic obligations of the lawyer broadly. It did not pay sufficient attention to the factor of remuneration for the

[82] ECtHR, Van der Mussele v. Belgium (8919/80) 23/11/1983
[83] Ibid, para. 40.
[84] ECtHR, Van der Mussele v. Belgium, Para. 39.
[85] EctHR, Graziani-Weiss v. Austria (31950/06) 18/10/2011, para 41,42.

imposed work. The ECtHR's reference to the "certain privileges of professional groups of lawyers" is not by itself a sufficient justification of the absence of remuneration.

### 1.2.4. The lack of the ECtHR's attention to the factor of remuneration

In *Ackerl and others v. Austria*[86] the applicants, judges, brought a complaint under article 4 as they had to assume the work of other judges without receiving supplementary remuneration. The reasoning of the Commission, which delclared the application inadmissible, was very brief. It stated that the applicants had freely entered public civil service and had not shown that their individual work-load had increased to such an excessive extent that the obligation to carry it out would have to be considered "unjust" or "oppressive". The Commission, regretfully, did not explain further its perception of just conditions of labour and did not mention that fair conditions of work should, in the first place, ensure the right for due remuneration. It did not consider the fact that the refusal to perform such additional work could lead to disciplinary sanction. Such reasoning might have led the ECtHR to the conclusion that the additional unpaid work was exacted under the threat of penalties being imposed, thus amounting arguably to forced labour.

In *Vnuchko v. Ukraine*,[87] as in many other similar cases against Ukraine, the applicants submitted that unpaid work should be considered as forced labour. In all of these cases the ECtHR used its usual framework of analysis on forced labour cases and decided that the applicants performed the work voluntarily and their entitlement to payment had never been denied. Therefore the ECtHR concluded that the dispute did not disclose any element of forced or compulsory labour within the meaning of article 4 and rejected the relevant part of the applications as being manifestly ill-founded.[88] These cases yet again demonstrate the weakness of the ECtHR's legal position as far as the monetary aspect of labour is concerned. In this context it must be noted that in some countries the concept of forced labour also

[86] EurCommHR, Ackerl and others v. Austria (20781/92) 29/06/1994
[87] ECtHR, Vnuchko v. Ukraine (1198/04) 14/12/2006
[88] ECtHR, Popov v. Ukraine (23892/03)14/12/2006, para 14 and Sokur v. Ukraine (29439/02), 26/11/2002.

includes unpaid work, thus attaching more importance to the principle of due remuneration and being more stringent about violations of employees' rights in this sphere.[89]

### 1.2.5. The obligation to accept any job as a criterion of eligibility for unemployment benefits

In a series of cases against the Netherlands, applicants claimed that the obligation to accept any kind of employment in order to receive welfare benefits constituted the violation of article 4. In 1976 an unemployed specialised building worker complained to the Commission that the obligation imposed on him to accept, in order to receive unemployment benefits, a job offer not in conformity with his qualifications, constituted 'compulsory labour'. Rejecting this complaint, the Commission observed that he was not compelled, by any penalty, to accept such an offer; nor would his refusal constitute an infringement of the law. A refusal would only be penalised by the temporary loss of unemployment benefits.[90] The same conclusion was reached in the later case *Talmon v The Netherlands*.[91] The applicant, a scientist, complained that the reduction of unemployment benefits for the refusal to perform required work, to which he had a conscientious objection, amounted to forced labour. The Commission declared the application inadmissible as it did not find that the applicant was in any way forced to perform any kind of labour or that his refusal to look for other employment than that of an independent scientist made him liable to any measures other than the reduction of his unemployment benefits.

The ECtHR applied the same approach in considering the complaint of an unemployed philosopher who claimed that due to changes in the relevant legislation she was forced to seek and take up employment which was deemed to

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[89] See, for example, art. 4 of the Russian Labour code. In India a failure to pay the minimum wage was regarded as forced or compulsory labour under the art. 23 of the Constitution of India. See Ben Saul, David Kinley, Jaqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary. Oxford University Press, 2014. P. 279.

[90] ECtHR, X v. Netherlands, Application 7602/76, (1976) 7 Decisions and Reports 161, cited from Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence, Cambridge University Press, 2002. P. 362.

[91] EurCommHR, Talmon v. The Netherlands (30300/96) inadmissible 26 February 1997

be “generally acceptable” as opposed to being “suitable”, stipulated in the previous legislation.[92] In that case, the ECtHR stated that the obligation to accept any kind of work was in effect a condition for the granting of benefits, and the State, which had introduced a system of social security, was fully entitled to lay down conditions which have to be met for a person to be eligible for benefits under that system. The ECtHR emphasised that Dutch legislation provided that recipients of benefits were not required to seek and take up employment which was not generally socially accepted or in respect of which they had conscientious objections.

This stance of the ECtHR demonstrates that, in spite of the recognition of a wide margin of appreciation of the States in establishing the social security system, certain positive obligations of the State might be deduced. Thus the State, establishing eligibility conditions for unemployment benefits, might be required to ensure that the work proposed to be given to an unemployed person, in circumstances wherea refusal to accept the job will lead to sufficient reduction or abolition of the relevant allowance, would not be in breach of his freedoms of religion, conscience and belief.

### 1.3. Conclusions

The jurisprudence of the ECtHR in relation to article 4 has both positive and negative aspects. The positive is the emphasis on the necessity of effective protection from slavery and involuntary servitude and including human trafficking within the activities prohibited by this article. The establishment of the qualitative requirements to the measures aimed at the prosecution of these crimes and to the protection of its victims is also a step forward. The negative aspect is the conservatism of the ECtHR’s interpretation of forced labour as illustrated by a number of cases, including by *Stummer v. Austria*. The reluctance of the ECtHR to give greater consideration to the remuneration of people obliged to fulfil civic obligations is another criticism.

[92] ECtHR, Schuitemaker v. The Netherlands (15906/08) inadmissible 04/05/2010.

# Chapter 2. Prohibition of Discrimination



The European Convention on Human Rights was the first international instrument which fixed an efficient prohibition of discrimination in 1950 after the proclamation of equality in article 7 of the Universal Declaration of Human rights. Since then the prohibition of discrimination has become one of the most frequently declared norms of international human rights law.[93] The ILO acknowledged the principle of non-discrimination as a fundamental principle of labour law[94] and has created a well-developed system of norms prohibiting discrimination.[95] In this perspective, antidiscrimination law is one of the most mature and symptomatic examples of a global law that unifies and, at the same time, produces plural regulations.[96]

It might seem that discrimination in employment is already abundantly dealt with and that article 14 of the ECHR is not relevant to labour law matters. However it is very important for the protection of both individual and collective labour rights. The ECtHR is the only international body on the European scene that can issue binding judgements and require the states to remedy discriminatory situations and to create effective systems of protection. For this reason, the

[93] Anne Bayefski, The Principle of Equality or Non-Discrimination in International Law, 11 Human Rights Law Journal 1990/1-2, p. 1.
[94] ILO Declaration on Fundamental Principles and Rights at Work, 1998.
[95] The ILO Discrimination (employment and occupation) Convention N 111, the ILO Equal Remuneration Convention N 100, ILO Recommendation concerning Discrimination in Respect of Employment and Occupation, No. 111, 1958, The ILO Vocational rehabilitation and employment (disabled Persons) Convention 1983(no. 159); the ILO Convention N 169on indigenous and tribal Peoples 1989; The ILO Convention N 175 on Part-time Work 1994; The ILO Convention N156 on Workers with Family Responsibilities 1981.
[96] Bruno Caruso, Changes in the Workplace and the Dialogue of Global Law in the Global Village. 28 Comp. Lab. L. & Pol'y J. 28:3 (2007), p. 509.

applicants in cases concerning the violation of employment rights often refer to this article. Taking into account the fact that the prohibition of discrimination is equally relevant to the rights expressly set out in the ECHR and to the rights which were integrated subsequently as the result of evolutive interpretation, the scope of antidiscrimination protections guaranteed by article 14 is very wide indeed. It has been taken to cover unfair dismissal,[97] the right of access to work[98], wages and pensions (under article 1 to the Protocol 1),[99] and the realisation at work of the rights expressly provided by articles 9, 10 and 11 of the ECHR and the procedural aspect of protection of labour rights.[100]

To present the ECtHR's approach to discrimination more harmoniously, this part will consequently address the following topics: the general aspects of the ECtHR's approach to discrimination; research the peculiarities of the indirect discrimination; and analyse positive obligations of the States under article 14. In all of these sections the research will be based on the case law of the Strasbourg bodies in respect of individual employment rights; the matters relating to the protection of trade unions and certain social security rights will be also taken into account.

### 2.1. General aspects of the ECtHR's approach to discrimination

According to article 14 of the ECHR, the enjoyment of the rights and freedoms set out in the ECHR should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The wording of this article is at the same time broad and restrictive. It is broad insofar as it leaves open the list of discriminatory grounds and provides the ECtHR with a wide discretion as to whether the difference of treatment was

[97] As the Court intergrated to the art. 8 the right to personal development, and the right to establish and develop relationships with other human beings and the outside world, see Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013, Niemietz v. Germany (13710/88)16/12/1992.

[98] ECtHR, Sidabras and Dziautas v. Lithuania (55480/00 59330/00) 27/07/2004, Bigaeva v. Greece (26713/05) 28/05/2009

[99] ECtHR, Valkov and Others v. Bulgaria (2033/04)25.10.2011, Stec and Others v. UK (65731/01, 65900/01), 12 April 2006.

[100] ECtHR, Fogarty v. The United Kingdom (37112/97) 21/11/2001

discriminatory.[101] The traditional list of discriminatory grounds provided in the European Directives was extended in a number of cases including for example, the status of an adoptive mother. In *Topčić-Rosenberg v. Croatia*,[102] the ECtHR found the violation of article 14 as the applicant had been denied the right to obtain maternity leave and related allowances after the adoption of her child, even though biological mothers had such a right from the date of the child's birth until its first birthday. The Strasbourg jurisprudence in the sphere of pension rights introduced another new ground such as the applicant's place of residence.[103] Commentators note that the broad approach to the ground of discrimination is advantageous as it helps the ECtHR to deal with complex forms of unequal treatment, such as discrimination based on multiple or cumulative grounds or intersectional discrimination.[104]

The restrictiveness of the article 14 is due to its complementary nature, as it only complements the other provisions of the ECHR and its Protocols which contain the substantive rules.[105]

The adoption of Protocol 12 to the ECHR[106] was intended to provide a wider protection against discrimination without attaching the difference in treatment to the violation of ECHR rights. This Protocol contains a general prohibition of discrimination in the realisation of any right guaranteed by law and might be more applicable in the sphere of labour rights' protection, as employment rights are not explicitly covered by the ECHR. However, it has, as at the date of writing, been ratified by only 18 states[107] (out of the 47 members of the CoE) and its violation had been found only in three cases which were unrelated to labour law.[108]

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[101] For example, in non-labour law cases the legal status of the son was found to be a discriminatory ground in ECtHR, Mazurek v France (34406/97) 01/02/ 2000, Fabris v. France (16574/08)07/02/2013 or the size of plot of land - in Chassagnou v France, No 25088) 29/04/1999.

[102] ECtHR, Topčić-Rosenberg v. Croatia (19391/11) 14/11/2013, para. 40.

[103] ECtHR, Pichkur v. Ukraine (10441/06) 07/11/2013

[104] Janneke Gerards, The Discrimination Grounds of Article14 of the European Convention on Human Rights. Human Rights Law Review 13:1 (2013), p. 119.

[105] See for example: ECtHR, Bigaeva v. Greece (No. 26713/05), 28/05/2009

[106] Signed in Rome on 05.11.2000.

[107] The status of the Protocol N 12 to the ECHR, available at: onventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG (accessed 18.02.2015).

[108] ECtHR, Sejdić and Finci v. Bosnia and Herzegovina [GC](27996/06, 34836/06) 22/12/2009; Zornić v. Bosnia and Herzegovina (3681/06) 15/07/2014; Savez crkava "Riječ života" and Others v. Croatia (7798/08) 09/12/2010.

The text of this Protocol was criticised by certain scholars for the lack of conceptual definitions and for containing ambiguities.[109] Present research of the ECtHR's jurisprudence on discrimination confirms that its provisions are actually not applicable in labour law cases and that article 14 remains the principal source of anti-discrimination in the Strasbourg system.

As has already been mentioned, the protection against discrimination under article 14 might be granted if the difference of treatment occurred in the enjoyment of the rights and freedoms fixed in this ECHR. Therefore, the ECtHR treats equality as being auxiliary to substantive rights[110] and tends to interpret this provision in a broad way. Following the legal positions of the Commission,[111] the ECtHR established that it is enough for the discrimination in issue to "touch the enjoyment of a specific right or freedom,"[112]; in other words, "the facts should fall within the ambit of one or more of the substantive provisions of the Convention and its Protocols."[113]

This interpretation of the prohibition of discrimination evidently makes the provisions of article 14 more applicable in labour law cases. Article 8, for example, does not provide any labour rights, however the ambit of the right to the respect for private life is very "spacious". It includes the protection of the moral, psychological and physical integrity of the person[114] and protection of the rights to personal development.[115] Article 8 also protects the right to establish relationships with others, including relationships of a professional nature[116] and to access a profession in the private sector.[117] Therefore, the difference of treatment in the

[109] Khaliq Urfan, Protocol 12 to the European Convention on Human Rights: a step forward or a step too far? Public law 3 (2001), p. 457-464.
[110] C. Barnard and B. Hepple, Substantive Equality. Cambridge law Journal 59(3). November 2000. P. 567.
[111] Opinion of the Commission on human rights in the "Belgian Linguistic Case" delivered 24th June 1965, cited in ECtHR, "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (1474/62 et al) 23/07/1968.
[112] ECtHR, "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (1474/62 et al) 23/07/1968, para. 4.
[113] ECtHR, Okpisz v. Germany (59140/00) 25/10/2005, para. 30, Willis v. THE UK (36042/97) 11/06/2002, para. 36.
[114] ECtHR, Brincat and others v. Malta, Raninen v. Finland (20972/92) 16/12/1997; Kyriakides v. Cyprus (39058/05) 16/10/2008.
[115] ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013, para. 65.
[116] ECtHR, C. v. Belgium (21794/93) 07/08/1996, para. 25.
[117] ECtHR, Sidabras and Džiautas v. Lithuania (55480/00, 59330/00) 27/07/2004, para. 47.

realisation of one of the mentioned rights will fall within the ambit of the article 14. The Strasbourg bodies' broad perception of the "ambit" is in contrast with the approaches of domestic judges. British judges, for instance, appear to interpret the relevant provisions of the *Human Rights Act 1998* (UK) in light of their perception of article 14 as "parasitic," and conceive it as a slightly extended version of the protective scope of the other more "substantive" articles.[118]

### 2.1.1. The way of adjudication of applications alleging discrimination

The principle of non-discrimination was filled with meaning by the ECtHR through developing an analytical approach and applying it to individual cases.[119] According to the ECtHR case-law, not every difference in treatment would amount to discrimination as prohibited by the ECHR. The ECtHR stated: "In spite of the very general wording of the French version ('sans distinction aucune'), Article 14 did not forbid every difference in treatment in the exercise of the rights and freedoms recognised". [120] Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14.[121] The ECtHR established the criteria which would enable a determination to be made as to whether or not a given difference in treatment contravened Article 14. It held that "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification,"[122] and that "the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies."[123] The difference of treatment in the exercise of a right laid down in the ECHR must pursue a legitimate aim and there must a reasonable relationship of proportionality between the means

[118] Baker, Aaron. "The enjoyment of rights and freedoms: a new conception of the 'ambit'under Article 14 ECHR." The Modern Law Review 69.5 (2006): 714-737. Available at: http://dro.dur.ac.uk/3236/1/3236.pdf (accessed 20.05.2015).

[119] Oddný Mjöll Arnardótt, Equality and Non-Discrimination Under the European Convention on Human Rights. Martinus Nijhoff Publishers, 2003, p. 15.

[120] ECtHR, "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (1474/62 et al) 23/07/1968, para. 60.

[121] ECtHR,Valkov and others v. Bulgaria (2033/04 et al) 25/10/2011, para. 115.

[122] For example, the difference of treatment of policemen in regard of the freedom of association was justified with the reference to their special status. See Rekvényi v. Hungary (25390/94) 20/05/1999.

[123] ECtHR, National union of Belgian police v. Belgium (4464/70) 27/10/1975, para. 46.

employed and the aim sought to be realised.[124]

Therefore the ECtHR's consideration of discrimination cases includes two main steps: the establishment of the difference in treatment; and the finding of an "objective and reasonable justification" for discriminatory provisions that exists if the difference of treatment pursues a legitimate aim and if there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[125]

The ECtHR's approach to the burden of proof[126] in discrimination cases requires the applicant to demonstrate the difference in treatment, and the respondent State to prove that the difference in treatment was justified.[127] The shift of the burden of proof to the defendant in cases of employment discrimination is characteristic for the countries of the EU but is alien to new members of the CoE such as Russia[128] or Ukraine[129].

In cases concerning indirect discrimination, the ECtHR held that the burden of proof should shift to the respondent State if the applicant establishes the rebuttable presumption that the effect of a measure or practice had been discriminatory. [130] It also noted that it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift.[131]

In considering whether a relevant difference in treatment existed, the ECtHR tends to compare the situation in question with the treatment of other people in analogous or "relevantly similar situations".[132] The requirement to demonstrate an analogous position does not mean that the comparator groups should be identical.

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[124] ECtHR, National union of Belgian police v. Belgium (4464/70) 27/10/1975.
[125] ECtHR, Adrejeva v. Latvia [GC] (55707/00) 18/02/2009, para. 81.
[126] The distribution of the burden of proof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. See Nachova and Others v. Bulgaria(43577/98, 43579/98) 06/07/2005, para. 147.
[127] ECtHR, I.B. v. Greece (552/10) 03/10/2013, para. 78.
[128] See more in E. Sychenko, Contradictions of anti-discrimination protection of employees in Russia and the influence of European Court of Human Rights in: "Labour Law in Russia: Recent Developments and New Challenges". Issue 6. Newcastle upon Tyne: Cambridge Scholars Publishing, 2014. P. 289 - 310.
[129] The possibility to shift the burden of proof was recently fixed in the changes to the Law of Ukraine "On Principles of Prevention and Combating Discrimination in Ukraine" adopted 13.05.2014 № 1263-VII, however, till now there is no evidence on the results of application of this law.
[130] ECtHR, Horváth and Kiss v. Hungary (11146/11) 29/01/2013, para. 108.
[131] Ibid.
[132] ECtHR, Willis v. the United Kingdom (36042/97) 11/06/2002.

An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently.[133] It must be found that other persons enjoy preferential treatment and that this distinction is discriminatory.[134] In *D. H. and Others v. The Czech Republic*,[135] for example, the ECtHR investigated whether the education of Roma children assigned to special schools was different from the education given to other children in the city of Ostrava. It was found that the applicants had received a substantially inferior education compared to non-Roma children and had therefore been victims of discrimination on the grounds of ethnic origin.

In cases concerning paternity leave the ECtHR compared the treatment of women and men and found that men and women were "similarly placed" as far as the role of taking care of the child during the period corresponding to parental leave was concerned.[136]

There have been several cases where the ECtHR has rejected discrimination claims on the basis that the applicants were not considered to be in a situation akin to that of another group treated more favourably. In *Carson and Others v. UK*,[137] the applicants (immigrants to South Africa, Australia, Canada) argued that they had been treated differently with regard to pension increases for pensioners living in the UK, as compared to those who had emigrated. The ECtHR did not consider that an act of discrimination had taken place, stating that the conditions of pensioners in UK and those abroad were incomparable in view of the rise of the standard cost of living in the UK.

The choice of comparators can be determinative of the claim.[138] For example, in *Fogarty v. UK*,[139] the applicant claimed that she suffered discrimination on the basis of legislation that conferred immunity in relation to employment-disputes concerning embassy staff. The ECtHR simply asserted that as the legislation in

[133] ECtHR, Valkov and others v. Bulgaria, para. 116.
[134] ECtHR, Andrle v. The Czech Republic (6268/08) 17/02/2011, para. 47.
[135] ECtHR, D. H. and Others v. the Czech Republic [GC] (57325/00) 13/11/2007.
[136] ECtHR, Petrovic v. Austria (20458/92) 27/03/1998, para. 36; Konstantin Markin v. Russia (30078/06) 22/03/2012, para. 132.
[137] ECtHR, Carson and others v. UK [GC] (no. 42184/05) 16/03/2010.
[138] C. Barnard, B. Hepple, Substantive equality. Cambridge law journal 59(3). November 2000. P. 563.
[139] ECtHR, Fogarty v. UK [GC] (37112/97) 21/11/2001.

question applied equally to all employment-related disputes within the Embassy there existed no different treatment. Therefore the ECtHR compared the applicant with other employees of the Embassy even though the applicant was referring to the difference in treatment with employees of other employers who were entitled to pursue the claim on discrimination in recruitment processes in the Industrial Tribunal. The status of the employer was the discriminatory ground in this case and the ECtHR had to consider whether the difference in treatment was founded on a "objective and reasonable justification."

Whenever a difference in treatment is found, the ECtHR has to determine if there was an objective and reasonable justification. Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the ECHR[140]. For example, the establishment of different retirement age for men and women was held by ECtHR legitimate as it was "rooted in specific historical circumstances" and was aimed at the correction of "factual inequalities" between sexes.[141]

According to the jurisprudence under article 14, "objective and reasonable justification" means that the discrimination in question pursued one or more legitimate aim(s) and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

### 2.1.2. The Court's approach to the legitimate aim in cases of discrimination

The ECtHR tends to interpret "legitimate aim" in a very broad manner. As such, it has acknowledged in this context the protection of national security[142], the general interest to avoid fragmentation of trade union organisations,[143] ensuring

[140] ECtHR, Zarb Adami v. Malta (17209/02) 20/06/2006, para. 76.
[141] See ECtHR, Andrle v. The Czech Republic, see supra note 134, para. 55; Stec and others v. UK (65731/01, 65900/01) 12/04/2006, para. 61. The Court took into account the move towards establishing the same pensionable age for both sexes.
[142] ECtHR, Rainys and Gasparavicius v. Lithuania (70665/01 74345/01) 07/04/2005, Sidabras and Dziautas v. Lithuania (55480/00 59330/00) 27/07/2004, Markin v. Russia [GC](30078/06) 22/03/2012.
[143] ECtHR, Wilson, National union of journalists and others v. The UK (30668/96 et al) 02/07/2002

the loyalty of civil servants towards the democratic regime,[144] providing access to services irrespective of sexual orientation of the person,[145] protecting occupational health,[146] enforcing the uniform code of the employer,[147] etc. The ECtHR's approach to "legitimate aim" has been criticised as being a "rhetorical and artificial assertion that has nothing to do with the issues truly deciding the case".[148] In fact, the examples of accepted "legitimate aims" mentioned above which have been referred to by the ECtHR are rather traces of reasonable grounds for the difference of treatment rather than being solemn "legitimate aims".

In certain cases the ECtHR sets higher standards in order for the legitimate aimto be established.[149] The ECtHR is particularly rigorous in its approach to the justification of discrimination based on gender, or sexual orientation. Where a difference of treatment is based on a person's gender, the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances of the case.[150]

In the recent case of *Emel Boyraz v. Turkey*, the applicant claimed that her dismissal from the post of security officer in the state-run Electricity Company was in breach of the provisions of articles 8 and 14 of the ECHR. The applicant had been terminated from her job as she did not fulfil the requirements of "being a man" and "having completed military service". The respondent stated that the post in question had been reserved for male candidates in view of the nature of the service and the need to recruit male personnel. The ECtHR accepted that there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out. However, the mere fact that

[144] ECtHR, Naidin v. Romania (38162/07) 21.10.2014
[145] ECtHR, Eweida and others v. The UK (48420/10 et al) 15/01/2013
[146] Ibid.
[147] Ibid.
[148] Oddný Mjöll Arnardóttir, see supra note 119, p. 45.
[149] Aalt Willem Heringa, Standards of Review for Discrimination. The Scope of Review by the Courts in "Non-Discrimination Law: Comparative Perspectives" ed. Titia Loenen, Paulo R. Rodrigues. Martinus Nijhoff Publishers, 1999. P. 30.
[150] ECtHR, Emel Boyraz v. Turkey (61960/08) 02/12/2014. Para. 51.

security officers had to work on night shifts and in rural areas and might be required to use firearms and physical force did not, the Court found, in itself justify the difference in treatment between men and women in this way. In the ECtHR's view, only the personal inability of the applicant to fulfil these tasks might be the legitimate reason for dismissal.[151]

In *Markin v. Russia* the ECtHR agreed with the State that the protection of national security could be regarded as a legitimate aim under article 14. However, it emphasised that the needs of security cannot be sufficient justification of the difference of treatment per se. Any restrictions of rights are acceptable in this context only where there is a real threat to the armed forces' operational effectiveness that must be "substantiated by specific examples."[152]

The ECtHR pointed out that the advancement of gender equality is today a major goal in the member States of the CoE and very significant reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the ECHR.[153]

### 2.1.3. The research on proportionality of interference

The research on proportionality of the difference of the treatment comes next after the establishment of the legitimate aim. The assessment of proportionality is influenced by a variety of factors which might be involved in any one case: the type of discrimination; the right concerned; the vulnerability of the applicant.[154] The application of the proportionality test in discrimination cases is not well-explained in the labour law jurisprudence of the ECtHR. The judgement of the ECtHR in the famous case of *Eweida and others v. UK*[155] is very illustrative in this context.

Two of four applicants suffered a difference in treatment because their employers did not permit themto wear a cross visibly around their necks. The first applicant, Ms. Eweida was an employee of British Airways, which required all

[151] Ibid, para. 56.
[152] EctHR, Markin v. Russia, para. 137.
[153] ECtHR, Emel Boyraz v. Turkey, para. 51.
[154] ECtHR, I.B. v. Greece (552/10) 03/10/2013.
[155] ECtHR, Eweida and others v. UK (48420/10 et al) 15/01/2013

their staff in contact with the public to wear a uniform and do not display any religious symbol, even discreet ones. The second applicant, Ms Chaplin, was a qualified nurse at the state hospital. After the hospital changed the nurse's uniforms she was requested to remove her cross as it might cause injury if an elderly patient pulled on it. In both cases the ECtHR found that the restrictions were justified by legitimate aims. Having considered the intereference's proportionality the ECtHR, however, came to different conclusions in respect of these two applicants.

In the case of Ms. Eweida, the ECtHR found the interference to be disproportionate. It stated that national courts did not strike a fair balance as they accorded too much weight to the employer's wish to project a certain corporate image. The Court found no evidence that the wearing of other previously authorised items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image and concluded that, in the absence of any real encroachment on the interests of others, the domestic authorities had failed to sufficiently protect the first applicant's right to manifest her religion, in breach of the positive obligation under article 9.

In the case of Ms Chaplin, the ECtHR found that the interference was not disproportionate as the reasons for the restriction were "inherently of a greater magnitude than that which applied in respect of Ms Eweida". In addition it was noted that in "this field" (one can surmise that the ECtHR meant by this hospitals' establishment of uniform policies) the domestic authorities must be allowed a wide margin of appreciation. This way of considering of the proportionality of the interference is a very simplified one as it consists of determining objective reasons for the restriction and the ascertaining of a wide margin of appreciation of the state.

The evaluation of proportionality in cases on trade union discrimination could also be criticised as being rather too cursory. Here, the evaluation of proportionality is substituted by a reference to the national margin of

appreciation.[156] For example, in *National union of Belgian police v. Belgium*,[157] the ECtHR had to decide whether the deprivation of the right to be consulted with by the Minister of the Interior constituted a violation of articles 11 and 14 of the ECHR. The applicant was a union open to municipal and rural police forces, but not to members of the gendarmerie and the police judiciary. To avoid having to deal with too many associations, the number of entities with which the Belgian State, i.e. its Minister of the Interior, had to negotiate was limited by using a criterion of representativeness and the applicant was denied sufficient representation.[158] The ECtHR, having found a certain disadvantage in the applicant's situation, stated that the State had not exceeded the limits of its freedoms to lay down the measures it deems appropriate in its relations with the trade unions and concluded that the disadvantage was not excessive in relation to the legitimate aim pursued.[159] It was found that the principle of proportionality was not offended although it was applied in this case in a very vague manner.

These examples demonstrate that the proportionality test in discrimination cases seem unclear, "weak" and is not being treated fully.[160]

In spite of certain shortcomings in the reasoning of judgments on employment discrimination, the jurisprudence of the ECtHR nevertheless provides a scheme of adjudication in such cases which might be used by national courts in new member states of the CoE, such as Russia. The establishment of the legitimate aim and of proportionality could ensure a more flexible approach to discrimination than that provided by article 3 of the Russian Labour Code. According to its provisions, establishment of distinctions, exceptions, preferences as well as limitation of employees' rights which are **determined by the requirements inherent in a specific kind of work as set by federal laws** or caused by **especial attention of the state to persons requiring increased social and legal protection** shall not be

[156] Arai, Yutaka, The ECHR and non-discrimination. Amicus Curiae, 1998 (7). P. 8.
[157] ECtHR, National Union Of Belgian Police v. Belgium (4464/70) 27/10/1975
[158] Cited from L. Caflisch, Labour issues before the Strasbourg Court in ILO (ed), The Distinguished Scholars Series, http://www.ilo.org/public/english/bureau/leg/download/series.pdf (accessed 20.02.2015).
[159] ECtHR, National union of Belgian police v. Belgium, Para. 49.
[160] Oddný Mjöll Arnardóttir, see supra note 119, p. 55, 192.

deemed discrimination.[161] This rule is formulated rigidly and does not permit national courts to estimate whether "positive" discrimination in the particular case was proportionate to the aim of protecting vulnerable persons.[162] In addition, it does not permit employers to allow for preferences or distinctions dictated by the type of work if the particular permission is not explicitly granted by law. As an example, we might refer to the employment of men for work in the men's sauna which is evidently necessary but is not permitted.

The ability to refer to the proportionality and necessity tests in estimating employment discrimination could render these norms more efficient and restrict positive discrimination only to cases where it is reasonably needed.[163]

## 2.2. Indirect discrimination

The ECHR does not mention indirect discrimination, however the ECtHR has developed in its case law protection from this type of discrimination as well. For a long time, the ECtHR was "rather hesitant" about indirect discrimination,[164] and was criticised for failing to develop an understanding of discrimination that went beyond clear-cut cases of direct discrimination.[165] As the former President of the ECtHR L. Wildhaber once pointed out: "The ECtHR's attitude has perhaps not been entirely coherent as to the weight to be given to the non-discrimination guarantee".[166] Recent jurisprudence of the ECtHR can boast of a development in this sphere and demonstrates the potential utility of article 14 in the context of protection against indirect discrimination in employment relations.[167]

### 2.2.1. The definition of indirect discrimination

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[161] See the English translation of the Russian Labour code on the ILO website: http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm (accessed 20 February 2015)

[162] See, for example, the Ruling of the Constitutional Court of the Russian Federation No. 617-O-O issued 22 March 2012.

[163] See more on positive discrimination in Russia and the opinion of the ILO on this subject in Lyutov N.L. Rossiyskoye trudovoye zakonodatel'stvo i mezhdunarodnyye trudovyye standarty: sootvetstviye i perspektivy sovershenstvovaniya.(Russian labor law and international labor standards: conformance and prospects of improvement)M.: ANO «Tsentr sotsial'no-trudovykh prav», 2012. P. 49.

[164] Christa Tobler, Limits and potential of the concept of indirect discrimination. European Commission, 2008, p. 14.

[165] Rory O'Connell, Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars, p. 211.

[166] Wildhaber Luzius, Proctection against Discrimination under the European Convention on Human Rights-A Second-Class Guarantee. Baltic YB Int'l L. 2 (2002), p. 71.

[167] See Eweida and others v. UK (48420/10)15/1/2013.

The ECtHR defines indirect discrimination as a "difference in treatment that takes the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group".[168] The ECtHR emphasised that a situation may amount to "indirect discrimination" even in the absence of a discriminatory intent.[169]

A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.[170]

Therefore the ECtHR's approach to indirect discrimination is largely the same as to the direct[171] and is focused on the aim of neutral policy and its proportionality. The ECtHR permits the use of statistical data as evidence in these cases. In earlier jurisprudence it held that statistics are not in themselves sufficient to disclose a practice which could be classified as discriminatory.[172] In the recent case of *Zarb Adami v. Malta*, the ECtHR pointed out that the discrimination potentially contrary to the ECHR may result not only from a legislative measure, but also from a de facto situation which was illustrated by the statistics provided by the applicant.[173]

### 2.2.2. *Thlimmenos v. Greece* and the value of the Court's legal positions for Russia

*Thlimmenos v. Greece*[174] is the ECtHR's landmark case on indirect discrimination and deserves to be dealt with in greater detail. In this case, the ECtHR stated that "the discrimination can be found when States […] fail to treat differently persons whose situations are significantly different".[175]

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[168] ECtHR, Opuz v. Turkey (33401/02) 09/06/2009, par. 183; ECtHR, Zarb Adami v. Malta (17209/02) 20/06/2006, para. 80.
[169] ECtHR, Horváth and kiss v. Hungary (11146/11) 29/01/2013, para. 105.
[170] ECtHR, Oršuš and Others (15766/03) 16.03.2010, para. 150.
[171] See ECtHR, Eweida and others v The UK, para. 104.
[172] ECtHR, Hugh Jordan v. the United Kingdom (24746/94) 04/05/2001, para. 154
[173] ECtHR, Zarb Adami v. Malta (17209/02) 20/06/2006, para. 76.
[174] ECtHR, Thlimmenos v. Greece [GC] (No. 34369/97) 06/04/2000.
[175] ECtHR, Thlimmenos v. Greece, para. 44. Similarly, ECtHR, Pretty v. UK (2346/02) 29/04/2002, par. 88.

The applicant was convicted for insubordination becausehe had refused to wear a military uniform during a general mobilisation. His refusal arose from his religious beliefs as a Jehovah's Witness, which included pacifism as a basic tenet. He was later turned down for the post of chartered accountant because of his previous conviction.

The ECtHR took into account the sentence served by the applicant for his refusal to wear the military uniform and considered the applicant's exclusion from the profession of chartered accountants as an additional sanction which was disproportionate and discriminative. The ECtHR found that the relevant Greek legislation violated the applicant's right not to be discriminated against under article 9 of the ECHR as it did not treat the applicant differently compared with others convicted for more serious crimes.

In this context, bearing in mind the particular importance of anti-discrimination provisions in the ECHR for non-EU countries in which domestic antidiscrimination provisions are poorly developed, mention should be made of a similar case heard by the Russian Constitutional Court. The applicants claimed that the provisions of the Russian Labour Code prohibiting the appointment of people with past convictions to posts related to teaching activities were unconstitutional.[176] The Constitutional Court examined the case in light of the infringement of the right to work and stated that not every crime listed in articles 331 and 351.1 of the Labour Code can lead to the unconditional and permanent prohibition of employment in teaching activities. The Constitutional Court affirmed the need to consider different factors such as the severity of the crime or personal characteristics with regard to the employment of people who have been convicted for crimes other than those considered serious and very serious, or crimes against sexual inviolability and sexual freedom. The unconditional and permanent prohibition of working as teacher for those who have committed serious and very serious crimes, crimes against sexual inviolability and sexual freedom was held to be constitutional and must be enforced without any exception.

[176] Decision of the Constitutional Court of the Russian Federation N 19-P issued 18.07.2013.

I suppose that if the applicants had related their claim to the anti-discriminatory provisions of the Constitution and to ECtHR's decision in *Thlimmenos v. Greece*, the decision of the Constitutional Court of Russia might have been different. The Constitutional Court, on the basis of the ECtHR's decision, may have been able to give a broader interpretation of Constitutional norms, including the necessity "to treat differently" even people who have been convicted of serious crimes.[177]

A review of the cases in which applicants claimed to be victims of indirect discrimination[178] shows that the ECtHR is not "so sensitive to rules with discriminatory effects which are not directly discriminatory".[179] The ECtHR itself stated that it should be cautious not to extend the breadth of Article 14 too far in developing the principle of protection from indirect discrimination.[180] However, the judgements in *Eweida and others v. UK* and *Thlimennos v. Greec*e demonstrate that the ECtHR becomes more sensitive to indirect discrimination in labour law cases where fundamental right are engaged.

The coverage of indirect discrimination by article 14 is particularly important for countries outside the European Union, because European directives already explicitly deal with the problem in the EU. Therefore, the Strasbourg mechanism is especially crucial for the protection from discrimination in employment relations for such countries as Russia, Turkey,[181] Armenia,[182] and Azerbaijan.[183] For

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[177] In the present decision the Constitutional Court found fair and legal the prohibition of employment connected with teaching activities for persons convicted, for example, for refusal to provide information to the Federal Assembly of the Russian Federation (art. 287 of the Criminal Code of Russia) or for violation of the rules of safety in the operation of military aircraft, resulting in serious consequences (art. 351 of the Criminal Code of Russia).

[178] ECtHR, Valkov and others v. Bulgaria (2033/04 et al) 25/10/2011; S.A.S. v. France [GC] (43835/11) 01/07/2014, Gas and Dubois v. France (25951/07) 15/03/2012; Biao v. Denmark (38590/10) 25/03/2014.

[179] Frans Pennings, Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR? Utrecht Law Review, Volume 9, Issue 1, January 2013, available at: http://www.utrechtlawreview.org/index.php/ulr/article/view/217 (accessed 20.02.2015).

[180] ECtHR, The Church of Jesus Christ of Latter-day Saints v. The United Kingdom (7552/09) 04/03/2014, para. 16.

[181] At least officially this country has made some progress in prohibiting discrimination in employment due to its status of accession country. See, for example, Implementation of EU anti-discrimination law in the Member States: a comparative approach. Available at: http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf (accessed 20.02.2015).

[182] The Committee of Economic, Social and Cultural rights on its session concluded on 24.05.2014 criticized Armenia for the discrimination of women and disabled persons in the labour market. See Concluding observations on the combined second and third periodic reports of Armenia, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5 (accessed 29.08.2014).

example, in Russia there are no cases on indirect discrimination.[184] This is due to the shortcomings of the Russian Labour Code, which does not clearly mention indirect discrimination, and to the peculiarities of the civil procedure that in general does not provide for the ability to reverse the burden of proof. The ECtHR's legal positions on this point can be referred to directly by the legal representatives of applicants in employment cases before domestic courts and they could also serve as an indication of the necessary changes in national legislation.

### 2.3. Positive obligations of the State under article 14

In the view of the ECtHR, the prime characteristic of positive obligations is that they in practice require national authorities to take necessary measures to safeguard a right.[185] This approach to ECHR rights was developed in early jurisprudence in such famous cases as *Marckx v. Belgium*[186] and *Airey v. Ireland*.[187] Judge Matscher in his opinion to the Marckx judgement noted that "it was generally accepted that the implementation of many fundamental rights … called for positive action by the State in the shape of the enactment of the substantive, organisational and procedural rules necessary for this purpose".[188]

This conclusion must be extended to article 14 of the ECHR: States are obliged to ensure effective anti-discrimination protection is actually implemented. There is a certain difference between treating discrimination matters in labour law cases arising in the private and public spheres. Cases dealing with discrimination against State employees are considered more rigorously as they concern primarily the negative obligation of the State not to interfere (and therefore not to discriminate).[189] The jurisprudence on anti-discrimination protection in private

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[183] ECRI Report On Azerbaijan Published on 31 May 2011. P. 35 Available at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Azerbaijan/AZE-CbC-IV-2011-019-ENG.pdf (accessed 20.02.2015).

[184] Text search for "indirect discrimination" was carried out on the sites of the Constitutional court and the Supreme Court of the Russian Federation. See http://www.vsrf.ru/, www.ksrf.ru (accessed 23 October 2013).

[185] Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights. Human rights handbooks, No. 7. Council of Europe. 2007, p. 7.

[186] ECtHR, Marckx v. Belgium (6833/74) 13/06/1979, para. 31.

[187] ECtHR, Airey v. Ireland (6289/73) 9/10/1979, para. 32.

[188] Partly Dissenting Opinion of Judge Matscher in Marckx v. Belgium (6833/74) 13/06/1979.

[189] See ECtHR, Sidabras and Dziautas v. Lithuania(55480/00 59330/00) 27/07/2004, Zarb Adami v. Malta(17209/02) 20/06/2006, Emel Boyraz v. Turkey (61960/08) 02/12/2014.

employment relations shows that the ECtHR gives greater weight to the views of the national courts and determines whether a fair balance had been stuck.[190] Therefore, it examines more closely the State's compliance with its positive obligation to ensure protection from discrimination.

Scholars justifiably note the lack of ECtHR jurisprudence deriving positive obligations from article 14 of the ECHR.[191] In fact, the judgement in the case of *Danilenkov and others v. Russia*[192] represents almost a unique example of the ECtHR's approach to dealing with the State's positive obligations to provide protection against employment discrimination under article 14. The applicants were employees of the Kaliningrad Commercial Seaport Co. Ltd. and members of the Kaliningrad branch of the Dockers' Union of Russia (DUR). On 14 October 1997, the DUR began a two-week strike for an increase in wages, better working conditions, and health and life insurance. The strike failed to achieve its goals and was discontinued on 28 October 1997. Subsequently the company management began to harass DUR members, attempting to penalise them for the strike and to get them to renounce their union membership.

DUR members subsequently found themselves reassigned to special work teams, transferred to part-time positions, and ultimately made redundant and dismissed; according to the company these changes in their work arrangemenets were due to a structural reorganisation of the seaport company.

The applicants responded to these and other actions by bringing a number of cases to local courts where they complained of being subjected to unlawful and discriminatory treatment due to their being union members. Discrimination charges were repeatedly dismissed on the grounds that applicants could not prove discriminatory intent on the part of the company. A number of civil courts stated that discrimination could only be established in the framework of criminal proceedings.

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[190] See ECtHR, Eweida and others v. UK (48420/10) 15/01/2013, I.B. v. Greece (552/10) 03/10/2013.
[191] Olivier De Schutter, The Prohibition Of Discrimination Under European Human Rights Law Relevance For EU Racial And Employment Equality Directives. European Commission. 2005, p. 52.
[192] ECtHR, Danilenkov And Others v. Russia (67336/01) 30/07/2009

The ECtHR's judgment emphasised the importance of the right to challenge discriminatory treatment and being able to exercise the right to take legal action in order to claim damages and other forms of compensation. It attached great weight to the ability to challenge discriminative conduct in civil proceedings. The ECtHR noted that the principal deficiency of a criminal remedy is that, being based on the principle of personal liability, it requires proof "beyond reasonable doubt"; in this case of direct intent on the part of one of the company's key managers to discriminate against the trade union members.[193] It further held that a criminal prosecution, which depended on the ability of the prosecuting authorities to unmask and prove direct intent to discriminate against the trade union members, could have provided adequate and practicable redress in respect of the alleged anti-union discrimination.

The ECtHR ruled that the State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership and found the violation of articles 11 and 14 of the ECHR.[194]

This judgment illuminates the ECtHR's approach to what it considers to be efficient anti-discrimination protection and the corresponding positive obligations it requires of the State in this sphere. The State has an obligation to create a system of judicial protection and to ensure it protects (or creates) the right to bring a *civil* action against discrimination. The applicant should not be required to produce proof "beyond reasonable doubt" of direct discriminative intent on the part of defendant.

The ECtHR did not, regrettably, develop further its legal position on the appropriate distribution of the burden of proof in relation todiscrimination cases. With reference to the European consensus (based on the experience of the EU) it could potentially have established the basic principles of proving discrimination and to require the States to introduce the ability to shift the burden of proof to the

[193] ECtHR, Danilenkov And Others v. Russia (67336/01) 30/07/2009, para. 134.
[194] Ibid, para. 136.

defendant in cases where the prima facie discrimination could be demonstrated by the applicant. This conclusion might have provided invaluable support to scholars from developing countries where the civil procedures legislation still does not provide any ability to shift the burden of proof in cases on discrimination. For example, in Russia scholars are calling for such an amendment since the prohibition of discrimination in employment was provided in the new Labour Code of the Russian Federation 2002.[195]

## 2.4. Conclusions

The evolutive approach to the interpretation of the ECHR attaches more potential to wideng the scope of antidiscrimination protection under article 14. It was demonstrated above that the ECtHR examined cases on employment discrimination in the light of states' infringement of both negative and positive obligations. The few cases in which the ECtHR granted protection against indirect discrimination show that "the jurisprudence has evolved from a formal to a more substantive model of equality".[196] The ECtHR's authority on the international stage means that it "can speak with a strong voice on the basis of an over-arching modern principle of substantive equality of opportunity."[197] It follows the development of European antidiscrimination law[198] and at the same time fulfils a "missionary function,"[199] spreading the values of equality and arguing the necessity of effective anti-discrimination protections required to be implemented by new members of the CoE.

[195] Lyutov N.L. Diskriminatsiya v oblasti truda i zanyatiy: problemy opredeleniya (Discrimination in Employment and Occupation: problems of definition) // Trudovoye pravo v Rossii i za rubezhom. 2011(4), pp. 20 – 24.

[196] Rory O'Connell, Substantive Equality in the European Court of Human Rights? 107 Mich.L. Rev.First Impressions 129 (2009), http:// www.michiganlawreview.org/firstimpressions/vol107/oconnell.pdf (accessed 25.02.2015).

[197] Sir Bob Hepple, The Aims of Equality Law. Current legal problems, Volume 61, issue 1 (2008). P. 22

[198] See, for example, judgment in Markin v. Russia where, basing on the development of the European legislation, the Court overruled its previous approach, expressed in Petrovic v. Austria. ECtHR, Markin v. Russia (30078/06) 22/03/2012; Petrovic v Austria (20458/92) 27/03/1998

[199] A W B Simpson. The ECHR: the First half Century'. 2004. University of Chicago Fulton Lecture Series. P. 12 Available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1017&context=fulton_lectures (accessed 30.10.2014).

## Part III. Rights of employees under the ECHR and unfair dismissal

The prohibition of forced or compulsory labour under the ECHR has already been dealt with in this paper. The traditional counterpart of this prohibition - the right to obtain work,[1] is not included in the ECHR. Its absence reflects the general bias of the ECHR toward the protection of political and civil rights. In many cases, the ECtHR has emphasised that the ECHR does not guarantee the right to obtain work.[2] However, in several recent cases, the ECtHR was less categorical about the absence of this guarantee and acknowledged the rights of applicants which were closely linked with the right to work. For example, in *Campagnano v. Italy*,[3] the ECtHR found the violation of article 8 as the applicant was unable to engage in any professional or business activity on account of the entry of her name in the bankruptcy register. In *Mateescu v. Romania*[4] it found the violation of article 8 as the applicant was not allowed to simultaneously practise two professions in the private sphere. In *Volkov v. Ukraine*[5], unfair dismissal was found to be in breach of the right to respect of private life with the result that the State was obliged to ensure the applicant's reinstatement.

Therefore the ECtHR implicitly acknowledged certain facets of the right to work, such as the right to choose freely one's occupation or the right to seek remedy when unfairly dismissed. Numerous cases on the protection of employee's freedom of expression, privacy, freedom of religion or association demonstrate that the ECtHR has developed a particular approach to the protection of these rights in employment relations. The ECtHR's jurisprudence has allowed scholars to posit that if a person is dismissed on account of his beliefs or his political opinions or

1 Fons Coomans, Education and Work. In: Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (editors). International Human Rights Law. Oxford University Press, 2013. P. 252.

2 ECtHR, Panfile v. Romania (13902/11) 20/03/2012, para. 18, Sobczyk v. Poland ( 25693/94and 27387/9510 February 2000; Dragan Cakalic v Croatia (17400/02)15 September 2003; Torri and Others v. Italy and Bucciarelli v. Italy (11838/07 and 12302/07) 24/01/2012.

3 ECtHR, Campagnano v. Italy (77955/01) 23/03/2006

4 ECtHR, Mateescu v. Romania (no. 1944/10) 14/01/2014.

5 ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013

activities, the legitimacy of the decision to dismiss will be subject to review by the ECtHR in light of the various substantive provisions of the ECHR.[6]

This Part will focus on cases where the violation of employees' ECHR rights lead to dismissal or when the dismissal (either the substantive reasons behind the decision to dismiss or the process by which the dismissal was carried out) itself amounted to the violation of the ECHR. Strasbourg jurisprudence on this matter is valuable for the development of domestic labour laws as well as for litigants, as the ECtHR's conclusions might in ceratin countries result in the need to re-consider the domestic courts' final judgments. It also influences national policy in so far as it establishes the binding interpretation of Convention rights in the context of employment relations.

This Part will consequently deal with the ECtHR's approach to the employee's right to private life, freedom of religion, expression and association with a particular focus on cases of unfair dismissals. The research of these rights is united within this Part as in contrast to rights analysed in Part IV, which were incorporated into the ECHR at a later stage; they represent genuine Convention rights and can be called civil liberties at work.

[6] Klaus Samson, The "Berufswrlwt" problem revisited — Views from Geneva and Starsbourg in Les normes internationales du travail: un patrimoine pour l'avenir : mélanges en l'honneur de Nicolas Valticos edited by Juan Somavía. ILO, 2004. P. 45

# Chapter 1. Employee's right to respect for private life



ARTICLE 8. Right to respect for private and family life

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The right to respect for private and family life is the most complex ECHR right in the context of employment relations. It will be referred to in all parts of this paper as the list of employment rights encompassed by these provisions is very wide. In this chapter these provisions will be dealt with *sensu stricto*, so far as they establish the employee's right to have her privacy protected and restricting unfair dismissals.

## 1.1. Protection of an employee's privacy under article 8 of the ECHR

The ECtHR has repeatedly stated that it is impossible and unnecessary to attempt an exhaustive definition of what "private life" in article 8 means.[7] In fact, over the

[7] ECtHR, Niemietz v. Germany (13710/88) 16/12/1992, para. 29.

years it appears to have explored increasing facets of this right. Scholars note that the material scope of the right to privacy as a part of the right to respect for private life has also been extended considerably.[8] However it is interesting to observe that the ECtHR has never stated in any case that the right to privacy was infringed. In the majority of cases, the applicant's claim of a breach of privacy has been interpreted by the ECtHR to mean a violation of the right for personal identity, such as a person's name or picture being disclosed inappropriately,[9] or ensuring protection against the interception of telephone calls made from office,[10] as well the monitoring of personal internet usage.[11] Professor Feldman noted in 1997 that article 8 does not purport to protect privacy as such, but rather the right to respect for a number of rather more "concrete" interests (private life, family life, home and correspondence) which are best described as privacy-related rights.[12] It seems that the situation has not changed since then. The term "privacy" remains alien to the ECtHR. However, it is rather productive for scholars to analyse cases on the gathering and protection of personal data and on prohibitions of interference with private aspects of life in order to understand the Court's approach to workplace privacy.[13]

In the present research both types of interferences with employee's privacy will be dealt with.

### 1.1.1. Private life and the emergence of the protection of employee's privacy on the European scene

[8] Bart van der Sloot, Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data" (2015) 31(80) Utrecht Journal of International and European Law 25, available at: http://www.ivir.nl/publicaties/download/1555 (accessed 20.05.2015).

[9] ECtHR, Köpke v. Germany (420/07) 05/10/2010.

[10] ECtHR, Halford v. The United Kingdom (20605/92) 25/06/1997, para. 44.

[11] ECtHR, Copland v. The United Kingdom (62617/00) 03/04/2007, para. 42.

[12] Feldman David, The developing scope of Article 8 of the European Convention on Human Rights. European Human Rights Law Review (1997), p. 265-274.

[13] See, for example, approach of prof. F. Hendrickx and Aline Van Bever in F. Hendrickx and Aline Van Bever, Article 8 ECHR: judicial patterns of employment privacy protection In: Filip Dorssemont, Klaus Lörcher, Isabelle Schömann, editors. The European Convention on Human Rights and the Employment Relation. P.p. 183-208. Certain scholars suppose that the right for privacy was acknowledged by the Court in the Niemitz case, see Sjaak Nouwt, Berend R. de Vries, Introduction In: Sjaak Nouwt, Berend R. de Vries, Corien Prins, editors. Reasonable Expectations of Privacy? Eleven country Reports on Camera Surveillance and Workplace Privacy. Cambridge University Press, 2005. P. 4.

As early as in 1890, the famous Judge Brandeis and Samuel D. Warren wrote that the right to life should be understood in an evolutionary way and include the right to be let alone.[14] The authors justified their conclusion by referring to the intensity and complexity of life, arguing that solitude and privacy had become more essential to the individual due to modern enterprise invading upon his privacy and by which such intrusion subjected an individual to mental pain and distress, such pain being far greater than could be inflicted by mere bodily injury.[15] It is interesting to note that contemporary scholars also refer to the analogous circumstances for urging the protection of privacy, adding globalisation and the threats of terrorism to the mix.[16]

More than 100 years have passed since the publication of that article but neither scholars nor case law have elaborated a unique definition of privacy or private life. It is traditional to criticise existing notions of privacy for being extremely vague and lacking a precise legal connotation.[17] However, there are two predominant understandings of privacy: as a right to liberty, which is characteristic for North Americans,[18] or as being an inherent part of an individual's dignity and autonomy - the prevailing European view.[19] Some European scholars perceive privacy as the logic of self-determination and of informational control on personal data,[20] or as a sphere that ought to be free from State intrusion.[21] These opinions are, however, in

[14] Samuel D. Warren and Louis D. Brandeis, The Right to Privacy. Harvard Law Review, Vol. 4, No. 5 (Dec. 15, 1890), p. 193.
[15] Ibid, p. 196.
[16] See Ugo Pagallo, La tutela della privacy negli Stati Uniti d'America e in Europa: modelli giuridici a confronto. Giuffrè Editore, 2008. P. 37
[17] See Sharon Rodrick, Open justice, privacy and suppressing identity in legal proceedings: 'what's in a name?' and would anonymity 'smell as sweet'? In: Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick, editors. Emerging Challenges in Privacy Law: Comparative Perspectives. Cambridge University Press, 2014, p. 372; Stéphanie Arnaud, Analyse économique du droit au respect de la vie personnelle: application à la relation de travail en France. Revue internationale de droit économique, 2007, vol. t. XXI, 2, issue 2, p. 129-156.
[18] James Q. Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty// 113 Yale L.J. 1151 2003-2004, p. 1160, see also Edward J. Eberle, Dignity and Liberty: Constitutional Visions in Germany and the United States, Praeger, 2002, where the author contrasted the countries' alternative visions of human dignity, autonomy or self-determination,and freedom of expression within the constitutional orders of two states.
[19] See, for instance, Mark Freedland, Data Protection And Employment In The European Union. An Analytical Study of the Law and Practice of Data Protection and the Employment Relationship in the EU and its Member States. Oxford, 1999. Available at: http://ec.europa.eu/social/main.jsp?catId=708 (accessed 20.05.2015).
[20] Stéphanie Arnaud, see supra note 17, p. 130.
[21] Katri Lõhmus, Caring Autonomy: European Human Rights Law and the Challenge of Individualism. Cambridge University Press, 2015. P. 48.

line with the understanding of privacy as personal autonomy. The same approach has also been proposed by Russian scholars.[22]

Resolution 428 (1970) of the Consultative Assembly of the Council of Europe defined the right to privacy as the right to live one's own life with a minimum of interference. Thus, the 70th Council of Europe already attached weight to the necessity to protect privacy. Later, its contributions were complemented by the Resolution of the Committee of Ministers on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector in 1973,[23] and the Resolution on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector in 1974.[24] In 1981 the Convention No. 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data was adopted by the CoE.[25] The European Union adopted the EU Data Protection Directive 95/46/EC which provided that protecting personal data was one way of ensuring individual privacy.[26] It included and further developed the general principles of the CoE Convention No. 108, while also providing a unified approach for regulation and control by the relevant data protection authorities.[27]

These instruments demonstrate the shift to the protection of personal data. Increased attention to this facet of privacy protection is understandable as the problem of data storage and of access to such information has been a new challenge for modern society. The ECtHR has largely based its decisions relating to data protection on these documents.[28] It has also referred to Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy,

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[22] Zykina, TA The right of employees to privacy (private) life (Pravo rabotnika na neprikosnovennost' lichnoy (chastnoy) zhizni). Pravovedeniye. 2007. № 1. pp. 81 - 87

[23] Adopted by the Committee of Ministers on 26 September 1973, available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=589402&SecMode=1&DocId=646994&Usage=2 (accessed 20.06.2015).

[24] Adopted by the Committee of Ministers on 20 September 1974, available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=590512&SecMode=1&DocId=649498&Usage=2(accessed 20.06.2015).

[25] Available at: www.conventions.coe.int/Treaty/en/Treaties/Html/108.htm(accessed 20.06.2015).

[26] Scholars noticed that this directive often conflict with U.S. interests in workplace transparency and information-flow for security reasons, see Sebastien Ducamp, Cheryl Tama Oblander, and Heather Benno, Recent Developments in EU Employee Data Privacy Law// Privacy & Data Security Law Journal April 2007, p. 473.

[27] Paul De Hert, Hans Lammerant, Protection of Personal Data in Work-related Relations. STUDY. European Parliament, Brussels, 2013, p. 14.

[28] ECtHR, Rotaru v. Romania [GC] (28341/95) 04/05/2000, para. 43.

adopted on the 26th June 1998,[29] which confirmed that the right to privacy was guaranteed by article 8 of the ECHR, and concluded that there was no need for the CoE to adopt another Convention dealing with privacy.

Turning to national privacy protection, it must be noted that the right to respect for private life is provided for in most European constitutions. The recognition of this right was also a first step towards the protection of employee's privacy. The introduction of a fundamental rights discourse in labour law and the constitutionalisation of the workplace have enabled privacy rights to develop.[30] General claims for privacy protection have been translated in employment legislations by adopting special legislation, such as in the case of the Finnish Act on Protection of Privacy in Working Life adopted in 2001,[31] or by introduction of relevant norms to main employment laws such as the Statuto dei Lavoratori in Italy in 1970,[32] Estatuto de los Trabajadores in Spain in 1995,[33] or the Labour Code in Russia in 2001.[34] It is interesting to note that French provisions on employment privacy were inspired by a particular publication of Professor G. Lyon-Caen, one of the leading French labour scholars, on computerised forms of monitoring of workers.[35]

The protection of private life in the context of employment relations is a very interesting subject, as the workplace is not a "private" place in the strict sense. The peculiarity of employment relations, namely the requirement for subordination of the employee and control of the employer over the employee, are other factors highlighting the unique approach that needs to be taken to protecting the private

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[29] ECtHR, Hannover v. Germany (No. 2)(40660/08 60641/08) GC 07/02/2012, Rothe v. Austria (6490/07) 04/12/2012.

[30] F. Hendrickx and Aline Van Bever, see supra note 13, p. 183.

[31] See Frank Hendrickx, Protection of workers' personal data in the European Union. 2002. Available at: http://ec.europa.eu/social/main.jsp?catId=708 (accessed 20.05.2015).

[32] Article 4 of Statuto Dei Lavoratori Legge 20 maggio 1970 n. 30) prohibits audio-video methods of workers'surveillance; See also Codice In Materia Di Protezione Dei Dati Personali. Decreto legislativo 30 giugno 2003, n. 196) that sets out requirements to protect personal information including the sphere of employment relations

[33] Article 4 provides for the right of employees to respect for their privacy and dignity. Available at: http://www.boe.es/buscar/doc.php?id=BOE-A-1995-7730 (accessed 29.05.2015)

[34] Chaper 14 of the Russian Labour Code "The protection of employee's personal data" which prohibits any gathering or use of such information without the consent of employee.

[35] Frank Hendrickx, Protection of workers' personal data in the European Union. 2002. Available at: http://ec.europa.eu/social/main.jsp?catId=708 (accessed 20.05.2015).

life of an employee. Researching the extent of a worker's right to privacy, Michael Ford noted that it becomes most problematic when the values of privacy collide with property ownership. Prof. Hendrickx pointed that the employee's right for privacy is qualified by the employer-employee relationship and therefore the employee's privacy expectations must necessarily and be accordingly "reduced".[36]

By the end of 1990's, national courts were confronted by cases requiring them to rule on employee's rights to privacy. The Spanish Supreme Court, for example, stated that the right to workplace privacy does not prevent employers from monitoring employees.[37] The Spanish Constitutional Court in 2000 acknowledged that video surveillance and video recording of employee could be justified if the employer had detected irregularities in the performance of the employee's contract, and such surveillance and recording did not (in those circumstances) constitute a violation of the employee's privacy if it resulted in an appropriate, necessary and balanced measure for assessing the veracity of the employer's suspicion of serious violations on the part of employee.[38] In France, rules were made as far back as 1987 stating that employer could not open employees' personal lockers unless employees were notified in advance and the lockers were inspected for reasons of periodic cleaning.[39] In 1998, the French Cour de Cassation, in a case concerning secretly installed video cameras in a petrol station cash booth, ruled that the employer was not entitled to rely on evidence obtained in breach of individuals' rights via those cameras so as to justify dismissals.[40] The same line of reasoning can be found in the decisions of Italian Courts. The Supreme Court of Cassation in 2000 stated that photos obtained from cameras installed at the workplace in order to check the fraudulent conduct of the worker, without informing the latter, could

[36] F. Hendrickx and Aline Van Bever, see supra note 13, p. 185.

[37] Tribunal supremo 4ª, sentencia de 19/07/1999, cited from Colección De Sentencias Relativas A La Actuación De Detectives Privados, APDPE. Sevilla, 2010. Available at: http://apdpe.es/sites/default/files/Jurisprudencia.pdf (accessed 20/05/2015).

[38] Sentencia 186/2000 de Tribunal Constitucional, 10/07/2000, available at: http://www.boe.es/boe/dias/2000/08/11/pdfs/T00029-00036.pdf (accessed 20/05/2015).

[39] See Société Gantois, Conseil d'Etat, 12 June 1987 and Centre Renault Agriculture, Conseil d'Etat, 9 October 1987, cited from Ford Michael, Two conceptions of worker privacy. Industrial Law Journal 31.2 (2002), p. 146.

[40] Ibid.

not be used as evidence in the proceedings.[41] In later cases, however, Italian courts have expressed a more employer-friendly legal position, permitting "defensive" control of employee's mail in order to establish a behaviour which endanger the employer's business provided that it did not amount to "significant elimination of any form of guarantee of the employee's dignity and privacy."[42]

Therefore, by the time the ECtHR was presented with its first workplace privacy dispute – *Halford v. UK*,[43] many European states had already considered how to protect the privacy of employees whilst balancing it against the employer's managerial interests.

The roots of the Strasbourg protection of the employee's private life can be found in *Niemitz v. Germany*, already referred to above. The ECtHR considered the application of the lawyer who claimed that the search of his office amounted to the violation of respect of private life. It acknowledged that the notion of "private life" should include activities of a professional or business nature "since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."[44] Such an interpretation was found to be consistent with the essential object and purpose of article 8.[45]

The ECtHR's conclusions, as expressed in *Peck v. UK*,[46] are also valuable for the protection of employees' privacy in so far as this case concerned the protection of privacy in public places. The ECtHR stated that even interpersonal relations conducted in a public context may fall within the scope of "private life". Developing a framework for considering cases concerning employees' privacy is the ECtHR's most significant contribution to the protection of employees. As noted above, European countries approached this issue in different ways such that

[41] Suprema Corte di Cassazione, Sentenza 17 giugno 2000 n. 8250, cited from Monica Gobbato, Controllo dei lavoratori: le pronunce del Garante e la recente giurisprudenza, published 21.07.2006. Available at: http://www.altalex.com/documents/news/2006/07/21/controllo-dei-lavoratori-le-pronunce-del-garante-e-la-recente-giurisprudenza (accessed 20.05.2015).
[42] Corte di Cassazione, sezione Lavoro, Sentenza 3 aprile 2002, n. 4746.
[43] ECtHR, Halford v. UK (20605/92) 25/06/1997
[44] ECtHR, Niemietz v. Germany (13710/88)16/12/1992, para. 29.
[45] Ibid, para. 31.
[46] ECtHR, Peck v. The United Kingdom (44647/98) 28/01/2003, para. 57.

the ECtHR could not create high standards of workplace privacy protection given this would evidently lack the support of European consensus and might even infringe the rights of employers. The focus of the ECtHR on the lawfulness and necessity of interference with an employee's private life, as well as its consideration of the concept of a "reasonable expectation of privacy", provides national courts with a range of tools by which to consider such cases.

### 1.1.2. Reasonable expectation of privacy

Cases on employee's privacy as adjudicated by the ECtHR can be divided into two main groups –data protection, in which the Court deals with the legality of it being collected, used and disclosed; and the protection from interference with private life by activities such as workplace monitoring usingvideo surveillance, searches of offices and equipment and the interception of workplace telephone calls.

The establishment of the employee's reasonable expectation of privacy is the main instrument for determining the interference with the applicant's private life. It was always used in the adjudication of the second group of cases. In contrast, the ECtHR referred to this factor only briefly in one case dealing with the use of personal information. Thus in Pay v. UK,[47] considering the application by a probation officer who was dismissed for being engaged with the activities of BDSM community (bondage, domination and sadomasochism), the ECtHR stated that when people knowingly participate in activities which may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor.[48]

The concept of a "reasonable expectation of privacy" came to Strasbourg jurisprudence from the United States of America (USA). It was developed in privacy cases considered under the Fourth Amendment to the United States (US) Constitution, which protects its citizens from unreasonable searches and seizures of their persons, houses and belongings which might be carried out by the

[47] ECtHR, Pay v. UK (32792/05) inadmissible 16.09.2008.
[48] Ibid.

government. In 1967, the US Justice John Marshall Harlan suggested a test for "reasonable expectation of privacy" in *Katz v. United States*. He proposed two standards by which it could be determined whether a person had a reasonable expectation of privacy. First, a person must have had an actual (subjective) expectation of privacy in the given situation. Secondly, that society more broadly would accept this expectation as being reasonable (i.e., the objective counterpart).[49] Subsequently, this test has been used in the jurisprudence of other countries, in particular in France, Canada and Australia.[50]

Scholars note that the establishment of the "reasonable expectation of privacy" by the ECtHR is based on concrete context of a given situation and the relevant facts. The reasonableness of these expectations depends, amongst other things, on the questions of whether the employee was informed about the fact that an interference with his right to privacy was possible; the presence of specific indications of the possibility of such interference; or the (permanent) nature and the impact of the interference.[51] The ECtHR's jurisprudence provides several examples of an employee's "reasonable expectation of privacy".

- In Halford v. UK[52] the ECtHR held that the applicant, who claimed that the interception of telephone calls made from workplace violated her right to respect for private life, had a reasonable expectation of privacy in respect of calls made from her work telephone. The applicant, who was at the relevant time the highest-ranking female police officer in the United Kingdom, brought discrimination proceedings after being denied promotion to the rank of Deputy Chief Constable over a period of seven years. She alleged that her telephone calls had been intercepted with a view to obtaining information to use against her in the course of the proceedings, the respondent State did not contested this point.[53] The ECtHR found that telephone calls made from business premises may be covered by the

[49] Sjaak Nouwt, Berend R. de Vries, see supra note 3, p. 3.
[50] Toby Mendel, Etude mondiale sur le respect de la vie privée sur l'Internet et la liberté: d'expression. UNESCO, 2013. P. 123
[51] F. Hendrickx, A.V. Bever, see supra note 13, p. 189.
[52] ECtHR, Halford v. United Kingdom (20605/92) 25/07/1997
[53] Ibid, para. 47.

notions of "private life" and "correspondence" within the meaning of Article 8.[54] In order to establish the expectation of privacy, the ECtHR gave weight to the following details: the applicant was not warned about the possibility that her calls might be intercepted; one of the telephones in her office was specifically designated for her private use; and she had been given the assurance, that she could use her office telephones for the purposes of her sex-discrimination case.

- In a similar case considered 10 years later, Copland v. UK,[55] the ECtHR applied the same line of reasoning to the collection and storage of personal information relating to the use of the telephone, e-mail and internet at the workplace. The applicant was employed by Carmarthenshire College, a statutory body administered by the State. She became aware that enquiries were being made into her use of e-mail at work when her step-daughter was contacted by the College and asked to supply information about e-mails that she had sent to the College. According to the State, the employer was monitoring the applicant's phone calls, e-mails and the internet usage in order to ascertain whether the applicant was making excessive use of College facilities for personal purposes. The State argued that its activities were lawful as the College was authorised under its statutory powers to do "anything necessary or expedient" for the purposes of providing higher and further education. The ECtHR was not convinced by these arguments. It stated that the applicant had a reasonable expectation as to the privacy of calls made from her work telephone, as well as in relation to her use of e-mail and the internet[56] because she had not been warned about the possibility of this use being monitored,[57] and telephone calls from business premises, e-mails sent from work and information derived from the monitoring of personal internet usage are protected under article 8. The establishment of the interference with the right for private life required the ECtHR to proceed to consider whether the interference was lawful. As there were no provisions at the relevant time, either in general domestic law or in the governing instruments of the College, regulating the

[54] ECtHR, Halford v. United Kingdom (20605/92) 25/07/1997, para. 44.
[55] ECtHR, Copland v. the United Kingdom (62617/00) 03/04/2007.
[56] Ibid, para. 42.
[57] Ibid.

circumstances in which employers could monitor employees' use of telephone, e-mail and internet, the ECtHR concluded that the interference was not "in accordance with the law" as required by article 8-2 of the ECHR.[58]

▪ In *Peev v. Bulgary*, the ECtHR applied the test of a reasonable expectation of privacy in a case involving unauthorised searches undertaken by an employer in the applicant's office. The applicant, an expert at the Criminology Studies Council of the Supreme Cassation Prosecutor's Office, wrote a letter which was published in a daily newspaper. In that letter, he criticised the Chief Prosecutor. After the letter was published his office was sealed off and searched. During the search, a draft resignation letter was found and that draft was then used as the basis for formally terminating his employment.

The ECtHR had to consider whether the applicant had a reasonable expectation of privacy at his workplace. In the ECtHR's opinion, the applicant had such an expectation, if not in respect of the entirety of his office, then at least in respect of his desk and his filing cabinets where a great number of personal belongings were stored. The ECtHR presumed that the privacy of a workplace desk was implicit in habitual employer-employee relations. As the employer did not adopt any regulation or policy discouraging employees from storing personal papers and effects in their desks or filing cabinets, there were no arguments to demonstrate that the applicant's expectation was unwarranted or unreasonable.[59]

The ECtHR concluded that this interference with the applicant's right for private life violated article 8 of the ECHR as it was not in accordance with law; the last because at the relevant time there were no provisions either in general domestic law or in the governing instruments of the employer which permitted it to carry out searches in employees' offices – except in the context of a criminal investigation which clearly did not apply in this case.

▪ In the most recent case of *Köpke v. Germany*[60] the ECtHR, for the first time, found that video surveillance of an employee made without her consent was

[58] ECtHR, Copland v. UK, para. 48.
[59] ECtHR, Peev v. Bulgary, para. 43.
[60] ECtHR, Köpke v. Germany (420/07) inadmissible 05/10/2010.

permissible and not a violation of her rights under article 8. The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance operation carried out by her employer with the help of a private detective agency. The ECtHR, in contrast to its decisions in *Peev*, *Halford* and *Copland,* did not enter into an analysis of the applicant's reasonable expectation of privacy. Instead, it briefly noted that this was not a necessarily conclusive factor. The ECtHR in this case seems to develop the idea, set out earlier in *Copland*, that: "the monitoring of an employee's telephone, e-mail or Internet usage at the place of work may be considered "necessary in a democratic society" in certain situations in pursuit of a legitimate aim."[61]

As the applicant was employed by a private employer, the ECtHR considered the case in light of the positive obligation of the State to strike a fair balance between the applicant's right to respect for her private life at work versus both her employer's interest in protecting its property rights, guaranteed by Article 1 of Protocol no. 1 to the ECHR, and the public interest in the proper administration of justice. The ECtHR found that the State did not fail to provide a legal framework for privacy protection, as the relevant domestic courts considered the case in accordance with the developed case law of the Federal Labour Court, which provided a mechanism for striking the balance between competing rights of an employer and those of an employee.

Having satisfied itself as to the reasoning of the State's domestic courts the ECtHR emphasised following factors which they said the State had were correctly evaluated in the process of balancing property rights versus employee's privacy:

1. The video surveillance was only carried out after losses had been detected during stocktaking in the department in which she worked;
2. The surveillance measure was limited in time and restricted in respect of the area;
3. The footage obtained was processed by a limited number of persons and used solely for the purposes of terminating the the applicant's employment;

[61] ECtHR, Köpke v. Germany (420/07) 05/10/2010.

4. The covert video surveillance of the applicant served to clear from suspicion the other employees who were not guilty of any offence.
5. There had not been any other equally effective means to protect the employer's property rights which would have interfered to a lesser extent with the applicant's right to respect for her private life.

Having regard to the due consideration of all these circumstances by national courts the ECtHR concluded that the domestic authorities had struck a fair balance between the applicant's right to respect for her private life under article 8 and both her employer's interest in the protection of its property rights and the public interest in the proper administration of justice. It therefore dismissed the application as manifestly ill-founded.

In the final part of its decision, the ECtHR stated that these competing interests might be given different weights in the future, having regard to the extent to which intrusions into private life are made possible by new, more and more sophisticated technologies. This stance should be understood as the readiness of the ECtHR to find there has been a violation of an employee's privacy, giving less weight to employer's rights, if the interference will affect essential aspects of private life or if it will justified by less important arguments.

### 1.1.3. In accordance with law

In broadening the scope of private life in *Niemitz*, the ECtHR noted that the coverage of professional activities would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by article 8-2.[62] Therefore the interference is permissible if it is in accordance with the law, pursues a legitimate aim and is necessary in democratic society.

The first test is particularly interesting in the cases on protecting an employee's privacy. The ECtHR had stated that the phrase "in accordance with the law" requires, at a minimum, compliance with domestic law. The quality of that law was also relevant, because it was expected to provide protection against arbitrary interference with individuals' rights under article 8 and be sufficiently clear in its

[62] ECtHR, Niemitz v. Germany(13710/88) 16/12/1992, para. 31.

terms to give indivdiuals an adequate indication as to the circumstances in which and the conditions on which the State would be entitled to resort to measures affecting those rights.[63] The ECtHR also required that the law in question be accessible to the individual concerned; moreover the individual should be able to foresee the consequences of those laws for him or herself.[64]

In four cases lodged by public servants, the ECtHR found that there had been a lack of provisions aimed at protecting employees against interferences with their rights to respect for private life and correspondence. Accordingly, in all 4 cases the ECtHR found the violation of article 8.[65]

- In *Köpke v. Germany*, the ECtHR implied that a legal framework must be proportionate to the severity of the threat to human rights; more serious threats required more serious safeguards.[66] It found that as **covert video surveillance at the workplace on suspicions of theft** did **not affect essential aspects** of private life, the requirement of lawfulness could be satisfied by reference to the jurisprudence of the German Federal Labour Court. That jurisprudence elaborated important limits on the admissibility of such video surveillance, safeguarding employees' privacy rights against arbitrary interference by domestic courts.

- In *M.M. v. UK*,[67] the ECtHR, taking into account the seriousness of the interference with applicant's private life, conducted a particularly rigorous analysis of the safeguards in the system by which criminal records were retained and could be disclosed. This case is a remarkable example of the application of severe qualitative requirements to the relevant provisions. The applicant was cautioned for kidnapping her grand-son in 2000; this information had to be retained for 5 years but was later extended to her life-span according to changes in practice of the Police Service in Northern Ireland. In 2006, the applicant was offered employment

[63] ECtHR, Malone v. The United Kingdom (8691/79) 02/08/1984, para. 68.
[64] ECtHR, Madsen v. Denmark (58341/00) inadmissible 07/11/2002.
[65] ECtHR, Halford v. The United Kingdom (20605/92) 25/06/1997, para. 44; Copland v. UK, para. 48; Peev v. Bulgaria (64209/01) 26/07/2007, para. 44; Radu v. Moldova(50073/07) 15/04/2014, para. 29-32.
[66] Laurens Lavrysen, Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights In: Yves Haeck, Eva Brems, editors. Human Rights and Civil Liberties in the 21st Century. Springer Science & Business Media, 2013, p. 96.
[67] ECtHR, M.M. v. UK (24029/07) 13/11/2012, para 198.

as a Health Care Family Support Worker, subject to vetting. She was asked to disclose details of prior convictions and cautions. She accordingly disclosed information about her actions in 2000, as well as the fact that she had been cautioned for the incident. As was required by the form she was asked to complete, she also consented tobeing the subject of a criminal record check. Her potential employer obtained the criminal record check and withdrew the offer of employment, taking into account the caution for child abduction. The applicant argued that retention of the caution data engaged her right to respect for her private life because it had affected her ability to secure employment in her chosen field.

The ECtHR established that there were no relevant domestic statutory provisions on the retention and disclosure of cautions. The recording of cautions in Northern Ireland was made under the police's common law powers to retain and use information for police purposes. The ECtHR noted that both the recording and, at least, the initial retention of all relevant data are intended to be automatic.[68] No distinction regarding how the information was to be stored, or how long it was required to be stored, was made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution was spent. [69] The ECtHR highlighted the absence of clear legislative framework for the collection and storage of data, the lack of clarity as to the scope, extent and restrictions of the common law powers of the police to retain and disclose caution data, as well as the absence of any mechanism for independent review of a decision to retain or disclose data.

"The cumulative effect of these shortcomings" led the ECtHR to conclude that the retention and disclosure of the applicant's caution data in this instance could not be regarded as being in accordance with the law and therefore violated her rights under article 8.[70] The ECtHR has thus set a high standard for provisions on retention and disclosure of police data, and underlined the need of flexibility in approach to relevant issues such that different circumstances can be taken into

[68] ECtHR, M.M. v. UK (24029/07) 13/11/2012, para 198.
[69] Ibid, para 204.
[70] Ibid, para. 207.

account accordingly. This case can be seen as a kind of development of the "Thlimmenos rule" to treat differently persons whose situations are significantly different.[71] It is interesting to note that *M.M.* judgment lead to the introduction of a filtering mechanism in Irish police data retention rules, so that old and minor cautions and convictions could no longer be automatically disclosed on a criminal record certificate. Since 2013, disclosure may only be made after taking into account the seriousness and age of the offence, the age of the offender and the number of offences committed by the person.[72]

▪ In *Radu v. Moldova*,[73] which concerned a hospital's disclosure of medical information, on request of the applicant's employer, the Police Academy, about the pregnancy of the applicant who was a lecturer, the ECtHR was not convinced that the State's reference to the domestic law on Access to Information justified the interference. It noted that this law had not been referred to by the Supreme Court of Justice, which had merely stated that the hospital was entitled to disclose the information to the applicant's employer, without citing any legal basis for such disclosure. The ECtHR ts emphasised that this law and all the relevant domestic and international laws expressly prohibited disclosure of such information and that in some jurisdictions, such disclosure even amounted to a prima facie criminal offence. Therefore the ECtHR concluded that the interference with the applicant's private life was not "in accordance with the law" and violated article 8. Accordingly, there was no need for the ECtHR to go further and to examine whether the interference pursued a legitimate aim or was "necessary in a democratic society".

▪ In certain cases, the ECtHR, having established the lack of relevant legislation in the respondent State's domestic legal systems, has been satisfied instead by existing employer's policies which themselves provide some privacy protection to its employees. For example, in cases of obligatory drug tests, such as in *Wretlung*

[71] ECtHR, Thlimmenos v. Greece [GC] (No. 34369/97), 06/04/ 2000, para. 44. Similarly, ECtHR, Pretty v. UK (2346/02), 29/04/2002, par. 88.

[72] Information about the execution of this judgment is available at official site of the CoE: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp (accessed 20.05.2015).

[73] ECtHR, Radu v. The Republic of Moldova (50073/07) 15/04/2014

*v. Sweden*,[74] the ECtHR noted that the requirement of lawfulness in countries where labour issues were mainly regulated by the parties on the labour market can be satisfied by the establishment of relevant provisions in collective agreements or the employer's policy.[75] In this case, the applicant who worked as a cleaner at the nuclear plant claimed that the compulsory drug testing was in breach with article 8 of the ECHR as an employee's refusal to undergo the tests could lead to his or her dismissal from the job. It is interesting to note that the central collective agreement in force did not provide for the conducting of any drug or alcohol tests on the employees by employers. On the other hand, the local collective agreement which introduced at the plant a drug policy programme, involving (inter alia) compulsory drug and alcohol tests, was not signed by the applicant's trade union. However, the employer subsequently issued a policy, containing the same obligations of all employees as did the local collecting agreement which the applicant's trade union had not signed.[76]

The ECtHR did not, in this case, give weight to the refusal of applicant's trade union to sign the relevant provisions of collective agreement. It relied completely on the approach of Swedish Labour Court which recognised the employer's right to manage and organise the work as a general legal principle. The right to carry out control measures was deduced from the right to manage and organise the work.

The ECtHR's broad approach to the perception of "lawfulness" in the context of interference with applicants' privacy provides countries with multiple possibilities in handling employee's privacy and facilitates the reconciliation of the employee's right for private life and the management rights of the employer. The ECtHR's case law in this area demonstrates that the States, in order to comply with either positive or negative obligations under article 8, have to do at least one of the following: introduce relevant legislation to protect employees' privacy; elaborate a particular approach of national courts to this issue; or to ensure the adoption of relevant policies or rules on the enterprise or local level.

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[74] ECtHR, Wretlund v. Sweden (46210/99) inadmissble 09.03.2004.
[75] Similar conclusions can be found in ECtHR, Madsen v. Denmark (58341/00) inadmissble 07.11.2002
[76] ECtHR, Wretlund v. Sweden (46210/99) inadmissble 09.03.2004

### 1.1.4. Necessary in democratic society

Where the lawfulness of an interference has been established, the ECtHR will turn to an analysis of its necessity in democratic society. This test enables the ECtHR to balance the rights concerned (usually the employee's privacy versus employer's right to manage the activities) taking into account the particular circumstances of the case.

Two similar cases discussed below concern data protection, in the context of the employer's ability to gather urine samples for drug and alcohol tests. Some scholars refer to this type of cases as centring on the protection of so-called "bodily privacy".[77] The ECtHR's reasoning in these cases matters for Europe because in the majority of European countries there are no express provisions in relation to bodily privacy and approaches differ significantly between jurisdictions. In the United Kingdom, for example, work drug testing is increasing in importance:[78] the Employment Practices Data Protection Code, issued by the Information Commissioner, states that testing for drugs and/or alcohol must be proportionate to the aim to be achieved and should only be carried out on workers whose drug or alcohol consumption would put at risk the safety of others.[79] In Italy, a Workplace Drug Testing (WDT) law took effect from 2008 and applied to workers involved in public/private transportation, oil/gas companies, and explosives/fireworks industry with the aim to ensure public safety for the community.[80] In Poland and the Czech Republic, workplace drug and alcohol testing is generally prohibited.[81]

The ECtHR's approach to the necessity of conducting drug tests on employees could provide general guidelines for finding a balance between the employee's

[77] See, for instance, Constance E. Bagley, Managers and the Legal Environment: Strategies for the 21st Century, 8th edition. Cengage Learning, 2015, p. 332; more on bodily privacy in Stefano Scoglio, Transforming Privacy: A Transpersonal Philosophy of Rights. Greenwood Publishing Group, 1998. PP. 109-112.

[78] Verstraete, Alain G., and Anya Pierce, Workplace drug testing in Europe. Forensic Science International 121.1 (2001) pp. 2-6.

[79] Alain Verstraete, Workplace Drug Testing. Pharmaceutical Press, 2011. P. 114.

[80] Kazanga, Isabel, et al. Prevalence of drug abuse among workers: Strengths and pitfalls of the recent Italian Workplace Drug Testing (WDT) legislation. Forensic science international 215.1 (2012) pp. 46-50.

[81] Danielle Urban, U.S. Drug-Testing Rules Do Not Translate Overseas. Published 12.08.2014. Available at: www.shrm.org/hrdisciplines/global/articles/pages/us-drug-testing-rules.aspx (accessed 30.05.2015)

right to privacy and the employer's rights, and help members of the CoE create a framework of protection based on the interpretation of the ECHR.

The fact scenarios in *Madsen v. Denmark*[82] and *Wretlund v. Sweden* are quite similar. In both applications the employees argued that the obligatory testing system itself amounted to the violation of their right for private life. In *Madsen* the applicant, a passenger assistant in a Danish shipping company, argued that employer's requirement for employees to pass random control measure (by means of providing a urine sample) violated article 8. In *Wretlund*, the applicant was an office cleaner at a nuclear plant who had no access to sensitive areas of the plant, and he claimed that the compulsory drug testing program instituted by his workplace was in breach of article 8.

In both cases, the ECtHR attached great weight to the legitimate aims of "public safety" and "the protection of the rights and freedoms of others". Both applicants argued that they were not directly responsible for the safety of the ship nor the nuclear plant respectively. The ECtHR pointed out in *Wretlund* that in cases of emergency the applicant could be required to perform tasks with importance for the safety of the plant. In *Madsen*, the ECtHR found that all crew members on board were part of the safety crew and had to be able to perform functions related to the safety on board at any time. The Court also noted that domestic courts had found the use of drugs by other employees of the Shipping company. Therefore a legitimate aim had been established in each of the cases.

Examining the proportionality of interference, the ECtHR took into account the following circumstances, as established by the national courts:

- Employees were appropriately informed about the possibility of such tests being conducted;
- The frequency of tests (once a year in *Madsen* and once in three years in *Wredlund*)
- Advance notice (In *Wredlund* employees were notified about a week in advance of the test;employees were not notified in advance in *Madsen*)

[82] ECtHR, Madsen v. Denmark (58341/00) inadmissble 07.11.2002

- Coverage of all employees without any exception;
- The way of testing and any further use of obtained data (in both cases, testing had to be performed in private and the results were disclosed only to persons involved in the drug policy for the purpose of detecting the employees' possible consumption of alcohol and drugs).

An examination of the factors set out above led the ECtHR to conclude that the assumed interferences were, in these instances, justifiable on the basis that they were "necessary in a democratic society," and declared each of the applications as being manifestly ill-founded. These decisions were criticised for the application of proportionality test in the same way as national courts do.[83] However, this point is an advantage of the ECtHR's review as it demonstrates to the countries, where proportionality test is not applied, a valuable tool for adjudication of disputes on employee's privacy.

In *Leander v. Sweden*, the ECtHR touched upon an important facet of informational privacy – the right to access one's personal information. Mr Leander complained that he had been prevented from obtaining permanent employment and had been dismissed from provisional employment on account of certain secret information held by the terminating employer, which allegedly named him as a security risk. The information related to his security risk assessment had not been disclosed him. Mr Leander complained that he should have been provided with the information in question. The application was lodged under articles 8, 10 and 13 of the ECHR. The jurisprudence of the ECtHR demonstrates that applicants are more successful in seeking access to their data (as stored by the public sector)[84] when they applicants combine their right to receive information, set out in article 10, with a demonstrated connection that failure to receive the information about

[83] J. Mouly, J-P. Marguénaud, L'alcool et la drogue dans les éprouvettes de la CEDH : vie privée du salarié et principe de proportionnalité, Recueil Dalloz Sirey : hebdomadaire, No. 1 (2005), p. 36.

[84] There are opinions that a positive obligation to provide information could be deduced from article 10 only in theory, see Hins, Wouter, and Dirk Voorhoof, Access to state-held information as a fundamental right under the European Convention on Human Rights. European Constitutional Law Review 3.01 (2007) pp. 114-126. Available at: http://www.coe.int/t/dghl/standardsetting/media/ConfAntiTerrorism/HinsVoorhoofBackground.pdf (accessed 30.05.2015).

themselves allegedly interferes with their right to respect for private or family life as set out in article 8.[85]

In *Leander* the ECtHR began by establishing the necessity in collecting peronal information and the fact that it was stored in registers not accessible to the public. In addition, the information was only used for the purpose of assessing the suitability of candidates for employment in posts important to national security. It stated that the lack of communication of the information in question could not by itself warrant the conclusion that the interference was not "necessary in a democratic society in the interests of national security", as non-communication was aimed at the efficacy of the personnel control procedure. The ECtHR did not explain how the communication of information could influence the personnel control procedure and proceeded with answering the question of whether the Swedish personnel control system provided the applicant with necessary safeguards in order to meet the requirements of article 8-2, concluding that the State did not violate article 8. Considering the case in light of article 10, the ECtHR observed that the right to freedom to receive information does not provide a right of access to a register containing information on the applicant's personal position, nor does it embody an obligation on the State to impart such information to the individual.[86]

In such situations, when public security overweighs the applicant's right to respect for private life, the existence of an effective remedy in case of an interference occurring becomes particularly important. However, the ECtHR by 4 votes to 3 found that "the aggregate of the remedies" (the control procedure by the National Police Board, the control by the Chancellor of Justice and the Parliamentary Ombudsman and the possibility of making an appeal to the

[85] See ECtHR, Leander v. Sweden (9248/81) 26/03/1987, Gaskin v. United Kingdom(10454/83) 07/07/1989, Guerra and others v. Italy(14967/89) 19/02/1998.

[86] In later cases the ECtHR was less rigorous and clarified that if a secret service file was used to justify restrictive measures against an individual, it must contain information making it possible to verify whether the secret surveillance measures taken were lawfully ordered and executed or not. Cited fromFranziska Boehm, Information Sharing and Data Protection in the Area of Freedom, Security and Justice: Towards Harmonised Data Protection Principles for Information Exchange at EU-level. Springer Science & Business Media, 2011. P. 78-79. See, for example, ECtHR, C.G. and others v. Bulgaria (1365/07) 24/04/2008.

Government) satisfied "the conditions of article 13 in the particular circumstances of the case" even in the absence of the impartial and independent Court. Judges Pettiti and Russo noted in their Partially Dissenting Opinion that an independent authority should be able to determine the merits of an entry in the register and even whether there has been a straightforward clerical error or mistake of identity - in which case the national-security argument would fail. The dissenting judges in this case emphasised that the State could not be the sole judge in its own cause in this sensitive area of human-rights protection and held that there had been a breach of Article 13.

This case had a very interesting follow up which proved that the dissenting judges were absolutely right. The applicant obtained access to the materials in question in 1997 and found out that his having been categorised as a security risk was based solely on the grounds of his belonging to the movement against the Vietnam War and that the State had, at the time of the case being adjudicated, completely misled the Commission and the ECtHR.[87]

On 27 November 1997, the Swedish Government made a statement officially stating that there was not, in 1979 nor then, any grounds on which to label Mr Leander a security risk; that it was wrong that he was dismissed from his job as a carpenter at the museum; and, as compensation for the unjust infringement of his rights, awarded him compensation of 400,000 Swedish crowns.[88]

The conclusion to the Leander story might teach the ECtHR to be more cautious with concluding that the lack of communication of the information cannot not by itself warrant the conclusion that an interference was "necessary in a democratic society". This case demonstrates the need to undertake a more detailed analysis of the necessity of interference. It also highlights the need to have impartial reviews of similar applications by independent bodies, such as the Supreme Administrative

[87] The Leander case: challenge to European court decision. Statewatch: monitoring the state and civil liberties in the UK and Europe, vol 7 no 6 November - December 1997. Available at: http://www.statewatch.org/subscriber/protected/sw7n6.pdf (accessed 30.05.2015).
[88] Ibid.

Courts in Belgium, France and Italy.[89] Control over the processing of personal data has in fact become "a precondition for the effective protection of other civil, social and political rights"[90], and labour rights in particular. The ECtHR's approach to this subject is crucial becausein certain legal systems national courts are obliged to follow it. For example, the Constitutional Court of Latvia viewed the denial of access to an investigation file, in the case of dismissal of a public servant, as a restriction on the right to respect for private life and justified such an interference with the reference to the Leander judgement.[91]

### 1.1.5. Positive obligations of the States

The majority of cases considered in this section concerned public employees. In these judgments and decisions the ECtHR outlines in some detail the acceptable scope of State interference with its employee's privacy, i.e. the limits of permissible negative interference. The establishment of the State's positive obligations in the sphere of privacy protection is especially valuable for the development of relevant national policies and should be examined further.

The ECtHR's approach to the positive duties of the States can be summarised as imposing an obligation to adopt regulations (the duty to regulate) and to provide for their effective implementation (the duty to act).

▪The duty to regulate

The ECtHR's requirements as to the quality of a State's legal framework dealing with privacy protection can be understood as requiring the State to adopt regulations of employee's privacy protection either by introducing relevant legislation or through case law, soft law or employer's regulations. The choice of those methods is left to the states. However, the Court has implied that that a more intrusive interference should be regulated by law.[92]

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[89] As pointed out by Dissenting Judges Pettiti and Russo in their Partially Dissenting Opinion in Leander v. Sweden (9248/81) 26/03/1987.

[90] Giorgio Resta, Dignità, persone, mercati. Giappichelli Editore, 2014. P. 156.

[91] See ECtHR, Ternovskis v. Latvia (33637/02) 29/04/2014, para.26. It is interesting to note that in this case the lack of access to secret files was one of the submissions which led the Court to conclude the violation of the right for fair trial (see para 72, 74).

[92] See ECtHR, Kopke v. Germany(420/07) 05/10/2010, M.M. v. UK (24029/07) 13/11/2012.

The State should ensure that in case of conflict between the rights of an employee and those of the employer, a proper balancing exercise taking all relevant circumstances into consideration should be undertaken.[93]

The general quality requirement to these regulations was formulated in the *Malone* case[94] as precision, certainty, and foreseeability. In *M.M. v. UK* the ECtHR went further and said that States needed to ensure there were clear, detailed rules governing the scope and application of measures interfering with the right for private life and providing minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrary use.[95] In respect of data protection the ECtHR emphasised that appropriate and adequate safeguards which reflect the principles elaborated in applicable data protection instruments and prevent arbitrary and disproportionate interference with article 8 rights must be ensured at each stage of data processing. [96]

- Duty to act

As far as the informational privacy of public employees is concerned, the State has a positive duty under article 8 to implement effective methods of data protection. This facet of privacy protection was developed by the ECtHR in *I. v. Finland*.[97] The applicant worked on fixed-term contracts as a nurse in the polyclinic for eye diseases in a public hospital; being HIV-positive she herself attended the the polyclinic for infectious diseases at the same hospital as a patient as well. At that time, hospital staff had unfettered access to the patient register which contained information on patients' diagnoses and their treating doctors. The applicant's colleagues thus became aware of her disease. Upon her request, the

[93] See, for instance, Kopke v. Germany (420/07) 05/10/2010, or Madsen v. Denmark(58341/00) 07/11/2002, Wretlund v. Sweden (46210/99) inadmissble 09/03/2004.
[94] ECtHR, Malone v. The United Kingdom (8691/79) 02/08/1984.
[95] ECtHR, M.M. v. UK (24029/07) 13/11/2012, para. 195.
[96] Ibid.
[97] ECtHR, I. v. Finland ( 20511/03) 17/07/2008, see also Råman Jari, European Court of Human Rights: Failure to take effective information security measures to protect sensitive personal data violates right to privacy–I v. Finland, no. 20511/03, 17 July 2008. Computer Law & Security Review 24.6 (2008), pp. 562-564.

hospital's register was amended so that only the treating clinic's personnel had access to its patients' records. The applicant complained before the ECtHR that there had been a failure on the part of the hospital to guarantee the security of her data against unauthorised access, or, in ECHR terms, a breach of the State's positive obligation to secure respect for her private life by means of a system of data protection rules and safeguards.[98] The ECtHR noted that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. The State had to provide the practical and effective protection to exclude any possibility of unauthorised access to her personal data stored by her employer. [99]

The judgment was met by scholars with much enthusiasm. Certain scholars supposed that as a result of the *I. v. Finland* judgement, signatory states to the ECHR could be found liable for failing to ensure that private parties had taken positive steps to prevent privacy violations by other private parties.[100] This opinion seems too optimistic at first glance; however, it might become true once applications by private employees are lodged claiming shortcomings in the State's control over employee privacy protection.

### 1.1.6. Conclusions

A former President of the ECtHR, R. Ryssdal, once wrote that cases on privacy protection suggest that article 8 might develop towards a right of informational self-determination as the collection, storage and handling of personal information by public powers might constitute an interference with the right enshrined in the first paragraph of article 8.[101] Scholars have noted that the willingness of the Strasbourg Court to adapt the ECHR to take account of the potential dangers that

[98] ECtHR, I. v. Finland (20511/03) 17/07/2008, para. 37.
[99] Ibid, para. 47.
[100] Purtova Nadezhda, Private law solutions in European data protection: Relationship to privacy, and waiver of data protection rights. Netherlands Quarterly of Human Rights 28(2010), p. 179. Available at: https://pure.uvt.nl/portal/files/1247976/Purtova_PRIVATE_LAW_SOLUTIONS_IN_EUROPEAN_DATA_PROTECTION_100712.pdf (accessed 25.05.2015).
[101] R Ryssdal, Data Protection and the European Convention on Human Rights. In: Data Protection, Human Rights and Democratic Values, Proceedings of the 13th Conference of Data Protection Commissioners held 2–4 October 1991 in Strasbourg (Strasbourg: CoE, 1992), p. 42.

new or uncontrolled forms of data processing create for individual liberties is the most positive aspect of the case law on article 8.[102]

In fact, in this area at least the ECtHR is responding to the challenges of the modern world. The jurisprudence of the Strasbourg Court reveals that the right to privacy is continuously engaged when authorities seek, collect, store, process, compare, or disseminate personal information about a data subject.[103]

The protection of personal data has, within the most recent 20 years, been included in the legislation of a large majority of members of the CoE.[104] However, certain countries have intrinsic difficulties with privacy protection at work. One leading Russian labour scholar noted that, as nothing could be "private" in the Soviet Union, the idea of privacy did not penetrate easily into the citizens' consciousness nor the State's legal systems.[105] The ECtHR's legal positions on protection of an employee's privacy (both in respect of data protection and protection from interference with his private life at the workplace) might serve as a kind of vector for the development of relevant national legislations and case law.

As there is a general trend towards broadening the roles of personal information use[106] as well as towards constant surveillance of employees' activities with the use of diverse equipment,[107] the ECtHR's jurisprudence on the lawfulness and necessity of the interference with an employee's privacy has particular value. The american experience, where more than one fourth of all employers have fired workers for misusing e-mail and nearly one third have fired employees for

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[102] Bygrave Lee A., Data protection pursuant to the right to privacy in human rights treaties. International Journal of Law and Information Technology 6.3 (1998), p. 284.

[103] Feldman D., Civil Liberties and Human Rights in England and Wales (2nd edn). Oxford: Oxford University Press, 2002, p. 530, cited from Benjamin J. Goold, Daniel Neyland, New Directions in Surveillance Privacy. Routledge, 2013, p. 80.

[104] See information on national laws providing data protection on the official site of the Council of Europe: http://www.coe.int/t/dghl/standardsetting/dataprotection/National%20laws/National_laws_en.asp (accessed 30.06.2015).

[105] A. Lushnikov Protection of employee's personal data: comparative and legal comments of chapter 14 of the Russian Labour Code (Zashchita Personal'nykh Dannykh Rabotnika: Sravnitel'no-Pravovoy Kommentariy Gl.14 Trudovogo Kodeksa Rf) Upravlenie personalom. 2009, № 17. Available at: http://www.top-personal.ru/issue.html?2150 (accessed 20.05.2015).

[106] Mark Freedland, Data Protection and Employment In The European Union. An Analytical Study of the Law and Practice of Data Protection and the Employment Relationship in the EU and its Member States. Oxford, 1999. Available at: http://ec.europa.eu/social/main.jsp?catId=708 (accessed 20.05.2015).

[107] Rowena Rodrigues, The surveillance industry in Europe In: David Wright, Reinhard Kreissl, editors. Surveillance in Europe. Routledge, 2014. Pp. 101-149

misusing the internet,[108] demonstrates that the ECtHR is absolutely right to confirm that an employee's telephone calls, e-mail, correspondence, use of internet from work premises, personal items stored at the workplace, and personal information should be protected against unnecessary interference under article 8, and requiring that such interferences with the right for privacy should be in accordance with the law and proportionate to the legitimate aim pursued by the employer.

### 1.2. Dismissal and the violation of the right to respect for private life

It is not controversial that every dismissal affects the private and family life of persons. However, the ECtHR is generally reluctant to ensure the protection from unfair dismissal – recognising that it constitutes a violation of the applicant's private life, but without finding the violation of any other Convention right.

The attempt to find a general approach to the ECtHR's adjudication of cases on unfair dismissal revealed a lack of coherency in the legal positions taken from case to case. For example, in the *Nenkova-Lalova v. Bulgaria*[109] case, which dealt with the dismissal of a journalist, the ECtHR stated that first of all it should ascertain whether the disciplinary dismissal amounted to an interference with the exercise of a ECHR freedom, or whether it lay within the sphere of the right to employment, a right not secured in the ECHR or its Protocols. However, 8 years earlier, the ECtHR ruled that some aspects of the right to employment affects "private life"[110] and considered the case on the ban on taking up private sector employment in the light of article 8 of the ECHR. The same year, the ECtHR had considered as admissible the application made by a cook who had been dismissed from his job cooking at an airport restaurant for (according to the respondent State) security reasons. The ECtHR considered his application admissible, rejecting the State's submission that the right to work is not guaranteed by the ECHR.[111] Since then, the ECtHR has repeatedly found that dismissal from a work position amounted to the

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[108] Electronic Monitoring & Surveillance Survey (2007) Available at: http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/ (accessed 20.04.2014).

109 ECtHR, Nenkova-Lalova v. Bulgaria (35745/05) 11/12/2012, para. 50.

110 ECtHR, Sidabras and Dziautas v. Lithuania (55480/00 59330/00) 27/07/2004, para. 47.

111 ECtHR, Jonasson v. Sweden (59403/00) admissibility decision 30/03/2004

interference with the right to respect for private life.[112] In the most recent case on the dismissal of professor,[113] it was even reluctant to investigate the nature of dispute and adjudicated the case in spite of its evident "employment law" grounds.

The lack of clarity in determining whether the dispute on unfair dismissal could be legitimately considered under the provisions of the ECHR has caused concern among some ECtHR's judges about "the risk of transforming the European Court of Human Rights into a higher-instance labour court adjudicating on the merits of labour disputes".[114] However, some clarity might be revealed through the systematisation of unfair dismissal cases considered under article 8.

Unfair dismissal and the right to respect for private life might be linked in several ways. This right might be infringed when the information used to justify the dismissal was of private character – in this situation the violation of the right for private life precedes the dismissal, determines it and the link with human right is direct. In the second situation, the right is infringed as a consequence of unfair dismissal, which was unfair due to the violation of some other ECHR provision and as a result, affected the dismissed person's right to establish and develop relationships with others. The link with the right for private life can be referred to as a consequential link in these circumstances.

### 1.2.1. When the reason of dismissal amounts to the interference with the right for private life

The cases considered in this subparagraph have a couple of fact scenarios in common: in the first fact scenario; the employer, who after becoming aware of some aspect of the employee's private life, came to the conclusion that the employee could no longer continue to be employed under new circumstances. In some cases, this inability for the employee to continue to be employed was prescribed by law – when it concerned homosexuality of military personal in the

112 ECtHR, İhsan Ay v. Turkey (34288/04)21/01/2014, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013, Özpınar v. Turkey ( 20999/04) 19/10/2010.
113 ECtHR, Rubins v. Latvia (79040/12) 13/01/2015.
114 ECtHR, Rubins v. Latvia, Dissenting Opinion of Judges Mahoney and Wojtyczek, para. 16.

UK[115], for example, or in the case of the collaboration of civil servants with the GDR Ministry of National Security in Germany.[116] In other scenarios, the information of private character received by the employer affected the employer's reputation, and revealed the lack of the employee's loyalty; for example, "unsuitable" clothing and make-up of a judge,[117] or in relation to the BDSM activities of a probation officer who in his job worked with sex offenders.[118]

According to article 8-2 of the ECHR, the right to respect for a person's private and family life might be restricted in accordance with the law if it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. This clause is traditionally read by the ECtHR as imposing upon national authorities and courts the obligation to balance fairly the rights or freedoms concerned.

Therefore, in adjudicating cases under article 8 the ECtHR answers the following questions: whether the interference was prescribed by law and pursued one or more legitimate aim(s); if it was necessary in democratic society; and if the restriction of the right was proportionate to the aim pursued. Thus in in the *Knauth v. Germany*[119] the ECtHR, considering the application of a nursery-school teacher who was dismissed for having collaboratied with the GDR Ministry of National Security, held the dismissal to be proportionate to the legitimate aim pursued. This conclusion was reached as the ECtHR found it legitimate for the employer to dismiss the applicant from the civil service, after examining each individual case of employees who had collaborated with the GDR Ministry of National Security, and above all those who had lied about their collaboration to their new employer as had occurred in the case before them.

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[115] ECtHR, Lustig-Prean and Beckett v. UK (31417/96, 32377/96) 27/09/ 1999; Smith and Grady v. UK (33985/96, 33986/96 ) 27/09/1999; Perkins and R. v. UK (43208/98 and 44875/98) 22/10/2002; Beck, Copp and Bazeley v. UK (48535/99, 48536/99 and 48537/99) 22/10/2002.

[116] ECtHR, Knauth v. Germany (41111/98) inadmissible 22/11/2001

[117] ECtHR, Özpınar v. Turkey (20999/04) 19/10/2010

[118] ECtHR, Pay v. UK(32792/05) inadmissible 16/09/2008

119 ECtHR, Knauth v. Germany (41111/98) inadmissible 22/11/2001

In *Ihsan Ay v. Turkey,*[120] the ECtHR noted that the dismissal of the applicant, a teacher, in the result of security check pursued legitimate aim, but was disproportionate to it. The applicant was dismissed as the employer's investigation revealed an erased criminal conviction. The Court pointed that the teacher was convicted for acts no longer considered to be criminal offences and which had been committed more than twenty years earlier. On this basis it concluded that the interference was not necessary in a democratic society.

In the majority of cases concerning unfair dismissal, the ECtHR considers whether the employer could have applied a less restrictive sanction to the employee, and takes into account particular circumstances of the employee's situation.

The cases on dismissal of church employees illustrate this approach. In *Schüth v. Germany*,[121] the ECtHR stated that an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees; however, a decision to dismiss based on a breach of such duty cannot be subjected only to a limited judicial scrutiny without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality.[122] In this case the applicant argued that his dismissal from the post of organist and choirmaster in a Catholic parish on the grounds that he had violated the basic regulations of the Catholic Church on employment with the Church, by engaging in an extra-marital relationship with another woman who was expecting his child, was in breach with the respect for his private life. Although the applicant was employed by a private organisation the ECtHR held that the State had a positive obligation to ensure the respect for private life fairly balancing it with the church's autonomy in considering the employment dispute.[123] The same approach was taken by the ECtHR in the *Obst v. Germany*[124]

[120] ECtHR, Ihsan Ay v. Turkey (34288/04) 21/01/2014.
[121] ECtHR, Schüth v. Germany (1620/03) 23/09/2010.
[122] Ibid, para. 69.
[123] ECtHR, Schüth v. Germany(1620/03) 23/9/2010, para. 66-69.
[124] ECtHR, Obst v. Germany (425/03) 23/09/2010.

case, where the applicant was dismissed from the post of director of public relations of the Mormon Church for Europe for adultery.

A careful scrutiny of the national ECtHR's judgments in *Schüth* reveals that due attention was not paid to the circumstances of the case, including factors such as the nature of the post, the good reputation of the applicant during 14 years of church service, and the limited opportunities of finding another job. However, all these details were considered by the German tribunals in *Obst*: national judgments explained why the Church had not been obliged to inflict a less severe penalty, and the consequences of dismissal were analysed taking into account relatively young age of the applicant.[125]

In *Schüth* the ECtHR stated that the duty of loyalty cannot be interpreted as a "personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce,"[126] whilst in *Obst* it underlined the necessity of absolute fidelity to the spouse within the Mormon Church, and the particular importance of the duty of loyalty of representatives of the Church.[127]

These judgments demonstrate that the ECtHR's consideration of dismissals in the private sphere is limited to an analysis of the national judicial system's adjudication of the employment dispute. As it noted in *Schüth*:

> *"..by putting in place both a system of employment tribunals and a constitutional court having jurisdiction to review their decisions, Germany has in theory complied with its positive obligations towards citizens in the area of labour law, an area in which disputes generally affect the rights of the persons concerned under Article 8 of the Convention".*[128]

In contrast to dismissals of private employees, applications by civil servants about having been unfairly dismissal are considered in a deeper way as the ECtHR revises the grounds and the procedure of dismissal verifying compliance with the negative obligations of the state under article 8.

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[125] ECtHR, Obst v. Germany (425/03) 23/09/2010, para. 48.
[126] ECtHR, Schüth v. Germany, para. 71
[127] ECtHR, Obst v. Germany, para. 50, 51.
[128] ECtHR, Schüth v. Germany, para. 59.

In this context, the cases on the dismissal of homosexual military men are of particular interest as the whole policy of the British Armed Forces was considered in the light of ECHR and was found to be in breach of article 8.[129] The ECtHR found it striking that the absolute and general character of the policy of dismissal in these cases took into consideration only their innate personal characteristics.

In *Lustig-Prean and Beckett v. United Kingdom* the applicants were dismissed based on the results of an investigation which included detailed interviews on their sexual orientation, sexual practices and even searches of the second applicant's locker. The ECtHR decided that these investigations and the consequent administrative discharge of the applicants on the sole ground of their sexual orientation interfered directly with the applicants' rights to respect for their private lives. Considering whether this interference might be justified the ECtHR noted that the State might impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness which must be "substantiated by specific examples,"[130] which were not provided by the State. The investigation process was found to be of "an exceptionally intrusive character" incompatible with article 8 of the ECHR; thus the "privacy" facet of the case was outlined. The impact of the dismissal on the right guaranteed by article 8was also considered. The ECtHR noted the profound effect of the disciplinary discharges on the careers and prospects of the applicants as they would have difficulties in transferring essentially military qualifications and experience to civilian life.[131] Therefore the ECtHR's conclusion on the violation of article 8 was substantiated by two types of arguments – the intrusive character of the investigation of the applicants' private lives and the consequences of their dismissal.

Investigations intoan employee's private life was scrutinised by the ECtHR in other civil servant dismissal cases. Thus in *Özpınar v. Turkey*, the ECtHR found the violation of the article 8 in the case of the dismissal of a judge for inappropriate

[129] ECtHR, Lustig-Prean and Beckett v. UK (31417/96, 32377/96) 27/09/ 1999, para. 86, 98.
[130] Ibid, para. 82
[131] Ibid, para. 85.

conduct, because during the disciplinary procedure against him the applicant was not provided protection against arbitrariness as required by article 8 of the ECHR. Therefore, the ECtHR integrated a "procedural" facet to article 8 which is particularly important for unfair dismissal cases. It also mentioned that the reputation of the applicant was at stake in this case and reiterated that the right of a person to protect his reputation is covered by article 8 as part of the right to respect for private life.[132]

Evaluating the scope of the protection of a judge's private life, the ECtHR noted that the ethical duties of a magistrate may impinge on privacy, when private conduct affects the image or reputation of the judiciary.[133] However, the public servant must be able to predict, to some extent, the consequences of private actions and, if necessary, to receive adequate safeguards.[134] Here, the applicant did not receive the report of the disciplinary investigation and was not able to familiarise himself with the witness testimony before the dismissal; furthermore, many aspects of her private life which were examined in the report had no relevant connection with her professional activities. Based on these findings, the ECtHR concluded that the interference was not proportionate to the legitimate aim pursued. The attention of the ECtHR both to the "quality" of the dismissal procedure and to the content of the private life information which served as a basis of the dismissal is an important feature of this judgement.

In the case *Pay v. the UK*[135] the ECtHR considered inadmissible an unfair dismissal application made by a probation officer who worked with sex offenders. The applicant was dismissed from his post for being closely engaged with the activities of a firm which advertised itself as the builder and supplier of products connected with bondage, domination and sadomasochism ("BDSM") and as an organiser of BDSM events and performances. He argued that the dismissal was disproportionate to the legitimate aim of protecting the reputation of the Probationary Service. As in the *Özpınar* case the ECtHR agreed that the dismissal

[132] ECtHR, Lustig-Prean and Beckett v. UK (31417/96, 32377/96) 27/09/ 1999, para. 47.
[133] ECtHR, Özpinar c. Turquie (20999/04) 19/10/2010, para. 71
[134] Ibid, para. 76.
[135] ECtHR, Pay v UK(32792/05) inadmissible 16/09/2008.

of a specialist public servant was a very severe measure and affected his reputation.[136] However, this sanction was found to be justified and proportionate as the duty of loyalty, reserve and discretion dictated some restriction of private life activities for probation officers who had to maintain the respect of the offenders placed under their supervision, the confidence of the public in general and victims of sex crimes in particular. The ECtHR also took into account the initial unwillingness of the applicant to accept that his BDSM activities could damage the reputation of his employer and to remove pictures of himself on the internet site of his business. Commentators noted that if the applicant had voluntarily severedhis links with the BDSM organisation, the ECtHR could have decided the application admissible and rule that the dismissal was a disproportionate measure.[137]

Scholars opine that the ECtHR should apply the test of proportionality in a way to justify dismissal on the ground of off-duty conduct only if there was a clear and present impact or a high likelihood of such impact on work, and that a speculative and marginal danger does not suffice.[138] In this case, in the opinion of V. Mantovalou, the dismissal of Mr. Pay should have been deemed unlawful, "because the sole reason that led to it involved his engagement in conduct that he considered fulfilling in his life after work, in his private time", and no stringent test was employed in scrutinising the employer's decision.[139]

In my opinion, this decision demonstrates that the ECtHR applied the test of proportionality in a rather detailed manner, bringing sufficient reasons for the justification of the employer's decision to dismiss the applicant.

### 1.2.2. When the consequences of dismissal amount to an interference with the right for private life

The first reference to article 8 in the context of the consequences of dismissal may be found in the Commission's decision in the *C. v. The United Kingdom*.[140] The applicant impugned his dismissal stating, among other things, that it caused

[136] The same approach was used in ECtHR, Ihsan Ay v. Turkey (34288/04) 21/01/2014 para. 31.
[137] H Collins & V Mantouvalou, Private Life and Dismissal: Pay v UK (2009) 38 Industrial Law Journal, p. 138.
[138] Virginia Mantouvalou, Human Rights and Unfair Dismissal: Private Acts in Public Spaces.The Modern Law Review. Vol.71: Issue 6, 2008. P. 935-936.
[139] Ibid, p. 937.
140 EurCommHR, C. v. The United Kingdom case (11882/85) inadmissible 07/10/1987.

the loss of his home (being tied to the job) and much distress to himself and his family and thus violated article 8. The Commission assumed that the dismissal "could be said to have involved an interference with the applicant's Article 8 rights", but it was justified as being "necessary in a democratic society" for the protection of the rights and freedoms of the applicant's employer. The Commission thus established a logical link between the fairness of dismissal and the absence of an interference with the right for private life.

Further development of the ECtHR's approach to unfair dismissal took place in 2004, when the ECtHR considered the case *Sidabras and Dziautas v. Lithuania*.[141] The ban on former employees of the Secret Service being employed in various private sector activities was considered in the light of the ECHR. The applicants were dismissed from public service for collaborating with the Secret service at the time of the USSR, and could not find employment in the private sphere due to prohibitions under new legislation. Therefore, the case was more about access to employment than about unfair dismissal. However, as it will be demonstrated further, the ECtHR's reasoning here is valuable for the cases on unfair dismissal.

The State in this case argued principle inadmissibility of the application as it concerned the right for employment which is not guaranteed in the ECHR. The ECtHR stated that the right for private life secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality. Citing the *Niemietz v. Germany* case,[142] it emphasized that respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. It is interesting to note that the judgment includes a reference to Article 1 § 2 of the European Social Charter as a kind of justification of integration of the right to establish and develop relations with others.

The above-mentioned arguments led the ECtHR to conclude that the right for respect of private life was affected, but not violated. According to the Strasbourg

141 ECtHR, Sidabras and Dziautas v. Lithuania (55480/00 59330/00) 27/07/2004.
142 ECtHR, Niemietz v. Germany (13710/88)16/12/1992, para. 29.

jurisprudence it was enough to find that the discrimination was in the ambit of Convention rights to begin a consideration of the case under article 14. This pattern was used in the *Sidabras* case, thus the ECtHR left a highly controversial "integrative" road and considered the impugned ban on employment in light of the prohibition of discrimination.[143] It found a violation of article 14 in conjunction with article8 as the applicants were discriminated on the basis of being "former KGB collaborators".

The ECtHR's conclusion was criticised for dealing unsatisfactorily with the material scope of the ECHR, and for refraining from undertaking a thorough analysis of the importance of work for one's private life.[144] However, although the ECtHR did not go deeper into the interconnection between the right for respect of private life and the right to work, it laid down the foundation for considering cases on unfair dismissal as for the first time it linked the right to develop relations with the right to work, thus "substantially expanding the scope of the Court's control".[145]

This approach was further applied in the case of unfair dismissal which was largely similar with the Sidabras case. In *Rainys and Gasparavicius v. Lithuania*,[146] the applicants impugned the violation of their rights as a result of the application of the Law on the Evaluation of the USSR State Security Committee and the Present Activities of Permanent Employees of the Organisation. Under the provisions of this Law, the first applicant was dismissed from a private telecommunications company where he had worked as a lawyer and the second applicant was disbarred because they were "former KGB officers".

The applicants complained that the loss of their jobs **and** the ban on their finding employment in various private-sector spheres breached article 8 of the ECHR, taken alone and in conjunction with article 14. In contrast with *Sidabras*, the

143 Three judges in this cases stated that it should be considered only under art.8 of the ECHR, see opinions of Judges Mularoni, Loucaides, Thomassen in Sidabras and Dziautas v. Lithuania(55480/00 59330/00) 27/07/2004.

144 Mantouvalou Virginia, Work and Private Life: Sidabras and Dziautas v. Lithuania (2005). European Law Review Vol. 30, 2005. P. 575.

145 Sophie Garcia-Jourdan, De La Transition Démocratique En Lituanie À La Consécration Du Droit D'exercer Une Activité Professionnelle Dans Le Secteur Privé. Revue trimestrielle des droits de l'homme, 2005, vol. 16. P. 369.

146 ECtHR, Rainys and Gasparavicius v. Lithuania (70665/01 74345/01) 07/04/2005.

applicants here argued that their dismissals were in breach of article 8 of the ECHR. Unfortunately, the ECtHR decided it was unnecessary to consider the application under article 8 taken alone. In order to establish the link with article 14 it stated that **the dismissal affected directly the applicants' right to respect for their private lives**[147] and further found the violation of article 14 in conjunction with article 8.[148] This is the first explicit reference to the right for respect of private life in the case of an unfair dismissal, which paved the way for the appeal of unfair dismissals under the provisions of the ECHR and the reference to article 8 is now usual practice in such applications.[149]

There are three cases which are particularly interesting for a detailed analysis: The first, *I.B. v. Greece*,[150] is an example of the violation of article 14 in conjunction with article 8. The applicant, who was HIV-positive, was dismissed from a private company following complaints by co-workers unwilling to work with him. A lower domestic court acknowledged a violation of the applicant's rights, but the Court of Cassation quashed this decision, finding that the termination of an employment contract was not abusive if it was justified in the employer's interests. The Strasbourg Court found that there was an interference with the employee's right for respect of private life as the dismissal resulted in his stigmatisation and uncertainty surrounding his search for a new job. It further stated: "The fact that the applicant did find a new job after being dismissed does not suffice to erase the detrimental effect of his dismissal on his ability to lead a normal personal life".[151] Based on the judgment in *Kiyutin v. Russia*,[152] the ECtHR acknowledged the vulnerable status of HIV-positive persons which should result in

[147] ECtHR, Rainys and Gasparavicius v. Lithuania, para. 35.

[148] It is interesting to note that in 2015 the Court considered the applications from Sidabras, Dziautas and Rainy who complained about Lithuania's failure to repeal legislation ("the KGB Act") banning former KGB employees from working in certain spheres of the private sector, despite ECtHR judgments in their favour in 2004 and 2005. The Court found the violation of article 14 taken in conjunction with article 8 only in respect of Mr Rainy, whose claim of reinstatement was refused by the domestic courts as provisions prohibiting the employment of former KGB officers in the private sphere were in force. The violation in respect of other applicants were not found as, in the opinion of the Court, they did not demonstrate that they had been discriminated against after the ECtHR judgments in their case. See ECtHR, Sidabras and Others v. Lithuania (50421/08) 23.06.2015.

[149] ECtHR, Žičkus v. Lithuania (26652/02) 07/04/2009; Beçaj v. Albania (1542/13) inadmissible 24/06/2014; Milojević and others v. Serbia (43519/07 et al) admissibility decision 03/09/2013, still pending.

[150] ECtHR, I.B. V. Greece (552/10) 03/10/2013.

[151] Ibid, para. 72.

[152] ECtHR, Kiyutin v. Russia ( 2700/10) 10/03/ 2011.

narrowing of the margin of appreciation of the States. The ECtHR's analysis of the consideration of the case by national courts was rigorous: it pointed out cursory argumentation of the Court of Cassation and found that the competing interests were not balanced carefully and thoroughly. As the Greek Court did not adequately explain why the employer's interests prevailed over those of the applicant, the ECtHR decided that the State failed to weigh up the rights of the two parties in a manner required by the ECHR. It is interesting to note that this conclusion was additionally justified by the reference to the experience of other States in this sphere which showed that there was a clear general tendency towards protecting HIV-positive persons from any discrimination in the workplace.

In other cases, the ECtHR has stated that employment disputes generally affect the rights of the persons concerned under article 8 of the ECHR[153]. *I.B.* demonstrates that the reference to article 8 in the application of discriminative dismissal entitles the person to seek relief in the ECtHR. This conclusion might in theory be spread also to other claims on discrimination in employment. Therefore, article 8 has high antidiscrimination potential, in particular it is evident in cases of unfair dismissal where the right for respect of private life is affected the most.

The judgment in *Fernández Martínez v. Spain*[154] also demonstrates the potential of article 8 in the context of employment relations. This case concerned the non-renewal of a contract with a teacher of religion because he violated his obligation to fulfil his duties "without risking scandal". The applicant was a Roman Catholic priest who applied for a dispensation from celibacy and then married. He taught the Roman Catholic religion and morals in a state high school; his contract had to be renewed annually by the Bishop. He was a member of the Movement for Optional Celibacy ("**MOCEOP**"). In 1996, a newspaper published an article about this movement where the applicant expressed his views on celibacy which were in contrast with the Church rules; photos of the applicant and his family were published as well. In 1997 the Vatican dispensed him from celibacy but stated that

[153] For example, Schut v. Germany(1620/03) 23/9/2010, para. 59, Bigaeva v. Greece (26713/05) 28/05/2009.
[154] ECtHR, Fernández Martínez v. Spain (56030/07) 12/06/2014.

anyone so dispensed was barred from teaching the Catholic religion in public institutions unless the local bishop decided otherwise according to his own criteria and provided that there was no scandal. In September 1997, the local bishop decided not to renew the applicant's teaching contract.

It is evident that this case encompassed several ECHR rights: the rights for the freedom of expression (art. 9), the right to express opinions about official Church doctrines (art. 10) and the right to be a member of an organisation holding specific views on issues concerning religion (art. 11). In the ECtHR's view, however, the main issue in the present application lay in the non-renewal of the applicant's contract which affected his private and family life. Both the Chamber and the Grand Chamber reviewed the case solely in light article 8 of the ECHR, integrating to some extent the elements of protection of other ECHR rights but at the same time reducing the level of their protection.

It is curious to note that the consideration of the non-renewal of applicant's contract under article 8 was substantiated by the reference to the employee's presumption of renewal as long as he fulfilled the conditions of employment and there were no circumstances that might justify its non-renewal under canon law.[155] Therefore, non-renewal constituted a sanction entailing serious consequences for his private and family life.[156] The ECtHR's conclusion on the non-violation of article 8 was in its turn determined largely by the conduct of the applicant, who had knowingly placed himself in a situation that was incompatible with the Church's precepts.[157] This argument creates doubt as to whether the applicant could have had a presumption of the contract being renewed of contract if he had not voluntarily made public his views and his membership of MOCEOP. It seems that the consideration of the case in light of article 8 was a weak part of this decision, as it did not permit the applicant to count upon developed standards of protection of the freedom of expression which, in my opinion, was violated in this

[155] ECtHR, Fernández Martínez v. Spain, para. 112
[156] Ibid, para. 145.
[157] Ibid, para. 146.

case.[158]

The ECtHR's assessment of the State's compliance with article 8 was based on an estimation of the applicant's conduct and his compliance with the duty of loyalty towards the Church, which was the consequence of the autonomy of religious communities. It balanced the right for autonomy of religious communities and the applicant's right guaranteed by article 8 and came to the conclusion that the interefence with the right for respect of private life was not disproportionate in this case. It stated that a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the Church.[159]

This judgment was criticised as indicating that church authorities have reduced obligations to respect the fundamental rights of their personnel[160] and for giving disproportionate weight to the autonomous existence of religious communities, possibly excluding particular employees from protection against discrimination under employment law.[161] Another point of criticism might be added to these comments: the ECtHR seems to have overestimated the loyalty due to the Church owed by a public school teacher. It could have adopted the approach established in the *Vogt v. Germany*[162] case where it took into account that the applicant did not spread her political views in class. *Schut and Obst v. Germany* could be helpful as the ECtHR stated a less strict duty of loyalty was owed by employees who did not represent the Church. This case shows that the use of article 8 as a kind of "rubber" clause might indirectly cause the tolerance of violations of other ECHR rights.

In *Oleksandr Volkov V. Ukraine*,[163] the ECtHR took a very wide approach to the protection of social rights and for the first time in its practice required the State to

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[158] See in contrast Lombardi Vallauri v. Italy (39128/05) 20 October 2009 where the non-renewal of contract with professor of Catholic University was found to be in breach with the art. 10 of the Convention.

[159] ECtHR, Fernández Martínez v. Spain, para. 146.

[160] Kristin Henrard, The Effective Protection of the Freedom of Religion: The ECtHR's Variable Margin of Appreciation Regarding Religion–State Relations and the Rule of Law in "Belief, Law and Politics: What Future for a Secular Europe?" edited by Marie-Claire Foblets et al. Ashgate Publishing, 2014, p. 162.

[161] Stijn Smet, Fernández Martínez v. Spain: Towards a 'Ministerial Exception' for Europe? http://strasbourgobservers.com/2012/05/24/fernandez-martinez-v-spain-towards-a-ministerial-exception-in-europe/ (accessed 20.04.2015).

[162] ECtHR, Vogt v. Germany (17851/91) 26/09/1995, para. 60.

[163] ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013.

ensure the reinstatement of the unfairly dismissed applicant.

The applicant was a judge of the Ukrainian Supreme Court. In 2009, two members of the High Council of Justice ("**HCJ**") conducted preliminary inquiries into possible misconduct by Mr Volkov. They concluded that he had reviewed decisions delivered by Judge B., his wife's brother, and that he had made gross procedural violations. Following these inquiries, the President of the HCJ submitted two applications to Parliament for dismissal of Mr Volkov from his post. In 2010, the applicant was dismissed by Parliament. He complained before the ECtHR that article 6 had been breached because the proceedings before the HCJ had lacked impartiality and during the electronic vote in Parliament those who were present had used absent peers' voting cards to skew the vote. The applicant concluded that his dismissal from the post of judge had been an interference with his private and professional life under article 8.

It is interesting to note that the State, perhaps for the first time for this type of case, did not contest that there was a violation of the right for respect of private life. The traditional approach of the respondent states was to deny any connection between an applicant's dismissal and his or her private life.

The ECtHR established numerous violations of article 6 in the way in which the dismissal was carried out. In regard to article 8, it stated:

> *"the dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including relationships of a professional nature. Likewise, it had an impact on his "inner circle" as the loss of his job must have had tangible consequences for the material well-being of the applicant and his family. Moreover, the reason for the applicant's dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected".*[164]

This finding was further substantiated by the reference to the evident shortcomings of the disciplinary procedure. It was stated in particular that there was no practice establishing a consistent interpretation of the notion of "breach of

[164] ECtHR, Volkov v. Ukraine, Para. 166.

oath", no adequate procedural safeguards had been put into place to prevent arbitrary application of the relevant provisions. In addition to this, the national law had not provided any time-limits for proceedings to be taken against a judge for a "breach of [his] oath", which had made the discretion of the disciplinary authorities open-ended and undermined the principle of legal certainty. The absence of am appropriate scale of sanctions for disciplinary offences of judges was also mentioned.

These arguments of the ECtHR can be regarded as a development of the procedural guarantees under article 8 which are particularly important for disciplinary procedures. Legal positions of the ECtHR can be read as establishing certain criteria of disciplinary procedures under article 8: the specificity of the charge, the right of employees to read the materials that present the case against them, the adoption of set time-limits for these procedures, and the elaboration of an appropriate scale of disciplinary sanctions.

The ECtHR's justification of why the State had to reinstate the applicant is another interesting feature of this case. The shortcomings of the national system of disciplinary procedure in respect of judges caused the ECtHR to establish the need of reforming the system of judicial discipline. This conclusion lead to the consideration that the reopening of domestic proceedings would not constitute an appropriate form of redress for the violations of the applicant's rights. The ECtHR stated that by its very nature the situation found to exist in this case did not leave any real choice as to the individual measures required to remedy the violations of the applicant's ECHR rights. Having regard to the urgent need to put an end to the violations of the ECHR, it held that the respondent State s**hall secure the applicant's reinstatement to the post of judge of the Supreme Court** at the earliest possible date.

Since this judgment was handed down, Ukraine has made some steps in order to fulfil the general measures requested by the ECtHR.[165] The applicant was

[165] Ashchenko A., Zaikina Y., Ibadova L., Okhotnikova N., Chovgan V., The implementation of judgments of the European Court of Human Rights in Ukraine ( Ispolneniye resheniy Yevropeyskogo suda po pravam cheloveka v Ukraine). Khar'kov, Izdatel'stvo "Prava Lyudini", 2014. P. 127.

reinstated on the 5th February 2015.[166]

The remedy required from the State in this case is evidently revolutionary. On the one hand the possibility of such a prescription might render the protection of the rights of unfairly dismissed applicants more efficient. On the other hand, it creates doubt as to whether the ECtHR remained within its subsidiary role as an international body. As such, it gives support to those opponents of the ECtHR who claim the need for a restrictive approach to the interpretation of the ECHR.

### 1.3. Conclusions

The research of the ECtHR's jurisprudence under article 8 demonstrates that the Strasbourg bodies have created the basis for the protection of employees' privacy, and indisputably acknowledged a link between private life and employment, stating that unfair dismissal might violate the right to respect for private life. This acknowledgment "can shield an individual employee against employer domination", a possibility that was absent in countries such as the United Kingdom before its incorporation of the ECHR.[167]

It is important to note that the judgments considered in this section contributed not only to the protection of the rights of the applicants, but forced the States to adopt certain changes into their national labour law, enhancing the level of protection of the right to respect for private life at the workplace. In addition, the ECtHR provided domestic courts with the framework to determine the violation of this right. It urged states to adopt a clear legislative framework for the collection and storage of personal data, and for the protection of employees' privacy at the workplace.

The ECtHR's approach to the private life of employees has becomes wider with the years and there is an obvious trend of enlarging the scope of the ECHR upon employment relations with the use of this article. This observation permits us to

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[166] See information on the official site of the Ukrainian Supreme Court: http://www.scourt.gov.ua/clients/vsu/vsuen.nsf/(documents)/40758947BA3FE9EAC2257DE00054D6B5?OpenDocument&year=2015&month=02& (accessed 20.04.2015).

[167] Virginia Mantouvalou, Human Rights and Unfair Dismissal: Private Acts in Public Spaces.The Modern Law Review. Vol.71: Issue 6, 2008. P. P. 939.

argue that article 8 of the ECHR has a great potential in the field of employment law.[168] In particular, it might be referred to in cases of harassment or violations of occupational health and safety rules by the employer. This idea will be developed in the last chapter of the present work.

## Chapter 2. Employees' freedom of thought, conscience and religion and unfair dismissals



Article 9 of the ECHR is formulated largely in the same manner as article 8 and protects the freedom of thought, conscience and religion.

According to this article, everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change one's religion or belief and freedom, either alone or in community with others and in public or private, to manifest one's religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Turning to the employment cases considered in the light of this article, the focus will be on the definitions of employee's freedom of thought, conscience and religion (Subsection 2.1.), and how applications under article 9 are adjudicated (Subsection 2.2.). The employee dismissal cases considered in light of the violation of the freedom of religion can be divided into two main groups: cases regarding the

[168] This point of view is shared by other scholars, see, for example Rory O'Connell, The Right to Work in the European Convention on Human Rights. European Human Rights Law Review, No. 2, 2012, pp. 176-190; Virginia Mantouvalou, The Protection of the Right to Work through the European Convention on Human Rights, Cambridge Yearbook of European Legal Studies, Vol 16 2013-2014.

manifestation of religious beliefs of the employee at the work-place, which will be dealt with in the Subsection 2.3.; and cases concerning the failure of the employee to satisfy the requirement of loyalty towards a particular religion imposed by his or her employer (Subsection 2.4.).

## 2.1. Definitions of employees' freedom of thought, conscience and religion

The ECtHR has in numerous cases emphasised the fundamental nature of the rights guaranteed in article 9. In *Kokkinakis v. Greece*, it noted that article 9-2, unlike the second paragraphs of articles 8, 10 and 11, which cover all the rights mentioned in the first paragraphs of those articles, that of article 9-1 refers only to the "freedom to manifest one's religion or belief."[169] Therefore the freedom to hold beliefs and convictions is unconditional; the only limitation – specified in article 9itself – concerns the way in which this freedom is exercised.[170]

Should this article be read as providing absolute freedom of thought, conscience and religion of the employee at the workplace? This question will be answered in respect of the freedom of religion in the first place and then it will be analised in repsect of the employee's freedom of conscience.

▪The freedom of religion

The wording of article 9-1 emphasises the primary importance of the right to freedom of thought, conscience and religion and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs.[171] In *Ivanova v. Bulgaria*, the ECtHR acknowledged the applicant's absolute freedom of religion. In this case, the applicant was a swimming pool manager who was dismissed from her post because she (ostensibly) lacked the required higher education. The ECtHR established that the dismissal in fact took place on account of her religious beliefs and affiliation with the organisation Word of Life, thus

[169] ECtHR, Kokkinakis v. Greece (14307/88) 25/05/1993, para. 33.

[170] Jean-François Renucci, Article 9 Of The European Convention On Human Rights: Freedom Of Thought, Conscience And Religion. Human Rights Files, No. 20. Available at: http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20%282005%29.pdf (accessed 12.04.2015).

[171] ECtHR, Ivanova v. Bulgaria (52435/99)12/04/2007.

constituting an interference with her right to freedom of religion in violation of article 9 of the ECHR.[172] It expressed a very important legal position: the fact that the applicant's employment was terminated in accordance with the applicable labour legislation – by introducing new requirements for her post which she did not meet – failed to eliminate the substantive motive for her dismissal.

The ECtHR analysed the circumstances of the cases which were not taken into account by national courts, such as the persecution of the members of the Word of Life and the earlier dismissal of the director of the same school who had been affilated with this religious organisation. It concluded that the dismissal constituted a violation of article 9 as the employment of the applicant had been terminated on account of her religious beliefs. Thus the ECtHR acknowledged the absolute right of employee for the freedom of religion.

▪The freedom of conscience

The ECtHR and the former European Commission of Human Rights refrained from acknowledging the absolute character of the employee's freedom of conscience. In the early case of *Grandrath v. Germany*,[173] which concerned a Jehovah's Witness who sought to be exempted both from military and from substitute civilian service, alleging a violation of his freedom of conscience, the Commission found it superfluous to examine any questions of interpretation of the term "freedom of conscience and religion" used in article 9 and concluded that that provision had not been violated.[174] The ECtHR appears to have followed this approach and to consider applications on the violation of an employee's freedom of conscience only in light of other freedoms. In *Blumberg v. Germany*,[175] the applicant complained that the dismissal violated his freedom of conscience. He was dismissed from his job as a doctor, for refusing to perform a medical examination because of a "moral dilemma". The ECtHR did not consider the case in respect of freedom of conscience and noted that article 9 primarily protects the sphere of personal beliefs and religious creeds. Further, it went on to ascertain the

[172] ECtHR, Ivanova v. Bulgaria, para. 84.
[173] EurCommHR, Grandrath v. Germany (2299/64) 12/12/1966.
[174] Ibid, Para. 32-33.
[175] ECtHR, Blumberg v. Germany (14618/03) inadmissible 18/03/2008.

scope of protection of personal beliefs. The judgment in *Maestri v. Italy*[176] is another example of the ECtHR's shift from the protection of the freedom of conscience of employees. The applicant, a judge, alleged that the imposition of a sanction on him for being a Freemason amounted to a violation of articles 9, 10 and 11 of the ECHR. The ECtHR stated that the applicant's complaints fell most naturally within the scope of article 11 of the ECHR and considered them under that provision only.

The application of Ms Ladele in *Eweida and others v. UK* is the most vivid and the most recent example of the ECtHR's unwillingness to grant protection to the employee's freedom of conscience under article 9. Ms Ladele was employed by the London Borough of Islington, a local public authority, from 1992. The applicant held the orthodox Christian view that marriage is the union of one man and one woman for life. The Civil Partnership Act 2004, which provided for the legal registration of civil partnerships between two people of the same sex, came into force in the United Kingdom on 5 December 2005. The employer decided to designate all existing registrars of births, deaths and marriages as civil partnership registrars. The applicant believed that same-sex unions were contrary to God's will and that it would be wrong for her to participate in the creation of an institution equivalent to marriage between a same-sex couple. Because of her refusal to agree to be designated as a registrar of civil partnerships, disciplinary proceedings were brought, culminating in the loss of her job. The applicant relied on articles 14 and 9 of the ECHR and claimed that she was discriminated on the ground of her religious beliefs as she was not treated differently. The majority of European Judges considered the case in the light of the freedom to manifest one's religious beliefs and article 14. It stated that the State had a wide margin of appreciation in striking balance between two competitive rights and this margin was not exceeded.

Dissenting Judges Vučinić and De Gaetano proposed another approach to the protection of Ms Ladele's rights which better corresponded to the circumstances of the case. The Judges noted that this case was not so much one of freedom of

[176] ECtHR, Maestri v. Italy (39748/98)17/02/2004.

religious belief as one of freedom of conscience. Further, they emphasised a principle which is particularly important for employment relations: no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience. The case of Ms Ladele was about conscientious objection. In the opinion of the dissenting Judges, once a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her).

This conclusion of Judges Vučinić and De Gaetano has some common points with the new approach of the ECtHR to conscientious objection. In *Baratyan v. Armenia*,[177] a case on conscientious objection to military service, the Grand Chamber overruled the judgment of Chamber and for the first time found article 9 applicable to conscientious objectors, unlike the Commission, which refused to apply that article to such persons. The Commission, dealing with similar cases, concluded that the right to conscientious objection was not included among the rights and freedoms guaranteed by the ECHR.[178] In *Baratyan* the Grand Chamber stated that although article 9 does not explicitly refer to a right to conscientious objection, the opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of article 9.[179] Therefore, the ECtHR acknowledged that the right for conscientious objection could be protected under article 9 but didn't recognise it as a part of a freedom of conscience. The dissenting Judges in *Ladele* went further and stated that when an employee has a conscientious objection it must be satisfied by the State as a part of its positive duties under article 9. It is interesting to note that the American Supreme Court decided as far back as in 1965

[177] ECtHR, Bayatyan v. Armenia (23459/03) 07/07/2011.
[178] EurCommHR, X v. Germany, (7705/76) 05/07/1977; Conscientious Objectors v. Denmark (7565/76) 07/03/1977; A. v. Switzerland (10640/83) 09/05/1984.
[179] ECtHR, Baratyan v. Armenia, para. 110.

that when Congress provided a "conscientious objection" exemption from military service for men whose religion would not allow them to serve, an atheist whose moral convictions also prohibited service did qualify for the objection.[180]

All of the above-mentioned cases demonstrate that the ECtHR appears to be uncomfortable with the protection of employees' freedom of conscience under article 9 and tends to rely on the elaborated case law on the protection of the manifestation of religious beliefs. This approach can clearly be explained, as the acknowledgement of the absolute right for conscientious objections within the context of employment relations would inevitably lead to the conflict of rights (rights of employers, rights of others; it would be in conflict even with public interests).

Therefore, the possibility to claim protection for employees' conscientious objections under article 9-2, as in the cases of opposition to military service, could be a large step forward in the development of the protections granted under article 9. It is interesting to note that a number of countries have recognized the conscientious objections of officials like Ladele, when introducing comparable legislation; in addition, national courts in the Netherlands upheld the claims to exemption on the grounds of conscientious objections.[181]

### 2.2. **The adjudication of employment cases under article 9**

Employment cases under article 9 tend to be adjudicated in a way consisting of a number of steps. First, the ECtHR investigates whether there was an interference with the right to manifest the employee's religion or belief. It determines the person's religion[182] or belief. An individual must show that the particular practice, for which he or she wishes to obtain protection as a 'manifestation' of religion or belief, is necessary to, or mandated by, the religion or belief system espoused.[183]

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[180] Cited from Ronald Dworkin, Religion without God. Harvard University Press, 2013. P. 4.
[181] Ian Leigh and Andrew Hambler, Religious Symbols, Conscience, and the Rights of Others Oxford Journal of Law and Religion, Vol. 3, No. 1 (2014), p. 9.
[182] Vickers Lucy, Religious freedom, religious discrimination and the workplace. Oxford: Hart, 2008, p. 107.
[183] Ian Leigh and Andrew Hambler, Religious Symbols, Conscience, and the Rights of Others. Oxford Journal of Law and Religion, Vol. 3, No. 1 (2014), p. 10.

In *Kosteski v Former Yugoslav Republic of Macedonia*,[184] the ECtHR stated that requiring the applicants to prove they were Muslims was not unreasonable or disproportionate as he was making a claim to a privilege or exemption to which he was not entitled unless he was a member of the faith concerned and in circumstances which arguably gave rise to doubts as his entitlement.[185]

The forms of manifestations are listed in article 9: worship, teaching, practice and observance. The ECtHR has stated on numerous occasions that this article does not protect every act motivated or inspired by a religion or belief.[186] Thus in the case *Skugar and others v. Russia*,[187] where the applicants sought to have their taxpayers' numbers cancelled on the ground that their attribution was tantamount to marking them with the "mark of the Beast" and thereby alienating them from the Orthodox Church, the ECtHR pointed that acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of article 9.

In *X. v. Denmark*, the Commission stated that the freedom of religion does not include the right of a clergyman to set up his own conditions for baptising.[188] Therefore, article 9 does not always guarantee the right to behave in the public sphere in any and all ways dictated by one's personal beliefs. This principle has been confirmed by the ECtHR in numerous cases.[189] The ECtHR has held that the freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance[190] and are therefore worthy of respect in a democratic society.[191] However, the States, according to the Strasbourg jurisprudence, have an obligation of neutrality and impartiality, which

[184] ECtHR, Kosteski v. "The Former Yugoslav Republic Of Macedonia" (55170/00) 13/04/2006
[185] Ibid, para. 47.
[186] ECtHR, Kalaç v. Turkey (20704/92) 01/07/1997, Para. 26, EurCommHR, Arrowsmith v. the United Kingdom, (7050/75) 12/10/1978; Leyla Şahin v. Turkey [GC] (44774/98) 10/11/2005, para. 105.
[187] ECtHR, Skugar and others v. Russia (40010/04) 03/12/2009.
[188] EurCommHR, X .v .Denmark (N° 7374/76) inadmissible 08/03/1976.
[189] ECtHR, Porter v. the United Kingdom ( 15814/02) 08/04/ 2003, and Zaoui v. Switzerland (41615/98) 18/01/2001.
[190] ECtHR, Leyla Sahin v Turkey[GC](44774/98) 10/11/2005; Leela Förderkreis e.V. and Others v. Germany (58911/00) 06/11/2008.
[191] ECtHR, Chassagnou and others v. France [GC] (25088/94 et al) 29/04/1999, para. 114.

is incompatible with any power on the State's part to assess the legitimacy of religious beliefs.[192]

The ECtHR has never provided a thorough explanation of what "cogency, seriousness and cohesion" means in this context. However, it has developed a broad approach to the interpretation of religious beliefs, which enables it to accept, in principle, that its protection extends to Druidism, pacifism, veganism, the Divine Light Zentrum and the Church of Scientology.[193]

British Courts have elaborated their understanding of the necessary level of cogency, seriousness, cohesion and importance of beliefs under the ECHR and the Human Rights Act 1998. Lord Nicholls in the case of *Williamson v Secretary of State for Education and Employment* said that while private belief (the forum internum) could be of any kind, any beliefs which are manifested must meet what he described as 'modest, objective minimum requirements': first, they must be consistent with basic standards of human dignity or integrity (thus ruling out beliefs which would involve subjecting others to torture, etc.), and secondly, they must be coherent, in the sense of being capable of being understood.[194]

In another case considered by the British Employment Appeal Tribunal ("**EAT**") the applicant's views on climate change were found to be cogent, serious, cohesive and important as they affected the way he lived his life, and his hopes and fears for the future. In addition, a certain amount of emphasis was given by the EAT to the fact that these views were worthy of respect in society.[195]

Interference with an employee's freedom of religion would constitute a violation of the ECHR if was not in pursuit of a legitimate aim, or if the interference was disproportionate to the aim pursued. Therefore, establishing a

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[192] ECtHR, Jakóbski v. Poland (18429/06) 07/12/2010, para. 44; Campbell and Cosans v. the United Kingdom (7511/76, 7743/76) 25/02/1982, para. 36.

[193] Bob Hepple and Tufyal Choudhury, Tackling religious discrimination: practical implications for policy-makers and legislators. Home Office Research Study 221, p. 9. Available at: http://www.religionlaw.co.uk/reportae.pdf (accessed 12.04.2015)

[194] Cited from Pitt Gwyneth, Keeping the faith: trends and tensions in religion or belief discrimination. Industrial Law Journal 40.4 (2011), p. 384.

[195] Cited from Vickers Lucy, Religious Discrimination in the Workplace: An Emerging Hierarchy? Ecclesiastical Law Journal 12.03 (2010) p. 290.

legitimate aim and conducting a balancing exercise are the next steps taken by the ECtHR in adjudicating cases under article 9.

According to this article, the interference does not amount to the violation of the ECHR if it was prescribed by law and was necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The list of legitimate aims can be very lengthy as each of these aims might be interpreted in a very broad manner. One commentator noted that the ECtHR has not endeavoured to define carefully the profiles of those concepts and utilised them with indetermination and even vagueness.[196] This problem influences how the cases are considered, as the ECtHR, having established a legitimate aim, will go on to balance the proportionality of the interference to the importance of the aim pursued. Therefore, it seems particularly important to conduct this balancing exercise with a correctly defined aim in place.

Let us return to the case of dismissal of Ms Ladele in *Eweida and others v. The UK*. The ECtHR, considering the proportionality of the interference, balanced the right of the applicant to manifest her religious beliefs with the legitimate aim to provide a service of registratng civil partnerships without discrimination (therefore against the right of others to be registered without discrimination). This right of others was called "abstract" by dissenting Judges Vučinić and De Gaetano as there was no actual complaint on the violation of this right by the applicant or her employer. In fact, it would be more appropriate for the ECtHR to balance the right of the applicant with the right of her employer to manage his staff, as the applicant was not the only registrar in the Islington Borough Council. According to the arguments of the applicant, the employer was not required to designate all existing registrars of births, deaths and marriages as civil partnership registrars. Some other United Kingdom local authorities took a different approach, and allowed registrars with a sincerely held religious objection to the formation of civil partnerships to opt out of designation as civil partnership registrars.[197] Therefore

[196] Martínez-Torrón Javier, Limitations on Religious Freedom in the Case Law of the European Court of Human Rights. Emory International Law Review 19 (2005), pp. 633-634.
[197] ECtHR, Eweida and others v. UK (48420/10) 15/1/2013, para. 25.

Ms Ladele's employer could have ensured that he delivered the required service of same-sex civil union registrations without imposing on the applicant an obligation to register such partnerships.[198] In other words, Islington Borough Council could accommodate applicant's religious beliefs by substituting Ms Ladele in cases of registring same-sex couples, or leaving her in the post of registrar of deaths and births whilst assigning others to deal with registering civil union partnerships and marriages. The attention to these circumstances should have led the ECtHR to a different balancing exercise to the one they actually undertook. The right of Ms Ladele to manifest her religion should have been weighted against the right of employers to manage their staff.[199] It is unlikely that as a result of such a balancing test the ECtHR could have found that the dismissal of Ms Ladele was proportionate to the legitimate aim pursued and that article 9 of the ECHR was not violated.

Turning now to the balancing exercise undertaken by the ECtHR in such cases, the focus will be on the details which attract the ECtHR's attention. Considering the circumstances in which the employee's freedom to manifest his or her religion has been restricted, the ECtHR establishes whether this restriction was of crucial importance for the employer. Thus in the case of Ms Eweida the ECtHR referred to the prohibition to wear a Christian cross visibly and considered that there was no evidence that the wearing of other, previously authorised, items of religious clothing by other employees had any negative impact on British Airways' brand or image. It also took into account further changes in the uniform code, which allowed the wearing of visible religious symbolic jewellery.[200] Basing on these facts, the ECtHR held that prohibiting Ms Eweida from wear her cross was not of crucial importance for the employer to carry out its business. Therefore, balancing the applicant's right with the right of the employer to establish a uniform code, the ECtHR gave priority to the rights of Ms Eweida.

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[198] The same idea was expressed by Vickers Lucy, see supra note 195, pp. 280-303.

[199] As, for example, in Matúz v. Hungary (73571/10) 21/10/2014, para. 34 (the case on protection of whistleblowers).

[200] ECtHR, Eweida and others v. UK (48420/10)15/01/2013, para. 95.

In contrast, in considering the application of Ms Chaplin, a nurse who was prohibited from wearing a cross due to safety and health reasons, the ECtHR found that the aim of interference was inherently of a greater magnitude than that which applied in respect of Ms Eweida. The interference with the applicant's right to manifest her religious beliefs at work was therefore found to be proportionate in that case.

Considering overall the adjudication of employment cases under article 9, it must be noted that the majority of applications were either held inadmissible or the violation of the ECHR was not established. In the majority of such decisions and judgments, the ECtHR referred to the wide margin of appreciation of the State in such cases. Regretfully, such references sometimes implies a refusal or avoidance to more deeply analyse cases which could lead to troublesome conclusions, such as the necessity to accommodate employees' conscientious objections in cases exemplified by that of Ms Ladele.

### 2.3. The right of an employee to manifest his or her religion

The approach of Strasbourg bodies to protecting the manifestation of one's religion or belief in the work-place has significantly changed with the years. The former European Commission on Human Rights had a steady line of jurisprudence showing that it was unwilling to provide protection against dismissals of persons whose employment was terminated because they came to work late or left early on a regular basisin order to comply with a prescript of their religion.[201] Although it acknowledged that a dismissal could, in certain circumstances, raise an issue under article 9, in the Commission's opinion this right could have been protected by the

[201] Henrard Kristin, A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church–State Relations' Under the Jurisprudence of the European Court of Human Rights. In M.C. Foblets, K. Alidadi & J. Vrielink (Eds.), Test of Faith? Religious Diversity and Accommodation in the European Religious Diversity and Accommodation in the European Workplace Ashgate, 2012. Available at SSRN:http://ssrn.com/abstract=2307845 or http://dx.doi.org/10.2139/ssrn.2307845 See, for example, EurCommHR 3 December 1996, Konttinen v. Finland (24949/94) 03/12/1996.

ability of the employee to resign from his or her post.[202]

The Commission was very reluctant to acknowledge the link between an employee's refusal to fulfil employment obligations and the right to manifest his or her religious beliefs. For example, in *Konttinen v. Finland*[203] an employee of the Finnish State Railways was dismissed for failing to respect his working hours, on the basis that to work after sunset on a Friday was forbidden by the Seventh-Day Adventist Church, of which he was a member. The Commission held in this case that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours; although the refusal was motivated by religious convictions, such a situation did not give rise to protection under article 9-1. The Commission emphasised that the applicant had failed to show that he was pressured to change his religious views or prevented from manifesting his religion or belief. In *X v. UK*, the Commission decided that the obligation imposed on a teacher to observe normal working hours, which clashed with his attendance at Friday prayers, was compatible with article 9.[204]

In *Stedman v. UK*,[205] the Commission considered the application of an employee who was dismissed from a private company for refusing to work on Sundays. The application was also considered inadmissible as the Commission held that the applicant was dismissed for failing to agree to work certain hours and not for the expression of her religious belief.

Recent case law of the ECtHR demonstrates that, in contrast with the approach of the Commission, it is developing the "better approach" by properly considering the proportionality of any interference. In *Eweida and others v. UK* it stated: "Given the importance in a democratic society of freedom of religion, the ECtHR considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job

[202] EurCommHR, Knudsen v. Norway (11045/84) inadmissible 08/03/1985; see also see, Konttinen v. Finland (24949/94) inadmissble 03/12/1996; Stedman v. the United Kingdom (29107/95) inadmissible 09/04/1997.
[203] EurCommHR, Konttinen v. Finland (24949/94) inadmissble 03/12/1996.
[204] Cited from Riza Tiirmen, Freedom of Conscience and Religion In: Marcelo Gustavo Kohen, editor. La Promotion de la Justice, Des Droits de L'homme Et Du Règlement Des Conflits Par Le Droit International. Martinus Nijhoff Publishers, 2007, p. 594.
[205] EurCommHR, Stedman v. UK (29107/95) inadmissible 09/04/1997.

would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."[206]

Thus the ECtHR has abandoned the Commission's view that the freedom to manifest one's belief might be protected by resigning from the post and has started to balance the freedom of the employee to manifest his or her religion in the workplace as against the rights of his or her employer, referring to the possibility to resign as only one additional factor in the overall balance. The balancing test which was absent from the early decisions of the Commission was applied by the ECtHR in *Dahlab v. Switzerland*,[207]concerning a primary school teacher who was prohibited from wearing an Islamic headscarf (*hijab*) in the performance of her teaching duties. The ECtHR weighed the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony. It gave weight to the tender age of the children for whom the applicant was responsible as a representative of the State and concluded that the authorities had not exceeded their margin of appreciation and that the measure they took was therefore not unreasonable.[208] This decision is in line with other more recent cases concerning the wearing of conspicuous religious symbols where the ECtHR held that the relevant ban was aimed at preserving the "secular nature of the institution concerned."[209]

However, these cases together with *Dahlab* represent a curious contrast to the famous *Lautsi* case, where the ECtHR seemed unconcerned about the potential influence a crucifix displayed in the classroom might have upon the pupils.[210]

*Eweida and other v. UK* is still the only case in which the ECtHR has touched upon the necessity to accommodate an employee's religious beliefs. The word "accommodation" was not used in the conclusions of the ECtHR. However, the

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[206] ECtHR, Eweida and other v. UK (48420/10)15/1/2013, para. 83.
[207] ECtHR , Dahlab v. Switzerland (42393/98)15/02/2001.
[208] Ibid.
[209] ECtHR, Leyla Sahin [GC] v. Turkey (44774/98) 10/11/2005, para. 116.
[210] Lucy Vickers, Freedom of Religion and Belief, Article 9 ECHR and the EU Equality Directive. In: Filip Dorssemont, Klaus Lörcher, Isabelle Schömann, editors. The European Convention on Human Rights and the Employment Relation, p. 213.

North American experience in this sphere, and further reliance on article 14 as requiring the State to treat differently persons whose situations are different,[211] together with previous case law on the accommodation of prisoners' religious dietary requirements,[212] altogether leads to the conclusion that the ECtHR is moving towards the recognition of such a right within article 9 of the ECHR. This conclusion is particularly important taking into account the fact that, in general, European legislatures and courts have been very reluctant to accept reasonable accommodation as a legally binding principle.[213]

The analysis of the various applicants' claims considered in the case of *Ms Eweida and others v. UK* demonstrates that the ECtHR's approach to the accommodation of employees' religious beliefs lacks consistency. For example, it paid significant attention to the voluntary acceptance of a job or role which did not accommodate the practice in question in respect of Mr McFarlan (another applicant) and Ms Ladele. However, the ECtHR did not find the violation of the ECHR in any of the cases although Ms Ladele was constrained to fulfil employment obligations which were in contrast with her religion, while Mr McFarlane must have known that the job of counsellor in a private organisation which provided confidential sex therapy might include the counselling of same-sex couples.

The finding of a violation of article 9 solely in relation to Ms Eweida causes us to assume that the absence of influence of such accommodation on the rights of others was a decisive factor in this case. Commentators were very optimistic with this judgment, supposing that it had become clear that many of the accommodations sought by employees, such as the meeting of dietary requirements, time off for religious observance, and uniform codes, could be viewed as manifestations of religion and thus be potentially protected by article

[211] ECtHR, Eweida and others v. The UK, para. 88.
[212] ECtHR, Vartic v. Romania (No. 2) (14150/08) 17/12/2013; Jakóbski v. Poland (18429/06) 07/12/2010.
[213] Heiner Bielefeldt, Freedom of Religion or Relief: Anachronistic in Europe? In: Dr Zeynep Yanasmayan, Ms Katayoun Alidadi, Professor Jørgen S Nielsen, Professor Marie-Claire Foblets, editors. Belief, Law and Politics: What Future for a Secular Europe? Ashgate Publishing, 2014 (55-67)P. 61

9.[214] I would be less optimistic as the Courts tends to interpret broadly the impact of the accommodation on the rights of others, which evidently would lead to acknowledgment of such a right only in exceptional cases where the refusal to accommodate one's religious beliefs could not be justified with the reference to article 9-2.

According to the ECtHR's case law, certain restrictions on the freedom to manifest one's religion or belief might be justified by the requirements of a particular job. Thus in *Pitkevich v. Russia*[215] the ECtHR emphasised that the States have a wide margin of appreciation in determining whether the interference with a judge's freedom to manifest his religion was proportionate to the aim of maintaining the authority and impartiality of the judiciary.

In this case, the applicant argued that her dismissal from the post of a judge was in breach of article 9, as her termination was based on her membership in the Living Faith Church and on her expressions of her Christian religious beliefs in the workplace. The ECtHR observed that the applicant was dismissed for specific activities (praying publicly during court hearings, promising certain parties to proceedings a more favourable outcome on their cases if they joined the Church) which were found to be incompatible with the requirements for judicial office. These activities, although connected with her religious beliefs, were found relevant to establishing the applicant's unsuitability as a judge and the consequent dismissal.

In *Kalaç v. Turkey*,[216] the ECtHR considered the application of a former judge advocate who claimed that his compulsory retirement on the ground of his holding unlawful fundamentalist opinions violated article 9. The ECtHR noted that the system of military discipline by its very nature implied the possibility of placing constraints on certain rights and freedoms of members of the armed forces; constraints which would not need to be imposed on civilians. It was established that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constituted the normal forms through

[214] Vickers Lucy, see supra note 210, p. 212.
[215] ECtHR, Pitkevich v. Russia (47936/99) inadmissible 08/02/2001.
[216] ECtHR, Kalaç v. Turkey (20704/92) 01/07/1997.

which a Muslim practises his religion. The ECtHR concluded that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by article 9 since it was not prompted by the way the applicant manifested his religion, but rather by his conduct and attitude.

### 2.4. Dismissals from religious organisations due to the lack of loyalty

The freedom of religion is read by certain scholars as including the right to create religiously homogenous workplaces.[217] In fact the Strasbourg cases on dismissal for lack of loyalty towards a religious community always include a balancing exercise between this right of the employer and ECHR freedoms of employees. This jurisprudence outlines another facet of article 9, namely, the scope of the rights of religious organisations to determine their own employment requirements.[218]

In order to provide a more systematic approach to this issue within this paragraph, the focus will be on cases considered under article 9 while similar cases considered in the light of other articles will be also mentioned. In the previous parts, several judgments concerning dismissals for the lack of loyalty were already discussed (see, for example, *Obst v. Germany*, *Schüth v. Germany*, *Fernández Martínez v. Spain*). In these cases, as well as in others concerning employment relations between religious organisations and their employees, the ECtHR granted to the States a wide margin of appreciation in determining the fair balance between the rights of the church and those of its employees. The ECtHR has also provided support for religious ethos organisations, such as religious hospitals or schools, to determine their employment requirements along religious lines.[219]

An understanding of the Strasbourg approach to the cases concerning employment in religious organisations is possible through analysis of the ECtHR's

[217] Freedland, Mark R., and Lucy Vickers, Religious Expression in the Workplace in the United Kingdom. Comparative Labor Law&Policy Journal 30.3 (2009), p. 601.
[218] Vickers, Lucy. Religious freedom, religious discrimination and the workplace. Oxford: Hart, 2008. p. 107
[219] Ibid, p. 111.

perception of the State's neutrality, the church's autonomy, and the employee's loyalty towards his or her employer.

▪ It might seem that the neutrality of the States, recognised by many national constitutions and acknowledged by the ECtHR,[220] should preclude the ECtHR from finding violations of the ECHR in the sphere of employment relations between an employee and religious organisations. In fact, judicial authorities across Europe have traditionally declared that they lack the power to review decisions of religious organisations and the processes underpinning those decisions, because these entities enjoyed religious autonomy.[221]

Strasbourg bodies, however, understand the State's neutrality in a more restrictive way: neutrality does not mean the absence of positive obligations of the State to protect employee in the case of conflict between church autonomy and the ECHR freedoms of an individual employee. As Judge Tulkiens once pointed out: "Neutrality does not have to be equivalent to indifference".[222]

In *Rommelfanger v. The Federal Republic of Germany*,[223] the Commission acknowledged the obligation of the State to ensure that national courts in relevant employment cases have weighed the freedom of an employee against the freedom of the employer and to establish that no unreasonable demand of loyalty had been made. In subsequent cases the ECtHR has broadened this approach and acknowledged the necessity to provide procedural safeguard to the employee in cases of dismissals for a lack of loyalty.

In this context, the case of *Lombardi Vellauri*[224] is particular interesting as the ECtHR found that the State's refusal to consider the applicant's application for a renewal of his employment contract as a professor of a Catholic University, was in breach of the ECHR due to the lack of procedural safeguards around the refusal. The ECtHR pointed out that the applicant did not receive any explanation of the

[220] ECtHR, S.A.S. v. France [GC] (43835/11) 01/07/2014, para. 127.
[221] Ioana Cismas, Religious Actors and International Law, Oxford University Press, 2014. P. 133.
[222] Tulkens, Françoise. "European Convention on Human Rights and Church-State Relations Pluralism vs. Pluralism", Cardozo L. Rev. 30 (2008): 2575. P. 14.
[223] EurCommHR, Rommelfanger v. The Federal Republic of Germany (12242/86) inadmissible 06/09/1989
[224] ECtHR, Lombardi Vallauri c. Italie (39128/05)20.10.2009.

university's decision; had no possibility of administrative appeal against that decision, and was denied an appeal in Italian courts, which embraced the traditional jurisdictional approach to church autonomy.[225]

Therefore, State neutrality, according to the ECtHR, means the State must ensure the fair trial standards provided in article 6 of the ECHR applies to disputes between employees and the religious organisations that employ them.[226] At the very least, this includes the employees knowing the case against them and having a chance to respond to it. This guarantee provides employees with a degree of protection from malice, unsubstantiated rumour and baseless accusations.[227]

▪ The autonomy of churches and other religious organisations was deduced by the ECtHR as a result of interpreting article 9 in light of article 11, which safeguards associative life against unjustified State interference.[228] The ECtHR has emphasised that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which article 9 affords.[229] Autonomy has several facets, such as the establishment of the inner domain of faith, doctrine and polity and administration of religious organisations. Commentators note that although there are areas of collective religious autonomy which have obtained more protection by the ECtHR, it is impossible, at this stage, to determine whether certain spheres of forum internum of religious communities are completely shielded from State interference.[230] As pointed out above, the ECtHR acknowledged that the State's positive actions are necessary in the sphere of protectiing church employees. It has thus moved away from traditional European approaches to religious autonomy

[225] I. Cismas, Religious Actors and International Law, Oxford University Press, 2014. P. 136
[226] See, for example, ECtHR, Ahtinen v. Finland (48907/99) inadmissible 23/09/2008.
[227] Cited from Evans, Carolyn, and Anna Hood. "Religious autonomy and labour law: A comparison of the jurisprudence of the United States and the European Court of Human Rights." Oxford Journal of Law and Religion, 2012, p. 25
[228] ECtHR, Siebenhaar v. Germany (18136/02) 03/02/2011, para. 41
[229] ECtHR, Sindicatul "Păstorul Cel Bun" v. Romania [GC] (2330/09) 09/07/2013, para. 136.
[230] Kiviorg, Merilin. "Religious Autonomy in the ECHR." Derecho y Religión IV (2009): 131-144. Available at: http://www.deltapublicaciones.com/derechoyreligion/gestor/archivos/07_10_31_124.pdf (accessed 20.05.2015).

issues, which was effectively a jurisdictional approach,[231] and determined certain limits of the church's autonomy in this field. These limits were classified by scholars into groups of procedural and substantial limitations.[232] Procedural limitatons were already dealt with in the example of the *Lombardi Vellauri* case. Substantive limitations might be illustrated by this citation from the *Fernández Martínez v. Spain* Grand Chamber judgment:

> *Mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.*[233]

Therefore, religious organisations and domestic Courts should take into account the rights of employees while deciding cases on dismissals for the lack of loyalty, giving attention to the particular circumstances of each applicant, including to factors such as the duration of employment with the religious organization,[234] the ability to find another job, or whether any unemployment benefit is available,[235] the nature of the restricted right.[236]

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[231] Evans, Carolyn, and Anna Hood. "Religious autonomy and labour law: A comparison of the jurisprudence of the United States and the European Court of Human Rights." Oxford Journal of Law and Religion, 2012 (1–27), p. 16.
[232] Ibid.
[233] ECtHR, Fernández Martínez v. Spain (56030/07) Chamber Judgment 15 May 2012, para. 132.
[234] ECtHR, Siebenhaar v. Germany, para. 44.
[235] ECtHR, Fernández Martínez v. Spain [GC] (56030/07) 12/06/2014 para. 124.
[236] ECtHR, Schüth v. Germany (№ 1620/03) 23.9.2010, para.131

The main consequence of giving religious communities autonomy is so that they may demand a certain degree of loyalty from those working for them or representing them.[237]

▪ Duty of loyalty

The ECtHR has on numerous occasions acknowledged that the employees of religious organizations have a higher duty of loyalty towards their employer.[238] It means that certain restrictions of their freedoms of religion, expression or association would not necessarily held to be in breach of their ECHR rights insofar as those restrictions were clearly set out in their employment contracts and could therefore be anticipated by the employees. The demand for loyalty is reasonable as far as it touches on an issue of crucial importance for the religious organisation (such as an opinion on abortions[239] or the celibacy of priests[240]). It is also reasonable in cases where the position of the employee, who infringed the duty of loyalty, could influence the image of the religion that the organisation is affiliated with or represents (as in cases of teachers[241] or university professors[242]).

In the case mentioned earlier, *Rommelfanger v. The Federal Republic of Germany*, the Commission recognized that the ECHR permitted contractual obligations where an employee accepts a duty of loyalty towards the Church which limits his ECHR freedoms to a certain extent. In other cases, the ECtHR has emphasised the importance of the employee's ability to anticipatethe restrictions dictated by the duty of loyalty.[243] Thus in *Siebernhaar*, the case in which a kindergarten teacher was dismissed from her position by the Protestant Church because of her active commitment to another religious community, the ECtHR attached weight to the fact that the applicant should have been aware of this duty as it was directly stated in her employment contract and the relevant regulations – all of which she ought to have read before signing the employment documents and

[237] See, for example, Fernández Martínez v. Spain (56030/07) Chamber Judgment 15 May 2012
[238] EurCommHR, Rommelfanger v. The Federal Republic of Germany (12242/86) inadmissible 06/09/1989, Fernández Martínez v. Spain (56030/07) Chamber Judgment 15 May 2012, para. 86.
[239] EurCommHR, Rommelfanger v. The Federal Republic of Germany (12242/86) inadmissible 06/09/1989
[240] ECtHR, Fernández Martínez v. Spain (56030/07) Chamber Judgment 15 May 2012
[241] Ibid, see also Siebenhaar v. Germany (18136/02) 03.02.2011.
[242] ECtHR, Lombardi Vallauri c. Italie (39128/05)20.10.2009.
[243] ECtHR, Fernández Martínez v. Spain, para. 119.

entering that employment. Therefore, it found that the applicant should have been aware that membership in the Universal Church and its teaching activities were inconsistent with her employment duties.[244]

According to the ECtHR's findings, Ms Siebenhaar's dismissal for lack of loyalty had been necessary to preserve the Church's credibility, which outweighed her interest in keeping the job. It was noted that the domestic courts had given more weight to the interests of the Protestant Church than to those of Ms Siebenhaar. This finding, however, did not preclude the ECtHR from **concluding that there had been no violation of article 9.**

This judgment, together with *Fernández Martínez*, demonstrates that the ECtHR, where it has found that the duty of loyalty should have been known by the applicant, becomes very reluctant to protect employees from dismissal in cases where it did not strike core ECHR rights as for example in *Schüth*. The ECtHR's approach to the cases of dismissal for the lack of loyalty is very narrow, as on many occasions it leads the ECtHR to accept the restriction on an employee's ECHR rights and the fact that national courts gave more weight to the interests of the Church, although a more thorough balancing exercise should have led to the opposite conclusion. Thus the interplay between the State's neutrality, religious autonomy and the employee's loyalty leaves, in fact, little space for the protection of individual ECHR rights of such employees.

However, a positive facet could be established here as well. The judgments mentioned in this section contributed to the understanding of the limits of the autonomy of religious organisations as employers and urged domestic courts to conduct a careful balancing exercise to address conflicts between the collective religious rights of organisations and individual human rights in a way that duly respects both sides, allowing them to co-exist.[245] It is interesting to note that after the judgments in *Schüth* and *Obst* were handed down, a labour court in Germany decided that the dismissal of a doctor from a Catholic hospital, following his civil

[244] ECtHR, Siebernhaar v. Germany, para. 46.
[245] Eva Brems and Loures Peroni, Religion and human rights: Deconstructing and navigating tensions. In: Silvio Ferrari, editor. Routledge Handbook of Law and Religion. Routledge, 2015. p. 145-160 (153).

divorce and his remarriage, was unlawful.[246] This example vividly illustrates the positive impact of the jurisprudence of the ECtHR upon national courts in the sphere of protecting the employees of religious organisations.

### 2.5. Conclusions

The ECtHR's achievements in the sphere of protecting employees' freedom of religion are rather modest. The majority of applications on the violation of employees' freedom of religion were either held inadmissible or the violation of the ECHR was not established. One of the main reasons for these conclusions was the repeated reference to the wide margin of appreciation allowed to the States in such cases.

However, several judgements of the ECtHR demonstrate a remarkable step forward in this sphere of establishing basic employee rights. In contrast with the former European Commission of Human Rights the ECtHR, instead of holding that the ability for applicants to change jobs negates any interference with their freedom of religion, balanced the rights of employees against the rights of employers to manage the staff and assessed the proportionality of any interference.

The ECtHR's judgment in respect of Ms Eweida moved forward to recognise a right for employees to religious accommodation at the workplace. This is a very important step for the members of the CoE as European legislatures and courts did not acknowledge such a right. The ECtHR's refusal to find a violation in the case of Ms Ladele in turn illustrates that the right for accommodation might be acknowledged in particular cases, when such accommodation does not infringe any broadly-interpreted rights of others.

In *Baratyan v. Armenia* the Grand Chamber acknowledged the right of conscientious objection to military service, absent from the text of article 9, thus establishing a common standard for the countries of the CoE.

In numerous cases brought by the employees of religious organisations, the ECtHR outlined the scope of the rights of religious organisations to determine their

[246] Cited from Van der Vyver, Johan D. "State Interference in the Internal Affairs of Religious Institutions." Emory Int'l L. Rev. 26 (2012): 1. Available at: http://law.emory.edu/eilr/_documents/volumes /26/1/recent-developments/vandervyver.pdf (accessed 20.05.2015)

own employment requirements. Relying on the concepts of a State's neutrality and the church's autonomy, the ECtHR tended to interpret broadly the duty of loyalty of such employees and granted to the States a wide margin of appreciation in determining the fair balance between the rights of the religious organisation and those of the employee. The positive facets of the Strasbourg jurisprudence in this sphere can be represented by the following requirements of the ECtHR:

1. The employee's ability to anticipate or know the restrictions dictated by the duty of loyalty;
2. To provide procedural safeguards to the employee in cases of dismissal for lack of loyalty;
3. To ensure that "no unreasonable demand of loyalty was made".

The recent case considered by a German court, referred to in this section, is an example of the adoption of the above rules by domestic court and represents the practical impact the ECHR may have on the human rights of employees on the national level.

## Chapter 3. The employee's freedom of expression and association



"Without publicity, no good is permanent;
under the auspices of publicity, no evil can continue".
**Jeremy Bentham**[247]

The freedoms of expression and association are considered by scholars to be essential for the enjoyment of all other freedoms included in the ECHR.[248] In this section, the focus will be on the protection of the employee's freedom of expression and the freedom of association as far as the protection of personal opinions is also "one of the objectives of the freedoms of assembly and association as enshrined in Article 11".[249]

The freedom of association understood as a set of collective labour rights, as elaborated by the ECtHR,[250] is outside the scope of the present research.

> *Article 10: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

[247] Cited from Gerald J. Postema, The Soul of justice: Bentham on Publicity, Law, and the Rule of Law In: Xiaobo Zhai, Michael Quinn, editors. Bentham's Theory of Law and Public Opinion. Cambridge University Press, 2014 (40-62): 46.
[248] Thilo Marauhn, Freedom of Expression, Freedom of Assembly and Association In: Dirk Ehlers, Ulrich Becker, editors. European Fundamental Rights and Freedoms. Walter de Gruyter, 2007 (97-129) p. 98.
[249] ECtHR, Volkmer v Germany (39799/98) inadmissible 22 November 2001.
[250] See among others: ECtHR, Young, James and Webster v. the United Kingdom (7601/76 7806/77)13/08/1981; Sorensen and Rasmussen v. Denmark (52562/99 52620/99) 11/01/2006; Wilson, National Union Of Journalists and others v. the United Kingdom (30668/96 30671/96 30678/96) 02/07/2002; Demir And Baykara V. Turkey(NO. 34503/97) 12 November 2008; Enerji Yapi-Yol Sen c. Turquie (68959/01), 21/04/2009; National Union Of Rail, Maritime and transport workers v. The United Kingdom (31045/10) 08/04/2014.

> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The list of possible restrictions is wider than in the articles 8 or 9; the drafters explicitly stated that this freedom may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law. The complexity found within the right to freedom of expression owes much to the jurisprudence of the Strasbourg Court.[251] The ECtHR stated that the freedom of expression, as enshrined in article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any exceptions must be convincingly established.[252]

The scope of employees' freedom of expression is narrower as employment relations impose the duty of loyalty which also means certain restrictions on employees' ECHR freedoms (the restriction on their freedom of religion was already illustrated above). Should employees be permitted to express negative opinions about their employers or to criticise the quality of product made by their employers? Might an employee participate in a political party and express political opinions in contradiction with the policy of her employer? Can a civil servant disclose publicly confidential information on the basis of the public interest and be expected democratic society to protect him? These are the most challenging questions for the domestic courts in this context.

Disputes over the employee's freedom of expression have become much more frequent in the last decade as the growing use of social networks such as Facebook

[251] Flauss, Jean-Francois. "European Court of Human Rights and the Freedom of Expression" Ind. LJ 84 (2009): 809. Available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1124&context=ilj(accessed 16.05.2015)

[252] ECtHR, Steel and Morris v. The United Kingdom (68416/01)15/02/2005, para. 87.

made the expression of an employee's opinion, which was previously more easily hidden from the employer and difficult to prove, easily accessible. It is not surprising that people are dismissed for the publications of photos or comments in Facebook or other similar systems. Thus the British Employment Tribunal stated that the manager of a pub had been fairly dismissed for gross misconduct after posting negative comments about customers on her Facebook page.[253] In another case, the British tribunal upheld the dismissal of an Apple retail store employee, who posted negative comments about Apple products on her private Facebook page,[254] since friends could copy and pass on the information thus making it public. French courts are more rigorous in deciding whether Facebook publications can amount to gross misconduct and they tend to overrule decisions of lower courts which have upheld such dismissals as lawful.[255] These cases demonstrate that new technologies increasingly erase the clear borders between public and private expression of opinions and the protection of the freedom of expression granted by the ECHR may become particularly valuable in this context.

The ECtHR's approach to the most complicated issues in addressing the employee's freedom of expression will be analysed on the basis of its numerous judgments. In particular. emphasis will drawn to the criteria for balancing the freedom of expression of the employee, bound by the duty of loyalty, against the right of employers to manage their staff. The limits of the freedom of expression, and the protection of whistle-blowers, will be also researched.

[253] Preece v JD Wetherspoons plc ET/2104806/10, see James, Sarah. "Social networks" at work–employment law and the Facebook generation." Human Resource Management International Digest 19.6 (2011).

[254] Crisp v Apple Retail, cited from Ornstein, Daniel. "Social Media Usage in the Workplace around the World-Developing Law and Practices." Bus. L. Int'l 13 (2012): 195.

[255] Arrêt de la Cour d'appel de Douai du 16 décembre 2011, L'arrêt de la Cour d'appel de Versailles était attendu le 22 février 2012 cited from Anthony Bem, Les « licenciements Facebook » : évolution et dernières actualités jurisprudentielles. Available at: http://www.legavox.fr/blog/maitre-anthony-bem/licenciements-facebook-evolution-dernieres-actualites-7765.htm#.VXVixs_tmkp (accessed 07.06.2015).

This Section will be divided into several subsections. Subsection 1 will deal with the duty of loyalty and discretion as it is a basic notion for understanding the ECtHR's case law on restricting employees' freedom of expression; subsection 2 will focus on criticisms of employers, the disclosure of information of public interest and standards of whistle-blower protection. Subsection 3 will research the most interesting cases on dismissal considered in the light of articles 10 and 11.

### 3.1. The duty of loyalty and discretion

The majority of the Strasbourg jurisprudence on the violation of article 10 in the context of employment relations concerns the rights of public servants. The ECtHR has reiterated repeatedly that employees owe to their employer a duty of loyalty, reserve and discretion.[256] The research of relevant case law does not allow us to define these notions separately and clearly. In the majority of cases, these duties are listed in order to remind us of the special character of employment relations in general and of public servants in particular, attaching particular weight to the special fiduciary character of employment relations especially as far as public servants being representatives of the State are concerned.

However, the ECtHR has pointed that the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests.[257] The scope of these obligations depends on the particular position of the employee, on the public interest in the disclosed information (in case of disclosure) and even on the historical background of a particular country.[258]

The duty of loyalty emerged in the Strasbourg case law in a series of cases against Germany, where public servants (mostly teachers) alleged that their dismissal for lack of loyalty to the German Constitution violated the ECHR. In

[256] See ECtHR, Langner v. Germany (14464/11) 17/09/2015, para. 43; Vogt v. Germany (17851/91) 26.09.1995, para. 53; Matuz v. Humngary (73571/10) 21/10/2014, para. 32; Pay v. The United Kingdom (32792/05) inadmissible 16/09/2008.

[257] ECtHR, Palomo Sánchez and others v. Spain[GC] (28955/06 et al) 12/09/2011, para. 76.

[258] See ECtHR, Vogt v. Germany, also Joint Dissenting Opinion of Judges Bonello, Strážnická, Bîrsan, Jungwiert and Del Tufo in Maestri v. Italy (39748/98) GC 17 February 2004.

*Kosiek v. Germany*,[259] the applicant, a probationary lecturer at a State Technical College, claimed that his dismissal for lack of loyalty violated article 10 of the ECHR. The employer stated that Mr Kosiek had not proved himself during the probationary period as he was an official of a political party, whose aims were inimical to the German Constitution. The ECtHR in this case perceived the duty loyalty as one of the conditions of eligibility for the post of a teacher. As the right for access to civil service was not enshrined in the ECHR, the ECtHR did not proceed any further into an evaluation of the proportionality of such a requirement. Despite pointing out that his status as a probationary civil servant did not deprive him of the protection afforded by article 10,[260] the ECtHR decided that there had been no breach of article 10 because access to the civil service, which was notguaranteed by the ECHR, lay at the heart of the issue.[261] This was a dangerous line of reasoning as it suggested that the dismissal involved no prima facie breach of the ECHR.[262] Such a conclusion could lead to the general neglect of employment rights' protection under the ECHR. Judge Cremona in the Concurring Opinion to the judgment in *Glasenapp*[263] correctly pointed that the civil service status provided no more than the general background, whereas the dominant feature in the foreground is a prejudice suffered because of the holding and expression of opinions.[264]

It is remarkable that both the ECtHR and the Commission in *Kosiek* and other similar cases such as *R.Q.* or *Glasenapp v. Germany* refrained from assessing the necessity of an interference with the rights of the applicants, ignoring each of the relevant applicant's arguments on this matter.[265] In the opinion of the dissenting Judge Spielmen in *Kosiek*, the question of the necessity of the interference in a democratic State (in other words, of its proportionality) was of crucial matter in

[259] ECtHR, Kosiek v. Germany (9704/82) 28/08/1986
[260] Ibid, para. 36
[261] Ibid, para. 39.
[262] Lucy Vickers, Freedom of Speech and Employment. Oxford University Press, 2002. P. 79
[263] ECtHR, Glasenapp v. Germany (9228/80) 28/08/1986.
[264] The Concurring Opinion of Judge Cremona in Glasenapp v. Germany.
[265] See EurCommHR, R.Q. v. the Federal Republic of Germany (10942/84) 09/12/1987, see also ECtHR, Otto v. Germany (27574/02) inadmissible 24/11/2005 (on the refusal to promote a civil servant with the police on account of political activities).

such a case and should lead the ECtHR to an opposite conclusion than the one they arrived at.[266]

A more considered approach to the duty of loyalty as the basis for restricting an employee's freedom of expression or association might be found in *Vogt* case, where the ECtHR for the first time found that the dismissal of a school teacher, for being a member of a political party, was in breach of both articles 10 and 11 of the ECHR. The ECtHR distinguished the Vogt case from previous similar cases because the applicant in this case had been a permanent civil servant for a number of years. However, as pointed out, Ida Koch, Glasenapp and Kosiek (the applicants in the cases referred to above) also had their permanent appointments annulled, and the difference between the cases was more modest than the ECtHR appeared willing to acknowledge.[267]

What *did* make the ECtHR step from the *Kosiek* and *Glasenapp* approach to the protection of public servants' freedom of expression? An examination of the necessity of the interference in a democratic society emerged in this case, and was also undertaken subsequently in similar cases such as *Volkmer v. Germany*[268] and *Petersen v. Germany*.[269] The ECtHR progressed from simply framing such cases as being about the right to access the public service, and actually undertook a proper analysis of the scope of the duty of loyalty, taking into account more relevant circumstances. In *Vogt*, it found the absolute nature of the duty of loyalty as construed by the German courts striking, and criticised such an approach in the following way:

> *It (the duty of loyalty) is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in*

[266] See Partly Dissenting Opinion of Judge Spielmann, Kosiek v. Germany (9704/82) 28/08/1986.
[267] Ida Elisabeth Koch, Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights. Martinus Nijhoff Publishers, 2009, p. 229.
[268] ECtHR, Volkmer v Germany (39799/98) inadmissible 22/11/2001.
[269] ECtHR, Petersen v. Germany (39793/98) inadmissible 22/11/2001.

*every context.*[270]

This is a remarkable statement of the ECtHR attempting to outline the limits of the loyalty civil servants owed to their employers, the State. According to the majority of the Grand Chamber, the duty of loyalty, as far as political views and membership in political parties are concerned, cannot be equally spread to all employees without taking into account his or her particular circumstances. It was pointed out that the States should ensure the distinction between an imposed duty of loyalty in the employee's professional versus private life. As a former Judge of the ECtHR J.A. Frowein once wrote, human nature should be taken into account in the adjudication of such cases.[271]

Having established these points the Grand Chamber further weighed circumstances of the *Vogt* case such as the political neutrality of the applicant at the workplace; her previous appointment to the permanent post in spite of the then-existing membership to the political party, which pursued, in opinion of the State, unconstitutional goals; the legality of the political party of which the applicant was a member. The Concurring Judges also took into consideration these factors; however, they came to the opposite conclusion, considering that particular circumstances of German history taken together with the possibility of ""hidden" ways in which political and moral values "creep into" academic language and logic"[272] justified the disciplinary measure of dismissing the teacher.

It is remarkable that the ECtHR tends to interpret more broadly the duty of loyalty of public or municipal servants as far as such pain points as racism or terrorism are concerned, as if it is willing to restrict any speculation on these topics. Thus in *Kern v. Germany*,[273] the ECtHR declared inadmissible the application by an environmental engineer with the Lübeck municipality, who had been dismissed for the publicly expressed support of the attacks on the World Trade Centre and the Pentagon in 2001 in the USA. The ECtHR put great weight

[270] Vogt v Germany (17851/91) 26/09/1995, para. 59.
[271] J.A. Frowein, How to Save Democracy from Itself? In: Y. Dinstein Domb, editor. Israel Yearbook on Human Rights. Martinus Nijhoff Publishers, 1996, p. 212.
[272] Dissenting opinion of Judge Jambrek in ECtHR, Vogt v. Germany (17851/91)26/09/1995.
[273] ECtHR, Kern v. Germany (26870/04) inadmissible 29/05/2007.

on the employee's duty to recognise the free democratic order. It is interesting to note that the contents of a press release issued by the applicant on behalf of a right-wing extremist group, on the day after the terrorist attacks, were not considered to be evidence of the lack of loyalty or as a refusal to recognise the free democratic order by the Labour Court. The first instance domestic court found that the applicant had basically condemned all terrorist attacks and expressed his sincere condolences to all innocent victims of the attacks and that he had merely expressed his anti-american feelings. The European ECtHR, however, had another view of the contents of the press release. Taking into consideration statements in it, which approved of the terrorist attacks and assumed the existence of a "Zionist oligarchy" as well as the impact of those statements on the civil service, it found that the dismissal was not an excessive restriction on the freedom of expression of civil service employees. The ECtHR agreed with the Court of Appeal that it was unacceptable for the employer to continue the applicant's employment, as it could not expect the applicant to respect the free democratic order in the future. This conclusion is rather surprising, as the text of the press release does not provide any grounds on which the applicant's views on the democratic order can be assessed.

In two cases concerning a teacher and a university professor respectively, the ECtHR noted that if the employees' expressed opinions infringed the basic values of the ECHR, such expression might be excluded from protection under articles 10 and 17. The propaganda of racist ideas[274] and opinions which could "sow doubts in the importance of the extermination of Jews and other groups stigmatized during the Second World War"[275] were evaluated as possible examples of such exemption.

The ECtHR's approach to the duty of loyalty and discretion owing by public servants has, with time, matured and developed to differentiate between applicants who might be military men, judges and members of parliament. Scholars suppose that this differentiation reflects the different scopes of the margin of appreciation afforded to the states in cases about the protection of various types of speech.[276]

[274] ECtHR, Seurot v. France (57383/00) inadmissible 18/05/2004
[275] ECtHR, Gollnisch v. France (48135/08) inadmissible 07/06/2011.
[276] Lucy Vickers, see supra note 262, p. 103.

▪ **Military men and police**

The ECtHR's approach to military men's freedom of expression was first established in *Grigoriades v. Greece*[277] where the conviction of an officer accused of "insult to the army" was found to be in breach of article 10 of the ECHR. The basis for his conviction was a letter he had written to his commanding officer, which contained certain strong and intemperate remarks in respect of army life and the army as an institution. The ECtHR stated: "Article 10 does not stop at the gates of army barracks and applies to military personnel as to all other persons within the jurisdiction of the Contracting States".

According to the ECtHR, States are entitled to impose restrictions on freedom of expression where there is a real threat to military discipline;[278] however, this right should not be used for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution. The conclusion of the majority was criticised by the dissenting judges[279] as undermining military discipline "for the benefit of an aggravating interpretation of the freedom of expression".[280] Scholars, however, supported the majority's view and considered that the ECtHR had been able to balance the interests of the State with the fundamental rights of the individual.[281]

The ECtHR's support of military personnel's freedom of expression was also expressed in *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*,[282] where the second applicant, a soldier of the Austrian army, was prevented from distributing a newspaper containing critical articles about army life. It is remarkable that Mr Gubi, during the several months before these events, had lodged complaints and published open letters criticising the number of fatigue

[277] ECtHR, Grigoriades v. Greece [GC] (24348/94) 25/11/1997.
[278] See also ECtHR, Jokšas v. Lithuania (25330/07)12/11/2013, para. 70. See also Kirchner Stefan and Vanessa Maria, The Freedom of Expression of Members of the Armed Forces Under the European Convention on Human Rights in Jokšas V. Lithuania. Baltic Journal of Law & Politics 7.1 (2014) pp.12-28.
[279] See Dissenting opinions of judges Sir John Freeland, Mr Russo, Mr Valticos, Mr Loizou, Mr Morenilla, joint dissenting opinion of Mr Gölcüklü and Mr Pettiti and dissenting opinion of Mr Casadevall. Grigoriades v. Greece.
[280] Cited from Flauss, Jean-Francois, European Court of Human Rights and the Freedom of Expression. Ind. LJ 84 (2009), p. 809.
[281] Rowe Peter, Control over armed forces exercised by the European Court of Human Rights. Geneva centre for the democratic control of armed forces. Working paper series 56 (2002), p. 67.
[282] ECtHR, Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria (15153/89) 19/12/1994.

duties to which he was assigned. The State in this case argued that by ordering him to cease distributing the newspaper, his commanding officer had sought to prevent Mr Gubi from destabilising his fellow soldiers even further given he was already responsible for the friction existing at the time in his barracks. The ECtHR found that the interference with Mr Gubi's right to freedom of expression was disproportionate as the newspaper articles did not call into question the duty of obedience or the purpose of service in the armed forces. The newspaper was aimed at criticising and putting forward proposals for reform in the army, and the freedom to express those views, in the ECtHR's opinion, had to be protected under ECHR.

The ECtHR's approach to the expression of political opinions by members of the armed forces is stricter. In this respect, it emphasised that the "duties and responsibilities" referred to in article 10-2 assumed a special significance, which justified leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference was proportionate to the above aim.[283] Based on this argument, the ECtHR declared inadmissible the applications of soldiers who were dismissed from the army for being part of political parties which pursued "unconstitutional" goals.[284]

The same approach, attributing major significance to the loyalty of policemen, can be traced in *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*,[285] which concerned the freedom of expression of police trade unions. The applicants, members of the police trade union, spontaneously called for the Government to step down during a public meeting, and displayed a banner which read: "If the State doesn't pay a policeman, the mafia will do so with pleasure." Subsequently, the Minister of the Interior criticised the meeting and its organisers and removed one of the applicants from his post as a director in the police force. In deciding this case, the ECtHR placed great weight on the police's duty of loyalty to

[283] ECtHR, Erdel v. Germany (30067/04) inadmissible 13/02/2007(Call-up of reserve officer revoked owing to membership of a political party suspected of disloyalty to the constitutional order)
[284] Ibid, Lahr v. Germany (16912/05) inadmissible 01/07/2008 (Early termination of a conscript's military service on the ground of his membership of an extremist party).
[285] ECtHR, Trade Union of the Police in the Slovak Republic and Others v. Slovakia (11828/08) 25/09/2012.

the State, which played a fundamental role in ensuring internal order and security and fighting crime.[286] Refusing to rule in favour of the applicants, it upheld the requirement that police officers should act in an impartial manner when expressing their views, so that their reliability and trustworthiness in the eyes of the public was maintained.[287]

However, in spite of the broader duty of loyalty imposed on policemen, the prohibition on them joining any political party or of engaging in any political activity has been found to be in breach of article 10. In *Rekvényi v. Hungary*,[288] the ECtHR stated that that this prohibition, because it curtailed the applicant's involvement in political activities, interfered with the exercise of the applicant's right to freedom of expression. The ECtHR had recognised the establishment of a politically neutral police force as a legitimate aim of the interference.[289] Considering the necessity of the interference it drew attention to the peculiarity of Hungarian history as only five years had passed since the collapse of the communist regime.[290]

Scholars noticed that the ECtHR gave considerable weight to the circumstance of the State's transition from that communist regime in conducting its balancing exercise.[291] The special regard paid to the length of this period reflected, in the opinion of certain commentators, the fact that in respect of dangers to democracy the ECtHR does not allow states to use the argument of special circumstances of transition for a very long time.[292] Besides this factor and with more depth, the ECtHR also considered the scope of the prohibition.

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[286] See also ECtHR, Lahr v. Germany, para. 69.
[287] ECtHR, Trade Union of the Police in the Slovak Republic and Others v. Slovakia, para. 70.
[288] ECtHR, Rekvényi v. Hungary [GC] (25390/94) 20/05/1999.
[289] Ibid, para. 46.
[290] Judge Fischbach, in contrast with the majority, found that it was essential that change be accompanied by an approach fostering awareness of democratic pluralism through divergent political views that fuel debate over ideas in the police as well. Partly Dissenting Opinion of Judge Fischbach, Rekvényi v. Hungary.
[291] Varju Marton, Transition as a Concept of European Human Rights Law (January 19, 2009). Available at SSRN: http://ssrn.com/abstract=1329978 (accessed 01.06.2015).
[292] Antoine Buyse, The truth, the past and the present: Article 10 ECHR and situations of transition. In: Antoine Buyse, Michael Hamilton, editors. Transitional Jurisprudence and the ECHR: Justice, Politics and Rights Cambridge University Press, 2011. P. 136.

Comparing the case with *Vogt*, ,[293] the Grand Chamber in *Rekvényi* found that the wording of the relevant article in the Hungarian Constitution might prima facie suggest that it required an absolute ban on the political activities of policemen. However, an examination of the relevant legislation showed that police officers had in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. Notably, whilst sometimes subject to restrictions imposed in the interest of the service, police officers had the right to expound on election programmes, including to promote and nominate candidates, organise election campaign meetings, vote in and stand for elections to Parliament, local authorities and the office of mayor, participate in referenda, join trade unions, associations and other organisations, participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics.[294] In these circumstances, the scope and the effect of the impugned restrictions on the applicant's exercise of his freedom of expression were found to be proportionate to the aim of protection of national security and public safety and the prevention of disorder.[295]

The ECtHR's reasoning as to the interference with the applicant's rights under article 11 was brief. Referring to its analysis in relation to article 10, the ECtHR stated that the interference with the applicant's freedom of association was justified under article 11-2 which did not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.[296]

This Grand Chamber judgment, in spite of having failed to find a violation, provides important guarantees of policemen's freedom of expression on political matters as it extends the main conclusion of the *Vogt* judgment - the freedom to express political opinions cannot be banned absolutely.

- **Judges**

[293] It's worth noting that Judge Jambrek in the Vogt case argued that the ban was not absolute. See Dissenting Opinion of Judge Jambrek, Vogt v. Germany (17851/91 )26/09/1995, para. 6.
[294] ECtHR, Rekvényi v. Hungary, para. 49.
[295] ECtHR, Rekvényi v. Hungary [GC] (25390/94) 20/05/1999, para. 41,50.
[296] Ibid,para. 61

The ECtHR has on many occasions emphasised the special role of the judiciary, which, as the guarantor of justice, must enjoy public confidence.[297] In order to maintain public confidence, judges are required to show restraint in exercising their freedom of expression in all instances where the authority and impartiality of the judiciary were likely to be called in question.[298] Public criticism of the judiciary on the part of judges themselves obviously undermines the public's confidence in this branch of Government. In these types of cases, the ECtHR has had to decide whether such a freedom of expression, which is evidently in contrast with the duty of loyalty, might be justified by the public interest and should be permitted in democratic society.

In *Wille v. Lichtenstein*,[299] the ECtHR protected the right of the judge to hold personal opinions on political matters and even to share it publicly in spite of the State's arguments that the nature of judicial office required the applicant to exercise a particularly high degree of self-restraint in making public pronouncements which had a political flavour.[300] The Chamber judgment in *Baka v. Hungary* protected the right of the president of the respondent's Supreme Court to criticise judicial reforms; in *Kudeshkina v. Russia*[301]- the right of judges to make whistleblower disclosures.

Therefore, the duty of loyalty and discretion imposed on judges, although rather wide, could be restricted in favour of the freedom of expression insofar as public interests in democratic societies were concerned.[302] In the cases of some Italian judges, punished for being members of mason organisations, the ECtHR did not consider the necessity of such an interference under either articles 10 or 11 of the ECHR, having found that such a sanction lacked foreseeability and thus violated the ECHR for that reason.[303] The *Maestri* case had a strong dissent; the dissenting opinions of five judges drew especial attention to the specific historical

[297] ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009, para. 86.
[298] ECtHR,Wille v. Liechtenstein[GC] (28396/95) 28/10/1999, para. 64, Kudeshkina v. Russia, para. 86.
[299] ECtHR, Wille v. Liechtenstein.
[300] ECtHR, Wille v. Liechtenstein[GC] (28396/95) 28/10/1999, para. 59.
[301] ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009.
[302] See also ECtHR, Pitkevich v. Russia (47936/99) inadmissible 08/02/2001, where the Court considered the judge's freedom of expression which did not serve any public interest.
[303] ECtHR, Maestri v. Italy (39748/98)17/02/2004; N F v. Italy (37119/97) 02/08/2001.

background of mason organisations being connected with the mafia,finding that the disciplinary sanctions imposed by the State was not in breach of the ECHR. These dissenting opinions show that judges' duty of loyalty might be read as precluding them from expressing views or against membership in organisations which might influence public's view of judicial impartiality.

- **Members of parliament**

In the recent case of *Karácsony and others v. Hungary*,[304] the ECtHR underlined that the right of democratically elected parliamentary representatives to the freedom of expression deserves a very high level of protection, because it is necessary to ensuring democratic principles and an open process, in addition to exemplifying the principles of pluralism.[305] In this case, which concerned the imposition of fines on members of Parliament,[306] the ECtHR did not agree with the State, which argued that speeches in Parliament did not fall under the ordinary standards of speech as they entaileded special responsibilities of parliamentarians. The ECtHR found the violation of article 10 in this case.[307]

In *Zdanoka v. Latvia*,[308] the ECtHR acknowledged that parliamentarians' duty of loyalty could not be identical or even similar to that required of other members of the public service.[309] It emphasised that candidates for legislature, which is based on the idea of political pluralism, cannot be required to be "politically neutral".

It further found that the State, having ruled on the applicant's ineligibility to stand for parliamentary election in Latvia due to her former membership of a political party and expression of certain political views, violated article 11 of the ECHR.

In *McGuinness v. The UK*,[310] the ECtHR ruled inadmissible the applicant's claim that his article 10 rights had been violated because his Northern Irish republican beliefs were in contrast with the prescribed oath of allegiance to the

[304] ECtHR, Karácsony and others v. Hungary (42461/13) 16/09/2014, the case was referred to the Grand Chamber, which considered the case on the 8.07.2015.
[305] Ibid, para. 66.
[306] The applicants were fined for conduct which was considered to be gravely offensive to the parliamentary order: during a Parliament sessions they presented a banners with the words "FIDESZ [the governing party]. You steal, you cheat and you lie" and "Here operates the national tobacco mafia". Ibid, para. 7-10.
[307] ECtHR, Karácsony and others v. Hungary (42461/13) 16/09/2014, para. 40, 69.
[308] ECtHR, Zdanoka v. Latvia (58278/00) 17/06/2004.
[309] Ibid, para. 85.
[310] ECtHR, McGuinness v. UK (39511) inadmissible 08/06/1999.

British monarchy. The ECtHR pointed out that the requirement for elected representatives of the House of Commons to take an oath of allegiance to the reigning monarch could reasonably be viewed as an affirmation of loyalty to the constitutional principles that support, *inter alia*, the workings of representative democracy in the respondent State. The alleged denial of access to services and facilities in the precincts of the House of Commons did not prevent the applicant from expressing his views and thus did not violate article 10 of the ECHR.

Therefore, parliamentarians' duty of loyalty, although rather limited compared with the analogous duty imposed on other public servants, is indisputable as far as basic constitutional principles are concerned.

▪ **Private employees**

In *Predota v. Austria*,[311] the ECtHR determined that a State Company employee, who did not exercise any public authority and whose employment relationship was governed by private law, and whose employment disputes were subject to the jurisdiction of the domestic Labour Courts, could not claim the violation of the State's negative obligations. Therefore, all private employees as well as employees falling within the category specified in the *Predota* decision can refer only to the violation of the positive obligation of the State, when seeking protection of their to the freedom of expression in the workplace. The ECtHR's approach to the loyalty of private employees is much more superficial in contrast to the above-mentioned cases in respect of public servants.

In *Van der Heijden v Netherlands*,[312] the applicant appealed against his dismissal from the Limburg Immigration Foundation due to his being a member of a political party which was hostile to the presence of foreign workers in the Netherlands. In dismissing this claim, the Commission noted the evident tension between the aims of the employer and the views of the applicant, concluding that the employer should have some discretion concerning the composition of his staff. Although the Commission refrained from considering the employee's loyalty, this decision

[311] ECtHR, Rudolf Predota v. Austria (28962/95) inadmissible 18/01/2000.
[312] EurCommHR, Van der Heijden v Netherlands (11002/84) inadmissible 08/03/1985.

demonstrates the factors which can have particular importance for establishing proportionality of an interference and therefore for outlining the limits of an employee's loyalty. It took into account the professional duties of the applicant, who was a regional director of a Foundation, and the specific nature of his work, which was aimed at protecting the rights of immigrants. The application was declared inadmissible, as in the view of the Commission, the employer could reasonably take account of the adverse effects which the applicant's political activities might have on the Foundation's reputation.

It is interesting to note that the Commission decided it was unnecessary to consider whether the views of the applicant influenced his professional activities, thus attaching high standards of loyalty to the employee without distinguishing between private life and professional activities.

The same approach may be seen in the *Rommelfanger* case,[313] in which the applicant, a doctor at a Catholic hospital, argued that his dismissal, based on his having expressed an opinion about abortion in the press that was not in conformity with the position of the Catholic Church, violated his freedom of expression. The Commission noted that by entering into contractual obligations vis-à-vis his employer the applicant had accepted a duty of loyalty towards the Catholic Church, which limited his freedom of expression to a certain extent. The Commission arrived at this conclusion without undertaking any analysis as to the actual harm which might be caused to the Hospital, or reflections of the public value of the applicant's opinion.

In the recent decision of *Lichtenstrasser v. Austria*,[314] the ECtHR was reluctant to protect the freedom of an employee to express his opinion and refrained even from the necessity test. The applicant in this case was forced to sign a mutual agreement on dismissal because his views as to the impossibility of his self-development at work and his desire to develop his own business had been raised in an interview published in the newspaper. . The ECtHR noticed that there was no

[313] EurCommHR, Maximilian Rommelfanger v. Federal Republic of Germany (12242/86) inadmissible 26/06/1986.
[314] ECtHR, Lichtenstrasser v. Austria (32413/08) 07/10/2014.

public interest in the dissemination of this information. Referring to the margin of appreciation of the State, it briefly concluded that "the dispute was an ordinary labour contract dispute, which did not disclose any inappropriate limits to the applicant's freedom of expression within the meaning of Article 10 of the Convention" as the applicant had a duty of loyalty towards his employer and was not under pressure when he signed the agreement to terminate his employment.[315]

The *Lichtenstrasser* decision makes us remember the judgment in *Ivanova v. Bulgaria*[316]where the ECtHR, despite there being a lawful reason for the applicant's dismissal, overruled the decisions of the national Courts, and found that it was in breach of the ECHR as it violated the applicant's freedom of religion. Therefore, the ECtHR on occasions goes much deeper into its analysis of what an "ordinary labour contract dispute"[317] might constitute on a national level.

This finding leads to the presumption that as far as private employees are concerned, the States have a particular wide margin of appreciation in their estimation of the duty of loyalty.[318]

Concluding this subsection on employees' duty of loyalty in the context of the freedom of expression or association, the main contribution of the ECtHR to the protection of the rights of employees should be emphasized. The ECtHR has elaborated a detailed approach to the scope of the obligation of loyalty and discretion in respect of different public servants; it has urged States to balance in all cases the duty of loyalty with the right to freedom of expression and association, paying particular attention to the rigorous examination of the necessity of the interference.

### 3.2. Public criticism of one's employer, disclosure of information and standards of whistle-blower protection

Public criticism by an employee evidently affects the reputation of his or her

[315] ECtHR, Lichtenstrasser v. Austria (32413/08) 07/10/2014, para. 30.
[316] ECtHR, Ivanova v. Bulgaria (52435/99)12/04/2007.
[317] The case Rubins v. Latvia is another example of a deeper scrutiny of employment disputes. ECtHR, Rubins v. Latvia (79040/12) 13/01/2015.
[318] See in this respect Collins, Hugh. On the (In)compatibility of Human Rights Discourse and Private Law. LSE Law, Society and Economy Working Papers 7/2012. Available at: http://www.lse.ac.uk/collections/LAW/wps/WPS2012-07_Collins.pdf (accessed 20.05.2015).

employer and is in contrast with the employee's duty of loyalty; this has already been discussed above. However, the ECtHR in many cases has acknowledged that an employee has the right to publicly criticise his or her employer if the criticism contributes in some way to the development of a democratic society, and is expressed in an appropriate form. The main questions that the ECtHR poses to consider such cases are: who, whom, why and in what form? In the first subsection, the ECtHR's approach to all these factors will be discussed. In the second subsection, the standards of whistle-blower protection will be dealt with.

### 3.2.1. Factors influencing the adjudication

▪WHO?

Deciding whether an interference with the employee's freedom of expression was necessary in a democratic society, the ECtHR putssignificantweight to the social or workplace position held by the applicant.[319] Generally, the ECtHR tends to give more protection to the right of higher management personnel, leading public officials, journalists, trade union leaders to freely express themselves, especially if the applicant could have a "complete vision of the situation concerned".[320]

**Higher management**

In case of *Bathellier v. France* the applicant, a State electric company human resources ("**HR**") chief, was dismissed for reporting to the prefect of the city the shortcomings in company which, in his opinion at the time, presented a serious danger to public security. The ECtHR, declaring the application inadmissible, pointed out (amongst other things) that the applicant, due to the peculiarity of his post, could not have a complete vision of technical aspects of the problem he was complaining of.

[319] ECtHR, Di Giovanni v. Italy (51160/06) 09/07/2013, para. 75.
[320] ECtHR, François Bathellier v. France (49001/07) inadmissible 12/10/2010.

Thus the ECtHR implicitly established the requirement that an employee seeking protection under this provision had to be duely competence in his or her public criticism of the employer, or over the substance of the disclosed internal information. Another example of this approach by the ECtHR, focusing on an applicant's"complete vision of the situation", is found in *Predota v. Austria*.[321] In this case, the applicant, a switch cleaner of the Austrian federal railway company, was dismissed for publicly criticising the railway service and the way prices were regulated . The ECtHR declared this application inadmissible as it imputed that the employee's main motivation was to damage the employer's reputation. However, taking into account that the terms used by the applicant were emotional rather than excessive, the ECtHR could have come to the opposite decision if the same information was spread by one of the leading managers who had access to the relevant information.

**Public officials**

The right of public servants' to publicly criticise their employer, the State, is granted in exceptional situations when the ECtHR considers that the information made public has indisputable social value and must be known to the citizens. In such cases, the ECtHR always balances the public official's freedom of expression on the one hand against the resultant damage to the State's reputation. Public prosecutors and judges have particular roles amongst public officials. In respect of prosecutors, the ECtHR has widened the admissible limits of public criticism, acknowledging that they can play a "crucial role in the administration of justice".[322]

[321] ECtHR, Predota v Austria (14621/06) inadmissible 18/01/2000
[322] ECtHR, Kayasu v. Turkey, para.91.

As far as judges' freedom of expression is concerned, the ECtHR has stated that judges are expected to show restraint in exercising this freedom in all cases where the authority and impartiality of the judiciary were likely to be called in question.[323] This restraint is an essential factor for ensuring the public's confidence in the judiciary which "involves a belief in the fairness and impartiality of the tribunal."[324] On these grounds, the freedom of criticism is protected only when the information has factual basis and was directly known to the judge who made the criticism.[325]

**Journalists**

The ECtHR has acknowledged the special character of journalists' duty of discretion, "given that it is in the nature of their functions to impart information and ideas". It has found, for instance, that the penalty imposed on journalists for publicly criticising the management and programming policy of public broadcasting organisations constituted a violation of article 10.[326] However, the ECtHR pointed out that a broad acceptance to the discretion and loyalty of journalists as employees did not mean that they are automatically entitled "to pursue, unchecked, a policy that ran counter to that outlined by employer, to flout legitimate editorial decisions."[327] In cases concerning the right of other employees (not journalists) to publicly criticise their employers, the ECtHR pointed out that the applicants did not have a role to inform and alert the public, nor to impart information and ideas on matters of public concern and therefore restricted their freedom of expression, finding their applications inadmissible.[328]

The ECtHR's perception of the scope of journalists' freedom to criticise was expressed in *Wojtas-Kaleta v. Poland*, where it upheld the applicant's argument that as a journalist, an employee had a right and an obligation to comment on

[323] ECtHR, Wille v. Liechtenstein, para. 64
[324] Miller, Arthur Selwyn. "Public Confidence in the Judiciary: Some Notes and Reflections." Law and Contemporary Problems (1970): 69-93. Available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3277&context=lcp (accessed 17.06.2015).
[325] Compare the ECtHR's judgments in Di Giovanni v. Italy and Kudeshkina v. Russia.
[326] ECtHR, Wojtas-Kaleta v. Poland (20436/02) 16/07/2009 and Fuentes Bobo v. Spain (39293/98) 29 February 2000; Matuz v. Hungary.
[327] ECtHR, Nenkova-Lalova v. Bulgaria (35745/05) 11/12/2012, para. 59.
[328] ECtHR, Balenović v. Croatia (28369/07) inadmissible 30/09/2010

matters of public interest.[329]

**Trade union leaders**

The freedom of expression of trade union leaders is "the oxygen which gives associative rights their vitality"[330] and forms a part of the freedom of association granted by article 11. The ECtHR has on numerous occasions confirmed that the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company.[331] European judges emphasised that this right is an essential and indispensable aspect of the right of association, a prerequisite to the fulfilment of the goals of associations and trade unions.[332]

However, this freedom is not unlimited and must be balanced with the necessity to protect the reputation of the employer. Trade unions of public servants are more subject to such limitations as even in their role as a trade union leader or member these public servants need to act with loyalty and restraint.

Thus, in *Szima v. Hungary* the ECtHR justified the criminal conviction of a police trade union leader for "accusatory opinions which undermine the trust in, and the credibility of, the police leadership".[333] The ECtHR emphasised that the applicant, who had considerable influence over other servicemen, should have had to exercise her right to freedom of expression in accordance with the duties and responsibilities which that right carries with it, in the specific circumstances of her status and in view of the special requirement of discipline in the police force.

The ECtHR's criticism of the applicant's internet publications shows that there would have been more likelihood of the ECtHR finding in her favour had the applicant's statements been more related to trade union activities and more than being a "pure value judgment" to actually having a clear factual basis. The ECtHR noted the fact that the applicant, in domestic legal proceedings, was deprived of the

[329] ECtHR, Wojtas-Kaleta v. Poland, para. 47.
[330] M. O'Boyle, "Right to Speak and Associate under Strasbourg Case-Law with Reference to Eastern and Central Europe", Conn. J. Int'l L., vol. 8, 1993, p. 282
[331] ECtHR, Palomo Sanches and others v. Spain, Szima v. Hungary, Vellutini v. France.
[332] Joint Dissenting Opinion Of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović And Vučinić in Palomo Sanches v. Spain.
[333] ECtHR, Szima v. Hungary, para. 32.

ability to submit evidence to support her statements; however, this finding did not change the general direction of the judgment. Commentators noted that such a refusal, in itself, to be barred from giving evidence or proof in court to show the factual basis of certain allegations, has been considered by the ECtHR in other cases to constitute a breach of article 10 of the ECHR.[334]

This judgment was criticised by scholars as largely restricting the freedom of expression of a trade union leader in respect of an ordinary staff member who would have been granted whistleblower protections.[335] In my opinion, the lack of attention to the facts asserted by the applicant is the problematic point of this judgment. Ms Szima's allegations, even if they were "indeed capable of causing insubordination since they might discredit the legitimacy of police actions", could have been justified under article 10 if they were based on hard facts. Therefore, the ECtHR's main mistake in this case (taken in the context of article 10) is failing to take into account the refusal of national courts to consider any evidence the applicant should have been able to bring to prove her accusations, and the reluctance to consider such relevant evidence in Strasbourg.

Returning to the scope of a trade union's right to criticise an employer, it is worth referring to the *Vellutini* judgment.[336] In *Vellutini*, the ECtHR found that the conviction of the President and the General Secretary of the municipal police officers' union ("**USPPM**") for public defamation of the mayor, on the basis of statements made in their capacities as union officials, violated their rights under article 10. It is interesting to note that trade union leaders were not, in this case, expected to prove their statements as rigorously as journalists have been in other cases.[337]

The ECtHR thus attached great significance to the fact that the applicants had

[334] Dirk Voorhoof, New Judgment on Trade Union Freedom of Expression. November 7, 2012. Available at: strasbourgobservers.com/2012/11/07/new-judgment-on-trade-union-freedom-of-expression/#more-1853 (accessed 02.06.2015).
[335] Filip Dorsscmont, Collective Action Against Austerity Measure In: Niklas Bruun, Klaus Lörcher, Isabelle Schömann, editors. The Economic and Financial Crisis and Collective Labour Law in Europe. Bloomsbury Publishing, 2014 (153-170) p. 162.
[336] ECtHR, Vellutini et Michel v. France (32820/09) 06/10/2011.
[337] ECtHR, Vellutini et Michel v. France (32820/09) 06/10/2011, para. 41.

made their statements in their capacities as union officials and in connection with the professional situation of one of the union's members. The mayor, even if directly named in the leaflet spread in the town by the applicants, was criticised only in connection with his professional duties. As the applicants' remarks had been made in response to the mayor's accusations about the professional personal conduct of a member of their union, the ECtHR was willing to justify on their part "a degree of exaggeration, or even provocation" and their use of immoderate language.[338] It stated that the impugned remarks had not been offensive or hurtful to a degree that went beyond the framework of trade union discourse.

In the Grand Chamber judgment of *Palomo Sanches and others v. Spain*,[339] the ECtHR, in contrast, stated that the applicants, whose criticism of their employers were formulated in a very offensive manner, exceeded the limits of the trade union's freedom of expression and justified the dismissal of trade-union members for publishing articles offending their colleague.[340]

This case law demonstrates that the trade union's freedom to express criticism is more protected[341] but still cannot overstep normal ethical rules.

▪WHOM?

The ECtHR attaches great significance to the position of the criticised person, as this factor helps to establish the limits of permitted criticisms. Thus in *Kudeshkina v. Russia*, the ECtHR pointed out that the freedom of expression targeted at criticising the judiciary should be more restricted taking into account the importance for judges to enjoy public confidence to fulfill their duties.[342] However, the social value of the disclosed information permitted the ECtHR to broaden the freedom of expression of the applicant and decide in her favour nevertheless in this case.

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[338] Ibid, para. 39.
[339] ECtHR, Palomo Sánchez and Others v. Spain [GC] (28955/06 et al) 12/09/2011.
[340] Ibid.
[341] See also Wojtas-Kaleta v. Poland (20436/02) 16/07/2009, para. 45.
[342] EctHR, Kudeshkina v. Russia, para. 86; Di Giovanni v. Italy, para. 81, Poyraz v. Turkey (15966/06) 07/12/2010, para. 77.

In several cases the ECtHR has pointed out that criticism of high-ranking officials, as, for instance, the deputy Prosecutor-General, should be granted more scope than in relation to a private individual.[343] The status of private individuals, in the opinion of the ECtHR, enlarged the zone of interaction, which may fall within the scope of private life and therefore narrows the scope of acceptable criticism.[344]

In two cases concerning the criticism of doctors, the ECtHR recognised that medical practitioners enjoy a special relationship with patients based on trust, confidentiality and confidence. However, the special fiduciary character in such relationships is not interpreted as preventing doctors from criticising other doctors' professional activities,[345] even those who have a superior position,[346] as far as it is aimed at protection of the rights of others.

▪WHY?

It is generally established that the criticism of one's employer or the disclosure of information would be protected by article 10 if the employee's criticism or disclosure was motivated by acknowledged social goods, such asthe maintenance of the impartiality of the judiciary;[347] reporting violations of democratic principles;[348] reporting the abuse or misuse of powers and other irregularities in the employer's activities;[349] or more broadly advancing the protection of the rights of others.[350]

If the motive of an employee was to harm the reputation of his employer or of other employees – such criticism or disclosures are generally not protected under article 10.[351] However, the intention to harm is not always objectively ascertainable. The ECtHR tends to find it in cases where the criticism or disclosure of information followed, or was made in the course of, a conflict between an

[343] EctHR, Raichinov v. Bulgaria (47579/99) 20/04/2006.
[344] EctHR, Marin Stănciulescu v. Romania (14621/06) 22/11/2011.
[345] ECtHR, Frankowicz v. Poland (53025/99)16/12/2008, para. 49.
[346] ECtHR, Sosinowska v. Poland (10247/09) 18/10/2011.
[347] ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009.
[348] ECtHR, Matuz v. Hungary (73571/10) 21/10/2014, reporting about censorship in the state telecommunication company.
[349] ECtHR, Guja v. Moldova [GC] (14277/04) 12/02/2008, also Rubins v. Latvia (79040/12) 13.01.2015.
[350] ECtHR, Sosinowska v. Poland, Heinisch v. Germany (28274/08) 21/07/2011.
[351] EctHR, Diego di Naria v. Spain(46833/99) 14/03/2002, para. 35; Predota v Austria (28962/95) 18/01/2000; Stănciulescu v. Romania (14621/06) 22/11/2011, para. 31-32.

employer and its employees. Thus in the recent case of *Langner v. Germany*, it referred to the conclusions of the national court, which found that the employee's allegations regarding his superior's illegal conduct was motivated by personal misgivings arising from the prospect of the impending dissolution of the applicant's sub-division at work (the city council).[352]

In the case of *De Diego Nafria v. Spain*[353], the ECtHR found that the dismissal of the Spanish Bank's employee, who sent a letter to the Vice-President of the bank accusing its Governor and other senior officials of various irregularities, was not in breach of article 10 because there had been pre-existing conflict between the employee and bank

In *Fuentes Bobo v. Spain*, the ECtHR also established that the employee, dismissed from the State telecommunication company for the criticism of the employer in non-ethical terms, was motivated by an intention to harm its reputation.[354] It took into account the harsh criticism he made of his employer in the radio interview leading to his dismissal was made in the course of a conflict between he and his employer after the cancelling of a TV programme on which the applicant had worked. However, seeing the social importance of the topic (the management of state telecommunications), the ECtHR focused its attention on the proportionality of the sanction and found that the employer should have chosen a less severe penalty.[355]

In *Predota v. Austria* the ECtHR, having established the employee's intention to harm the reputation of his employer, did not consider the proportionality of the dismissal.[356] In *Rubins v. Latvia*[357], the ECtHR acknowledged that the motives of the applicant, who was dismissed for an unethical letter sent to the employer, were relevant for the assessment of the proportionality of the interference. However it

[352] ECtHR, Langner v. Germany (14464/11) 17/09/2015, para. 47
[353] ECtHR, De Diego Nafría v. Spain (46833/99) 14/03/2002
[354] ECtHR, Fuentes Bobo v. Spain (39293/98)29/02/2000.
[355] Dissenting Judges Caflisch and Makarczyk, in contrast to the majority, supposed that the employer could not have been required to choose another sanction as a less severe disciplinary penalty was already used against the applicant. See Opinion dissidente de mm. les Juges Caflisch et Makarczyk, arrêt Fuentes Bobo v. Spain (39293/98) 29/02/2000.
[356] EctHR, Predota v. Austria(28962/95) 18/01/2000.
[357] ECtHR, Rubins v. Latvia (79040/12) 13/01/2015

refrained from conducting an in-depth analysis of this factor. The ECtHR concluded that the dismissal of Mr Rubins, a professor who was threatening to the Rector of the University that he would disclose public information on certain irregularities in order to keep his post, violated article 10. In *Balenović v. Croatia*,[358] the ECtHR paid much greater attention to the motives of the applicant. The applicant in that case had publicly accused the management of the State oil company of mismanagement and fraud. Having established the lack of a factual basis for such statements, it noted that the applicant was motivated by a concern to publicise her own professional grievances.

These cases demonstrate that the ECtHR has not elaborated a coherent theory of how it regards or considers "the motive factor". In some cases it seems to have a major importance for dismissing the application, in others it serves only as one of many other factors, and does not significantly influence the overall conclusion either way.

▪ IN WHAT FORM?

The ECtHR has repeatedly stated that article 10 is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[359] However, article 10 protects the expression of such "shocking" or "disturbing" information only if it is made in appropriate terms, the form of expression corresponds with the circumstances of the case (depending on factors including the people concerned and the reasons for which the disclosures are made, as has been looked at in the immediately preceding paragraphs), and must have a factual basis.[360] The criticism must be more than a "pure value judgment"[361] and the more serious allegation requires the more solid the factual basis.[362] Criticism of employers or the disclosure of information is generally more protected if it forms a part of political speech or advances

[358] ECtHR, Balenović v. Croatia ( 28369/07) inadmissible 30.09.2010
[359] ECtHR, Handyside v. The UK (493/72) 07/12/1976, para. 49; Raichinov v. Bulgaria, para. 48; Kudeshkina v. Russia, para. 82.
[360] EurCommHR, Eliane Morissens v. Belgium (11389/85) inadmissibile 03/05/1988.
[361] ECtHR, Szima v. Hungary (29723/11) 09/10/2012, para. 30.
[362] ECtHR, Balenović v. Croatia (28369/07) 30/09/2010.

recognised public interests.[363]

The general approach to the role played by the form of the criticism can be found in *Palomo Sánchez and others v. Spain*, where the ECtHR found that the opinions which are expressed in grossly insulting or offensive terms cannot be protected under article 10.[364]

This approach is largely justified as the use of grossly offensive vocabulary tends to reveal an intention to humiliate, rather than to contribute to the social debate. However, the ECtHR is not always clear in its analysis dealing with the form of an employee's freedom of expression. Returning to the case of the railway employee in *Predota v Austria*,[365] it must be mentioned that, in the ECtHR's opinion, the terms used by the applicant revealed that his main intention was to damage his employer's reputation, so the dismissal was considered necessary in a democratic society and proportionate to the aim pursued.

This decision leads us to consider which words or terms, used by the employee, could have led the ECtHR to such a conclusion. It is worth reproducing here an extract of the leaflet distributed by the applicant:

> *"Very often our railways are of no use, stairs too high, connections bad (often there are none), uncomfortable (ugly) waiting rooms, stations too far from the towns, trains not suitable for handicapped people and so on...*
> *Prices too high; rates too complicated; soon nobody will understand.*
> *Practical personnel are diminishing; useless bureaucracy is increasing.*
> *Showing off instead of comfort and the clients feel angry.*
> *(Political) party posts paralyse ideas; practical and friendly co-operation becomes more and more meaningless".*

[363] ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009; Matuz v. Hungary (73571/10) 21/10/2014, see also Nilsen and Johnsen v. Norway [GC] (23118/93) 25/11/1999, para. 46.
[364] ECtHR, Palomo Sánchez and others v. Spain [GC] (28955/06 et al) 12/09/2011, para. 76.
[365] ECtHR, Predota v Austria (14621/06) inadmissible 18/01/2000.

These statements are evidently emotional, but it is conceivable that they still contribute to the social debate, in contrast with the ECtHR's views as expressed in the case. It can be argued that the railway has become an essential part of everyday life for almost every citizen; therefore the quality of the service, the transparency of prices are matters of legitimate public concern. The ECtHR did not take into account the previous suggestions and critical comments sent by the applicant to his employer and his further transfer to a lower post. It did not consider whether another sanction could have achieved the employer's goals.

In contrast, the ECtHR in *Kudeshkina v. Russia* protected a judge's freedom of expression in spite of the fact that they found she had "allowed herself a certain degree of exaggeration and generalisation."[366] The importance of the information she disclosed, which was absent in *Predota*, made the ECtHR conclude that her statements should not be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.

An analysis of the jurisprudence reveals that the ECtHR assesses more rigorously written expressions of criticism and public criticisms. It has foundthat criticism of higher-level officials was protected by the ECHR as the criticism was "apparently made in the course of an oral exchange and not in writing, after careful consideration".[367] In *De Diego Nafria*, the ECtHR found that the dismissal of the Spanish Bank's employee, who sent a letter to the Vice-President of the Bank accusing the Governor and other senior officials of various irregularities, was not in breach of article 10. It noted that the accusations were "expressed in complete serenity and clarity in substance and form".[368] In *Langner v. Germany*, the ECtHR pointed out that the applicant's oral allegations of his supervisor's illegal conduct were subsequently substantiated in writing; therefore, Mr Langner had time to reflect on the impact of his allegations and had the opportunity to verify their legal significance.[369] Basing on these findings, the ECtHR concluded that the dismissal

[366] ECtHR, Kudeshkina v. Russia, para. 95.
[367] ECtHR, Raichinov v. Bulgaria, para. 52.
[368] ECtHR, De diego Nafria v. Spain, para. 35, see also Aguilera Jiménez And Others v. Spain (28389/06) 08/12/2009, para. 35.
[369] ECtHR, Langner v. Germany (14464/11) 17/09/2015, para. 50.

of the applicant did not violate his freedom of expression.

The ECtHR distinguishes between written forms of employees' criticisms "means which have a broad and immediate impact",[370] such as newspapers or leaflets,[371] and others which have less impact, such as letters written to the organisation itself, and applies a more rigorous analysis in the case of the former when determining the social value of the information concerned versus any harm caused to the employer's reputation by the publication of that information.

Considering cases on criticism of employers, the ECtHR urged national courts to assess the truthfulness of the respective employee's statements.[372] Thus in *Di Giovanni v. Italy*, the ECtHR decided that the disciplinary sanction imposed on a judge was a proportionate measure for the State to take as the information related in her newspaper interview was not grounded in facts and at that time, presented a rumour, subsequently discredited, as a well-founded public opinion.[373]

In contrast, the ECtHR found in *Kudeshkina v. Russia*that the dismissal of a judge for criticising the Court to be in breach of article 10, as the information disclosed in the radio interview which comprised the criticism was directly known to the applicant and had been confirmed by other testimonies.[374]

The approach of the ECtHR to the various forms of criticism can be summarised as follows: a more public expression of criticism requires a more solid factual basis and must be justified by the social interest in democratic society. The cases considered above show that the ECtHR has elaborated a complex approach to the cases of public criticism or disclosure of information. The set of questions used by the ECtHR (who is making the disclosure, whom are the subject of the disclosures being made, why are the disclosures being made and in what form the disclosures are publicised) might provide a very helpful framework for national courts in consideration of employment disputes where the employee's freedom of

[370] ECtHR, Balenović v. Croatia (28369/07) inadmissible 30/09/2010
[371] ECtHR, Predota v. Austria(28962/95) 18/01/2000.
[372] ECtHR, Sosinowska v. Poland (10247/09) 18/10/2011.
[373] ECtHR, Di Giovanni v. Italy (51160/06) 09/07/2013, para. 79. The applicant stated in the interview that a member of the examining body, established for the recruitment of judges and public prosecutors, had used his influence to help a relative to pass the competition.
[374] ECtHR, Kudeshkina v. Russia, para. 92.

expression is engaged. Even though the application of this test, on occasions, lacks coherence and clarity, it still provides a practical tool for the determination of violations of employees' right to the freedom of expression.

### 3.2.2. Standards of whistleblowers protection

The protection of whistleblowers has gained particular public attention in recent times, especially after the disclosures made by Edward Snowden. The UN High Commissioner for Human Rights, Navi Pillay, said that national legal systems must ensure that there are adequate avenues afforded to individuals disclosing violations of human rights to express their concern without fear of reprisals.[375] However, the research of the domestic European State's laws shows that most EU countries fail to adequately protect whistleblowers even though their value in anticorruption and crime-fighting efforts has long been proven.[376]

Only about half of the members of the CoE have ratified the Termination of Employment Convention no. 158 of the International Labour Organisation, which contains provisions on whistleblower protection.[377] Twenty countries have not ratified the Criminal Law Convention on Corruption adopted by the CoE on 27 January 1999.[378] Therefore, on the European stage there was no unified approach to this problem and an elaboration of the framework for such protection is the main contribution of the ECtHR to support whistleblowing. The Commission, in contrast to the ECtHR, was rather reluctant to protect employees who disclosed important information.

Thus in *Patrick Haseldine v.UK*,[379] where the applicant argued that his dismissal for writing a published letter to the Guardian newspaper criticising the British

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[375] UN High Commissioner for Human Rights, Navi Pillay, Mass surveillance: Pillay urges respect for right to privacy and protection of individuals revealing human rights violations (published 12.07.2013) Available at: hhtp://www.ohchr.org (accessed 20.06.2015).

[376] Mark Worth, Whistleblowing In Europe Legal Protections For Whistleblowers In The EU. Report. 2013. Available at: https://whistlenetwork.files.wordpress.com/2014/01/whistleblowing-in-europe-report-november-2013.pdf (accessed 20.06.2015). See also Sándor Léderer, Tivadar Hüttl, Whistleblower Protection In The Central And Eastern Europe Region, Final study. www.whistleblowing-cee.org/summing-study/ (accessed 20.06.2015).

[377] The list of countries that have not ratified this Convention is available at: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312303:NO (accessed 20.06.2015).

[378] Ratification list is available at: http://conventions.coe.int/treaty/en/Treaties/Html/173-1.htm (accessed 20.06.2015).

[379] EurCommHR, Patrick Haseldine v. UK (18957/92) inadmissible 13/05/1992.

Prime Minister was in breach of article 10. The Commission did not analyse the public interest of the information presented in the letter. It focused on the duties of the applicant as a civil servant in a sensitive governmental post and considered that the applicant's action in criticising the policies of the Government to whom he was responsible as an employee was incompatible with his position. The application was further declared inadmissible as the dismissal was found to be a proportionate sanction.

The ECtHR developed a more considered approach to whistleblowing in *Guja v. Moldova*.[380] The circumstances of the case can be summarised as follows: after a public call by the President of Moldova on law enforcement officers to disregard undue pressure from public officials the applicant, who was then the head of the press department of the Prosecutor General's Office, gave the newspaper two letters received by the Prosecutor General's Office, neither of which bore any sign of being confidential, which revealed the attempt of the Deputy Speaker of Parliament and of the Vice-Minister to influence the process of criminal investigations in respect of policemen. After the publication of these letters the applicant was dismissed on the grounds that, among other things, the letters had been secret and that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing over the letters, in breach of the press department's internal regulations.

The applicant had in fact breached his employment obligations and the ECtHR had to determine where it was the case of whistleblowing, which should attract particular protection to the employee's freedom of expression by waiving his duty of loyalty and discretion towards his employer.

The ECtHR noted that a civil servant, in the course of his work, might become aware of in-house information, including secret information, the publication of which corresponds with a strong public interest. The exposure of illegal conduct or public misconduct in the workplace should, in the opinion of the ECtHR, s enjoy protection under article 10 in certain circumstances.

[380] ECtHR, Guja v. Moldova [GC] (14277/04) 12/02/2008.

The ECtHR further set out a list of factors which should be taken into account in considering such cases:

▪ First, it attached great significance to the role of the applicant in this case, pointing that such protection should only be granted in cases where the employee was the only person, or part of a small category of persons, who was aware of what was happening at work and was thus best placed to act in the public interest by alerting the employer or the public at large.[381]

▪ The sequence of disclosure was considered relevant and it was emphasised that disclosure should be made in the first place to the person's superior or some other competent authority and could be disclosed to the public without such prior notification only if such notificiation was clearly impracticable.[382] In any case, the ECtHR had to determine whether there were any other effective means of remedying the wrongdoing which the applicant intended to uncover available to him.[383]

▪ The research of the public interest which would be advanced by the disclosed information should also form part of adjudication process in order to determine whether it was so strong as to override even a legally imposed duty of confidence.[384]

▪ The information disclosed should be genuine and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable.[385]

▪ The damage from disclosure should be assessed to see whether it would outweigh the public interest in having the information revealed[386]

[381] ECtHR, Guja v. Moldova, para. 71
[382] Ibid, para. 73.
[383] Ibid.
[384] Ibid, para. 74.
[385] Ibid, para. 75.
[386] Ibid, para. 76.

▪ The motive behind the actions of the reporting employee is another relevant factor in deciding whether a particular disclosure should be protected or not. The ECtHR directly stated that an act motivated by personal grievance or a personal antagonism, or to gain a personal advantage, including pecuniary gain, would not justify a particularly high level of protection.[387]

▪ The proportionality of the sanction imposed on the applicant (its severity and the availability of other less severe penalties) should be considered, as well as the consequences of imposing each of those sanctions where options are available.

Having considered the case in the light of these principles the ECtHR found that the dismissal constituted a violation of the applicant's right to impart information.

Later, these principles were expressed in Recommendation 1916 (2010), adopted by the Parliamentary Assembly of the Council of Europe, which invited all member States to review their legislation concerning the protection of whistleblowers.[388]

The same principles were upheld to lead the ECtHR to its conclusions in *Kudeshkina v. Russia*. Considering the applicant judge's motives in making public accusations against the President of the Moscow City Court, the ECtHR noted that the accusations were made during the applicant's election company for the post of the deputy of the State Duma. It pointed out that political speech should enjoy special protection under article 10.[389] In assessing the proportionality of the sanction, it noted that the dismissal of the applicant could undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of loss of judicial office.[390] Therefore, as in the *Guja* case,[391] the ECtHR weighed the possible "chilling effect" of the sanction, "which works to the detriment of society as a whole,"[392] and attached much significance to this factor.

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[387] ECtHR, Guja v. Moldova, para. 77.
[388] Recommendation 1916 (2010), adopted by the Parliamentary Assembly of the Council of Europe, adopted on 29 April 2010, Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTMLen.asp?fileid=17852&lang=en (accessed 20.06.2015).
[389] ECtHR, Kudeshkina v. Russia, para. 95.
[390] Ibid, para. 98.
[391] ECtHR, Guja v. Moladova, para. 95; see also Heinisch v. Germany, para. 91; Bucur et Toma c. Roumanie (40238/02) 08/01/2013, para. 119.
[392] ECtHR, Guja v. Moladova, para. 99

In *Heinisch v. Germany*,[393] it stated that the State has a positive obligation to protect the right to freedom of expression, even in private employment, and concluded that the applicant's dismissal from a state-owned limited liability company specialising in health care, on account of her criminal complaint against her employer andupheld by the German courts, constituted an interference with her right to freedom of expression. The applicant was dismissed for publicly disclosing information about the alleged deficiencies in the care provided by the public health institution where she worked as a nurse.

The ECtHR affirmed that "the public interest in being informed about the quality of public services outweighs the interests of protecting the reputation of any organisation." In order to justify external reporting by means of a criminal complaint it found that she had made sufficient numbers of internal complaints before. As an additional argument, the ECtHR noted that German law did not provide for a particular enforcement mechanism for investigating a whistleblower's complaint and seeking remedial action from the employer.[394] In these circumstances, the ECtHR concluded that the dismissal violated article 10 of the ECHR.

In *Bucur and Toma v. Romania*,[395] the first applicant, who worked for the Romanian Intelligence Service ("**RIS**"), was convicted for breaching official secrecy as he stated at a press conference that the RIS unlawfully tapped the phones of a large number of journalists, politicians and businessmen.

It is particularly interesting that the ECtHR reproached the respondent's national courts for the refusal to verify that the divulged information was indeed classified as "top secret". In its opinion, the domestic courts should have examined whether maintaining the confidentiality of the information outweighed the public interest in knowing about any illegal interceptions.[396] Therefore, the ECtHR established that the national courts should examine the content of the classified information and satisfy itself as to the legitimacy of its claims to confidentiality before making a

[393] ECtHR, Heinisch v. Germany (28274/08) 21 July 2011
[394] Ibid, Para. 75
[395] ECtHR, Bucur et Toma c. Roumanie (40238/02) 08/01/2013.
[396] Ibid, para. 111.

decision in such cases.

The ECtHR granted protection to the applicant in this case, in spite of the fact that the accusations were not reported internally before the press conference. It pointed out that given the irregularities the applicant had discovered concerned directly his superiors, it was unlikely that any internal complaints could have stopped the unlawful practices in question. The ECtHR also stressed the fact that at the time of the disclosure being made, the new laws providing a legal framework for whistleblowing had not yet been adopted by the State.[397]

The most recent confirmation of the whistleblowing protection available under article 10 of the ECHR can be found in *Matuz v. Hungary*.[398] The applicant, a journalist at the State TV company, had published a book with numerous in-house letters comprising exchanges concerning alleged censorship by the cultural director of the company. After the publication he was dismissed for breaching the confidentiality clause in his employment contract. The domestic courts upheld the dismissal, having found that the applicant had indeed breached his contract by means of the unauthorised publication of his former employer's internal documents.

The ECtHR noted that the national courts failed to consider the case in the light of the applicant's right to freedom of expression, and the respondent's Supreme Court had even expressly excluded from its scrutiny the question of whether the applicant's freedom of expression justified a formal breach of his employment contract. The ECtHR further stressed that the absence of an effective judicial review of the impugned measure may also lead to a violation of article 10 and the degree of the margin of appreciation afforded to the authorities will necessarily be narrower if the reasoning of the national courts demonstrates a lack of sufficient engagement with the general principles of the ECtHR under article 10 of the ECHR.[399]

In spite of the difference between such a journalist employed by the State

[397] ECtHR, Bucur et Toma c. Roumanie, para. 99.
[398] ECtHR, Matúz v. Hungary (73571/10) 21/10/2014
[399] Ibid, para. 16, 35.

television company and a public servant who discloses illegal conduct, the ECtHR's approach in addressing the respectivedisclosures of confidential information to advance the public interest was largely the same.[400] The ECtHR used the framework elaborated in the *Guja* judgment and considered: (a) the public interest involved in the disclosed information; (b) the veracity of the information disclosed; (c) the damage, if any, suffered by the employer as a result of the disclosure in question; (d) the motive of the reporting employee in making the disclosure; (e) whether, in light of the duty of discretion owed by an employee towards his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) the severity of the sanction chosen to be imposed.[401]

Having considered the relevant circumstances, the ECtHR concluded that the interference violated article 10. This judgment was applauded for raising awareness about the lack of whistleblower protection in many European states.[402] Indeed, it raised significant attention to the need to support whistleblowing on the national level and reminded national courts to take into consideration the fundamental rights element when considering labour disputes.

An example where the severity of the sanction imposed on an employee for making a disclosure was the main point of the Court's scrutiny can be found in *Marchenko v. Ukraine.*[403] The applicant argued that his criminal conviction for publicly accusing his superior of misappropriation and for requesting an official investigation was in breach with article 10. Mr Marchenko, a teacher and the head of a trade union, had lodged criminal complaints against the director of his school about misuse of school property, which were dismissed for lack of evidence. Later, he organised picket at the local administration offices and displayed banners with slogans accusing the director of professional misconduct and abuse of office. The director sued the applicant for defamation and was successful in obtaining a

[400] ECtHR, Matúz v. Hungary, para. 33.
[401] Ibid, para. 34.
[402] Dirk Voorhoof, Whistleblower Protection for Journalist Who Alarmed Public Opinion about Censorship on TV. November 25, 2014. Available at: http://strasbourgobservers.com/2014/11/25/whistleblower-protection-for-journalist-who-alarmed-public-opinion-about-censorship-on-tv/ (accessed 20.06.2015).
[403] ECtHR, Marchenko v. Ukraine (4063/04) 09/02/2009.

judgement against the applicant.

The ECtHR considered the letters demanding investigations into the director's official conduct and the banner slogans exposed during the picket separately. It found that the letters were written in good faith as he had acted on behalf of his trade union and presented various materials in support of his allegations. The banner slogans, however, were found to be defamatory and undermined the director's right to be presumed innocent of the allegations made by the bannes' messages, particularly as the slogans were phrased in particularly strong terms directly accusing her of misappropriating school property. In these circumstances, the ECtHR accepted that the domestic authorities had reasonable grounds for convicting the applicant of defamation. Considering the proportionality of the sanction imposed, it reminded us that the protection of the reputation of others should not unduly hinder public debate concerning matters of public concern, such as the misappropriation of public funds.[404] The imposition of a prison sentence, even if it was suspended, would inevitably have a chilling effect on public discussion and therefore was not necessary in democratic society. This judgment also separately emphasises the necessity of determining the public interest factor and of the balancing exercise, expanding whistleblowing protection to include criminal cases based on defamation actions.

Prof. Dirk Voorhoof once wrote that the ECtHR had "manifestly helped to create an added value for the protection of freedom of expression".[405] The elaboration of a clear framework for the adjudication of cases on whistleblower protection, a careful consideration of the employee's freedom of expression in the context of employment relations, the emphasised value of information disclosed in the public interest – these are the priceless contributions of the ECtHR to the construction of domestic whistleblower protection, a protection which is presently missing in many members of the Council of Europe.

In Russia, for example, article 9 of the Law "On Combating Corruption"

[404] ECtHR, Marchenko v. Ukraine, para. 52.

[405] Voorhoof Dirk, The right to freedom of expression and information under the European Human Rights system: towards a more transparent democratic society. EUI Working Paper RSCAS 2014/12. Available at: http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf?sequence=1 (accessed 20.06.2015).

imposes a duty on all civil servants and municipal employees to "notify the employer, the prosecution authorities or other state agencies of all cases referred to it to any person in order to induce him to commit corruption offenses". However, there are still no provisions on the protection of such whistleblowers from dismissal or disciplinary sanctions.[406] Considering that in 2014 alone, six thousand people reported corruption in Russia, there is an obvious need to create a system to protect whistleblowers.[407]

Whistleblowing, even if disturbing to employers and undermining their reputations, serves to ultimately benefit society and even, in the opinion of certain scholars, advances "the moral good of the employer".[408]

### 3.3. Unfair dismissal and the protection of the freedom of expression and freedom of association at the workplace

The majority of cases considered above concerned unfair dismissal when used as a sanction against employees exercising their freedom of expression. However, very little was said about the positive obligations of the State in case of unfair dismissal on the grounds of political beliefs or affiliations. In addition, several cases, very briefly considered in the previous subsections, pose a very interesting question: whether the adjudication on the merits of labour law disputes by the ECtHR leads to "the risk of transforming it into a higher-instance labour court". [409]

This section addresses these queries. The first subsection will deal with the positive obligations of the state, developed in *Redfearn v. UK*.[410] The second researches the "borders of adjudication" of labour disputes under the ECHR, thus

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[406] The draft of such a law is still pending. See the draft of the federal law "On the protection of persons reporting corruption offenses from persecution and violation of their rights and legitimate interests", presented for discussion in the Civic Chamber of the Russian Federation on the 15.05.2015. Available at: https://www.oprf.ru/ru/1449/2133/1537/2192/newsitem/29263?PHPSESSID=pgp301g98n02muckpmoro9p3b6 (accessed 26.06.2015).

[407] Victor Khamraev, The reporting of a bribe will be facilitated (Chinovnikam oblegchat sdachu vzyatki).16.05.2015. Available at: www.kommersant.ru/Doc/2728291 (accessed 26.06.2015).

[408] Varelius Jukka., Is whistle-blowing compatible with employee loyalty? Journal of Business Ethics 85.2, 2009. P. 263-275.

[409] ECtHR, Rubins v. Latvia (79040/12) 13/01/2015, Dissenting Opinion of Judges Mahoney and Wojtyczek, para. 16.

[410] ECtHR, Redfearn v. UK (47335/06) 06/11/2012.

setting out certain limits for the human rights impact on labour law.

### 3.3.1. Positive obligation of the State

The judgment in *Redfearn v. UK*[411] demonstrates the ECtHR's development of the law regarding States' positive duties under article 10. Mr Redfearn, a driver in a private company, was responsible for transporting people with disabilities, the majority of whom were Asian in origin. He was elected to the position of local councillor with the British National Party and was consequently dismissed from his job. His employer referred to the possible harm to its reputation, as well as the potential health and safety risks which might arise from the applicant's continued employment because his remaining in the role could give rise to considerable anxiety among his passengers. Under British law at the time, the applicant had been employed for less than a year, so he could not bring a claim on unfair dismissal on the grounds of political views.

The ECtHR noted that the State had a positive obligation to protect employees against dismissal by private employers where the dismissal was motivated solely by an employee affiliation with a particular political party. It accepted that the consequences of his dismissal were serious and capable of striking at the very substance of his rights under article 11 of the ECHR.[412] The main question at stake, in the ECtHR's view, was whether the qualifying period provided in the then British law for applicants to seek review of an unfair dismissal in such circumstances, was reasonable and appropriate in protecting the applicant's article 11 rights. The ECtHR noted that such a time requirement deprived the applicant of the only means by which he could effectively have challenged his dismissal on the ground that it breached his fundamental rights at the domestic level.[413] Assessing the qualifying period in general, it agreed that it was both reasonable and appropriate for the respondent State to bolster the domestic labour market by preventing new employees from bringing unfair dismissal claims.

[411] ECtHR, Redfearn v. UK (47335/06) 06/11/2012.
[412] Ibid, para. 47.
[413] Ibid, Para. 52.

However, the ECtHR further noted that in practice, the one-year qualifying period did not apply equally to all dismissed employees and certain employees were exempt from this rule.[414] It found that domestic tribunals should be allowed to decide whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the article 11 rights asserted by the employee, regardless of the length of the latter's period of employment.[415] The ECtHR left to the States a choice as to the measures it could effect in order to comply with this interpretation of article 11: to either adopt a further exception to the one-year qualifying period; or to permit a free-standing claim for unlawful discrimination on the grounds of political opinion or affiliation.[416] Because the British legislation was found to be deficient in this respect, the State was held responsible for the violation of article 11 of the ECHR.

The dissenting Judges in this case wrote that the majority of the ECtHR had "pressed the positive obligation too far" and that the states should have a wide margin of appreciation in determining the exceptions from the qualification period rule.[417] Scholars, in contrast, supported the majority, pointing out that "it is not within the states' margin of appreciation which grounds of discrimination they may prohibit within employment",[418] and praised the push for higher levels of positive obligations on the part of the States to ensure employees' political views/affiliations could remain protected in the workplace.[419] It is interesting to note that the respondent reacted promptly to this judgment and by 2013 had already introduced amendments to its Employment Rights Act 1996, stating that the qualifying period of employment does not apply if the reason for the dismissal is, or relates to, the employee's political opinions or affiliation.[420]

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[414] Redfearn v. The UK, para. 54.
[415] Ibid, para. 56.
[416] Ibid , para. 57.
[417] Joint Partly Dissenting Opinion Of Judges Bratza, Hirvelä And Nicolaou, para. 4. Redfearn v. The UK.
[418] G. Letsas, Redfearn v UK: Even Racists Have the Right to Freedom of Thought. UK Const. L. Blog (13th November 2012),available at: http://ukconstitutionallaw.org (accessed 20.06.2015).
[419] Lourdes Peroni, Redfearn v. the United Kingdom: Protection against Dismissals on Account of Political Belief or Affiliation (December 11, 2012) Available at: www. strasbourgobservers.com/2012/12/11/redfearn-v-the-united-kingdom-protection-against-dismissals-on-account-of-political-belief-or-affiliation/ (accessed 20.06.2015).
[420] Enterprise and Regulatory Reform Act 2013: http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted.

This case one more time demonstrates the importance of the ECtHR jurisprudence for labour law, particularly in respect of procedural norms which should also comply with the fundamental rights of employees.

### 3.3.2. Should there be limits on the ECtHR's ability to adjudicate labour law disputes?

This question is addressed within the chapter dealing with the protection of employees' freedom of expression and association, as judgments in this area have made the author query whether the ECtHR has taken too profound approach tolabour disputes, which might be difficult to justify in respect of an international Court.

In the majority of cases which considered the dismissals of employeea under article 10, the ECtHR tends to determine whether the dismissal amounted to an interference with the applicant's right to exercise his or her freedom of expression, or whether it lay strictly within the sphere of employment rights, the latter not being secured by the ECHR nor its Protocols.[421] In order to answer that question, the ECtHR considers the appropriateness of the dismissal by putting it in the context of the specific facts of the case and of the relevant legislation establishing a casual link between the expression of the employee's opinion and the sanction which followed that expression.[422]

Taking the subsidiary role of the ECtHR into account, there is a need to determine the depth of the consideration of employment disputes by the ECtHR. It was established already in the Belgian linguistics case that the ECtHR cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery.[423] In recent cases on article 10, the ECtHR affirmed that it is for the national authorities, notably the

[421] See ECtHR, Nenkova-Lalova v. Bulgaria, para. 50; Glasenapp v. Germany, para. 50; Wille v. Liechtenstein para. 43.

[422] For example this link lacked in the Nenkova-Lalova v. Bulgaria and the ECtHR did not find the violation of article 10 (ECtHR, Nenkova-Lalova v. Bulgaria, para. 61).

[423] ECtHR, Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (Merits) (Belgium Linguistic case) ( 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64) 23/07/1968, para 10.

courts, to interpret and apply domestic law;[424] and that it cannot question the way in which the domestic courts have interpreted and applied national law except in cases of flagrant non-observance or arbitrariness.[425]

In the opinion of scholars, this subsidiarity means that the ECtHR should not only follow the national system in procedural terms but also take into account the substance of the decision taken at a national level.[426] Prof. Sandra Fredman once wrote that the ECHR presupposes a full-blooded role for national courts.[427] It was noted by other scholars that the ECtHR generally refrains from interpreting domestic laws and it defers to national courts' assessments on the credibility of witnesses and the relevance of evidence to the issues in the case, and only in exceptional cases where member states insufficiently investigate credible claims of serious human rights violations, might the ECtHR might reconsider the case on its merits.[428]

Striking the right balance between conducting an effective review and recognising the primary role of national courts to interpret national law is obviously difficult.[429] However, moving the discourse into the labour law field, such a problem becomes less evident. Thus many unfair dismissal applications have been declared to be inadmissible. Alternatively, the violation of the ECHR was not found as the ECtHR accepts the findings of the national courts which established that there was a reasonable ground for the dismissal.[430] The ECtHR tended to find violations only in the cases where the national courts did not take into account the applicants' claims on violations of fundamental rights, or when it

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[424] ECtHR, Perinçek v. Switzerland (27510/08) 17/12/2013, para. 66; Delfi As v. Estonia [GC] (64569/09) 16/06/2015, para. 127.

[425] ECtHR, Yordanova and Toshev v. Bulgaria (5126/05) 02/10/2012, para. 41.

[426] Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights. Cambridge University Press, 2015. P. 166.

[427] Fredman, Sandra, From Deference to Democracy: The Role of Equality Under the Human Rights Act 1998. Oxford Legal Studies Research Paper No. 5/2006; Law Quarterly Review (2006) Vol. 122, pp. 53-58. Available at SSRN: http://ssrn.com/abstract=894252.

[428] Laurence R. Helfer, Embeddedness as a Deep Structural Principle of the European Human Rights Regime. EJIL (2008), Vol. 19 No. 1, pp. 142-144.

[429] Geranne Lautenbach, The Concept of the Rule of Law and the European Court of Human Rights. Oxford University Press, Oxford, 2013. P. 85.

[430] ECtHR, Pitkevich v. Russia (47936/99) 08/02/2001, Lichtenstrasser v. Austria (32413/08) 07/10/2014; Nenkova-Lalova v. Bulgaria (35745/05) 11/12/2012; Balenović v. Croatia (28369/07) 30/09/2010; Pay v. UK (32792/05) 16/09/2008; Leander v. Sweden(9248/81) 26/03/1987; Knauth v. Germany (41111/98) 22/11/2001.

determined that the State had incorrectly assessed the proportionality of the sanction.[431]

Therefore, the ECtHR has developed a particular subsidiary approach to labour cases where the consideration of the case was firmly restricted to an evaluation of the national judgment in the light of ECHR principles. In taking such an approach, which evidently respects the subsidiarity of the international court, the ECtHR should obviously not consider the employment dispute on its merits. However, in two recent cases the ECtHR appears to have overstepped these limits on international adjudication, dealing with the applications as if it was a higher-instance labour court.

▪***Baka v. Hungary***

Mr Baka was elected to the post of President of the Supreme Court of Hungary for a six-year term in 2009. In his capacity as President of that court and of the National Council of Justice, the applicant expressed his views on various legislative reforms affecting the judiciary on a number of occasions in the period from April to November 2011. The Fundamental Law of 25 April 2011 established that the highest judicial body would be the Kúria. The transitional provisions of the new Constitution provided that the Kúria would be a legal successor of the Supreme Court and that the mandate of the President of the Supreme Court would end, following the new Constitution taking effect. In October 2011, a criterion for the election of the new president of the Kúria was adopted. As the applicant did not satisfy the new requirements (candidates were required to have at least five years' experience as a judge in Hungary), he was ineligible for the post of President of the new Kúria and was instead appointed as a judge. He argued that the early termination of his employment breached article 6, as he was deprived of any ability to seek judicial review of his termination; and of article 10, as the dismissal was in response to his criticism of the proposed judicial reforms. In this unanimous

[431] ECtHR, Kudeshkina v. Russia (29492/05) 26/02/2009, Ihsan Ay v. Turkey (34288/04) 21/01/2014; Schüth v. Germany (1620/03) 23.9.2010; Özpinar c. Turquie (20999/04) 19/10/2010.

judgment, referred later to the Grand Chamber,[432] the ECtHR acknowledged that the premature termination of the applicant's role had in fact been a reaction for the views he expressed publicly in his professional capacity. The Court found this to haveviolated article 10 of the ECHR. The ECtHR said that the crux of the case they had to determine was whether the applicant's mandate as the President of the Supreme Court was ended solely as a result of the reorganisation of the judiciary in Hungary, as the State claimed, or whether, as the applicant argued, it was due to the views he expressed publicly on legislative reforms affecting the judiciary. Despite the absence of any direct evidence[433] on the casaul link between the expression of his opinions and the termination of his employment, the ECtHR found it persuasive that the proposals to terminate the his mandate; as well as the new eligibility criterion for the new post were submitted to Parliament after he had publicly expressed his views on the legislative reforms, and were adopted by Parliament subsequently within an extremely short period of time.[434] The ECtHR was not convinced by the State's arguments that the impugned measure was a necessary consequence of the fundamental structural changes to the supreme judicial authority in Hungary. It was not convinced either by the decision of the Hungarian Constitutional Court, which had considered an application by the Vice-President of the Supreme Court in relation to the premature termination of *his* employment also purportedly as a result of the judicial reforms. The Constitutional Court had rejected the then Vice-President's complaint, stating that the premature termination of the claimant's term of office had not violated the Fundamental Law, since it was sufficiently justified by the wholesale reorganisation of the judicial system and the broadened tasks and competences of the President of the Kúria.[435]The European ECtHR, whose mission is to supervise and not to substitute

[432] The hearing in the Grand Chamber was held on the 17th june 2015, until 17 September 2015 there is no official information on the judgment.

[433] As for the example in Wille v. Liechtenstein, where the non-appointment to the post of the President of the Administrative Court on the grounds of the applicant's political views was proved by the letter written by the Prince of Liechtenstein announcing the intention not to reappoint the applicant. See Wille v. Liechtenstein, para. 50; in the case of Kudeshkina v. Russia, the applicant was dismissed in the result of disciplinary proceedings organiszed after the expression of critical remarks in respect of the court she worked at.

[434] ECtHR, Baka v. Hungary, para. 94.

[435] Ibid, para. 46.

national authorities, did not consider the necessity of the new criterion and did not consider the fact that the applicant still worked as a judge of the new Kúria.[436]

The ECHR as signed by members of the CoE is about the protection of human rights and not about how the States should organise its domestic judicial arrangements. The States alone should have the right to determine for themselves the eligibility criteria for judicial appointees and the ECtHR does not have a mandate to interfere with this process unless there is a direct and significant evidence of abuse which led to human rights violations. Where the circumstances of the case do not permit to establish with certainty that causal link, the State should not be held responsible for any alleged violation of the ECHR. The State's margin of appreciation in the sphere should be limited only in very exceptional cases where it can be demonstrated beyond any doubt that the negative obligation under the ECHR was violated.[437] This judgment seems to demonstrate that the ECtHR has crossed the borders of legitimate international adjudication and makes us rememember the words of prof. David Kennedy: "When we invoke human rights against state power, we are pounding ... also on sovereign privilege and constitutional right".[438]

▪ ***Rubins v. Latvia***

This case is an example of the ECtHR's high level attention paid to the circumstances of a case, which had little relevance to the employment dispute in the opinion of the national courts. The applicant was a professor and Head of the Department of the State University. The latter position was abolished as a result of the merging of two Departments of the faculty. After the decision to abolish his position, the applicant sent an email to the Rector of the University and to several other recipients, including to the members of the Senate, criticising the lack of democracy and accountability in the leadership of the university, using

[436] It was superficially considered in para. 95.

[437] Previous case law demonstrates that the ECtHR's scrutiny of the applications of judges was limited to the consideration of the fairness of the disciplinary sanctions and proceedings: see ECtHR, Kudeshkina v. Russia, or Volkov v. Ukraine, Harabin v. Slovakia (58688/11) 20.11.2012; Olujic v. Croatia (22330/05) 5.02.2009; Maestri v. Italy (39748/98)17/02/2004; N.F. v Italy(37119/97) 02.08.2001; Juričić v. Croatia (58222/09) 26.07.2011.

[438] Kennedy David, The international human rights regime: still part of the problem? In: Examining Critical Perspectives on Human Rights, edited by Rob Dickinson. Cambridge University Press, 2012, p. 25.

unfavourable terms when speaking about several university managers.

In another letter titled “Settlement agreement,” sent to the Rector of the University, the applicant proposed to withdraw all his appeals if the University revoked all the orders and decisions of the Senate concerning the merger of his Department, or paid him a compensation in the sum of 123 000 euros. The Rector refused and the following day, 23 March 2010, the national news agency published the applicant’s views about the alleged shortcomings in the management of the university. After an investigation of the applicant’s conduct was carried out by an *ad hoc* investigative committee and the university’s ethics committee, the applicant received a notice informing him that his employment at the university was terminated. The notice stated, inter alia, that the “settlement agreement" was one of the reasons for dismissal as it was considered as absolutely contrary to good morals.

Mr. Rubins appealed to the District Court, which held that an unethical email sent to one’s employer was not a legitimate reason for being dismissed from one’s job, and ordered the applicant’s reinstatement with back-payment of his salary. The Appeal Court quashed the first-instance court’s judgment. It considered that the applicant had invited the Rector to carry out “unlawful actions”, namely to annul a decision of the Senate of the University concerning the merger of two departments. The Appeal Court emphasised that the letter sent to the Rector evidenced the applicant’s wish to act for a selfish cause, namely to retain his position as head of department, contrary to the Senate’s decision on reorganisation, and to receive substantial financial compensation. It also pointed out that the applicant did not attempt to inform society and the relevant authorities about the alleged violations by the University before the decision to abolish his post was made.

The form of the letter and the motives of the applicant were considered to be in breach of ethical norms by both national courts. The public criticism of the University was mentioned as only one of the facts which in totality led the Court of Appeal to conclude that the applicant had contravened the obligation to treat the staff of the university with respect.

Notwithstanding the foregoing, the ECtHR remained reluctant to accept the State's submissions on the inadmissibility of the application. The Government stated that the application concerned the dismissal of an employee for a violation of ethical norms, which is not covered by the ECHR. Moreover, it emphasised that in his civil claim of 11 May 2010, the applicant had not made any allegations that his freedom of speech had been impinged. The ECtHR largely ignored these submissions. It briefly acknowledged that "the crux of the employment dispute was the allegedly unethical manner of expression used by the applicant in communication with his employer,"[439] and then shifted to analyse the information that the applicant was going to disclose and did actually disclose.[440] All the subsequent reasoning of the ECtHR was of little relevance to the employment dispute at stake, and largely concerned the information disclosed, which was a misstep.[441]

Why was this way of consideration a misstep? The case was about the dismissal of a professor for unethical behavior (for writing and sending his employer a threatening letter). The Court of Appeal considered that the further disclosure of information was a relevant fact in the case but did not treat it as a determinative factor. The ECtHR did not have any grounds on which to shift its attention from the official reasons of the applicant's dismissal to the public criticism, which, in its opinion, should have been protected.

The ECtHR decided that the interference with the applicant's right to freedom of expression was not necessary in a democratic society and found a violation of article 10, taking into account its serious chilling effect on other employees of the University.

Dissenting Judges Mahoney and Wojtyczek opined that the ECtHR came to the wrong conclusion as it had misconceived the nature of the dispute. They argued that the majority's approach brought with it the risk of transforming the ECtHR

[439] ECtHR, Rubins v. Latvia, para. 45.
[440] Ibid, para. 84.
[441] This point, expressed in my comments on the Rubins judgment on strasburobservers.com was criticized by Prof. Dirk Voorhoof. See Dirk Voorhoof, Response to comment on Rubins v. Latvia: adjudication is not erroneous at all (April 14, 2015) strasbourgobservers.com/2015/04/14/response-to-comment-on-rubins-v-latvia-adjudication-is-not-erroneous-at-all/ (accessed 20.06.2015).

into a higher-instance labour court adjudicating on the merits of labour disputes.[442] Evidently, this is not what the international court of human rights should be; in the light of the majority's decision in this case, the analysis on the merits of employment cases will add yet another layer of complexity and uncertainty to national labour law.[443]

However, the majority of the European Judges supported such a reading of the case. Prof. Dirk Voorhoof argued that this judgment is a well-balanced and transparently motivated example of how a disproportionate interference with the right to freedom of expression of an employee could be scrutinised by the ECtHR.[444] From labour law scholar's point of view, the excessive attention paid by the ECtHR to the disclosure of the information misled it into protecting the freedom of expression of the employee who has violated the employment contract instead of balancing this violation with the imposed sanction. This approach, in my opinion, infringes the principle of subsidiarity, which is a "a necessary component of democratic rule and human rights law."[445]

Scholars noted that subsidiarity requires international courts to exercise some deference to national courts through appropriately defined judicial standards of review.[446] The cases considered above demonstrate that on occasions, the failure to pay such respect to the domestic adjudication of the labour disputes can lead to an unjustifiable interference with the regulation of domestic employment relations. The protection of employee human rights is indisputably valuable; however, implementing such protection should not permit the *biased pursuits* of one's own self-interest and should ensure a harmonious and well-balanced regulation of the duties and rights of both parties of an employment contract. The international adjudication of labour disputes should respect the limits of subsidiarity and, in particular, the margin of appreciation of the states when making appointments to

442 ECtHR, Rubins v. Latvia, Dissenting Opinion Of Judges Mahoney and Wojtyczek, para. 16.
443 Frank Cranmer, Free speech" or "misconduct in employment? Rubins v Latvia. Law & Religion UK, 14 April 2015,http://www.lawandreligionuk.com/2015/04/14/free-speech-or-misconduct-in-employment-rubins-v-latvia/ (accessed 20.06.2015).
444 Dirk Voorhoof, see supra note 441.
445 Shelton Dinah, Subsidiarity and Human Rights Law. Human rights law journal 27 (2006), p. 4.
446 Andreas von Staden, The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review. Int J Constitutional Law (2012) 10 (4), pp. 1023-1049.

leading roles in the public sector. Otherwise, it risks its authority on the national level and bolsters the arguments of opponents of the ECtHR.[447]

### 3.4. Conclusions

Strasbourg jurisprudence on article 10 shows the ECtHR has developed a very detailed and profound approach to the protection of employees' rights to the freedom of expression and association. The principal achievements of the ECtHR in this area are as follows:

1. It has demonstrated that the ECHR is an instrument capable of protecting the freedom of expression at the workplace, in respect of both public and private employees.
2. It has interpreted the possible derogations set out in article 10 in a restrictive way.
3. It has urged the States to balance in all cases the duty of loyalty with the right for freedom of expression and association, putting great weight on the need to rigorously examine the necessity of the interference.
4. It has developed a particular approach to the scope of the employee's duty of loyalty, creating a framework by which domestic courts may consider cases regarding the public criticism of one's employer, the disclosure of information in the public interest and a for the adjudication of cases on whistleblower protection.
5. The ECtHR's conclusions have lead, in some cases, to significant changes in the national legislation in favour of employees (*Redfearn v. UK*[448] is an example which has been discussed earlier). The national cases mentioned in the first subsection of this part demonstrate that some domestic courts are aware of these achievements and do refer to article 10 of the ECHR. Raising this kind of

[447] There is currently a heated debate over the limitations of the influence of ECtHR judgments in UK and Russia and there is even talk of withdrawing from the ECHR. These discussions were provoked by the judgments in respect of the prisoner's rights to vote and compensations to the YUKOS share holders, the judgments considered in this subsection might support the opponents of the ECtHR, providing evidence of the excess of powers. See Nicholas Watt and Owen Bowcott, Tories plan to withdraw UK from European convention on human rights (03.10.2014) Available at: http://www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights (accessed 17.07.2015); See also: Russian Constitutional Court permits Russia not to implement the decisions of the ECHR (KS razreshil Rossii ne ispolnyat' resheniya YESPCH), available at: http://www.interfax.ru/russia/453542 (accessed 17.07.2015).

[448] ECtHR, Redfearn v United Kingdom, (47335/06) 6.11.2012

awareness and the promoting the Strasbourg judgements domestically are vital to ensuring their greater impact and effectiveness. This is particularly the case in relation to whistleblower protections, because in many countries of the CoE there is no equivalent legislation offering adequate protections. Application by national courts of the framework elaborated in Strasbourg might encourage the enhancement of protection. Even in the absence of domestic legislation in monist countries, the reference to the ECHR and to the ECtHR's interpretation of article 10 could grant certain protections to whistleblowers.

A survey of whistleblowers protection regimes in the Eastern European region revealed that in the majority of countries, the legislation lacked instruments for effective enforcement of such protection.[449] Amongst these countries, Poland, the Czech Republic, the Slovak Republic, Romania, Bulgaria, Slovenia, Estonia and Russia can be characterised as monist countries. Therefore, the ECHR as interpreted by the ECtHR may be directly applicable in those countries to protect employees' right to the freedom of expression.[450] The direct implementation of the ECtHR's legal positions is possible when national courts are aware of the jurisprudence and esteem it. Such deference can be better maintained if the ECtHR ensures that it only acts within the confines of its subsidiary role, according due respect to the national courts and refraining from considering employment disputes on merits.

[449] See Sándor Léderer, Tivadar Hüttl, see supra note 376.

[450] The list of monist countries was cited from Andrea Oil, Multilevel Regulations Reviewed by Multilevel Jurisdictions: The ECJ, the National Courts and the ECtHR. In: Andreas Føllesdal, Ramses A. Wessel, Jan Wouters, editors. Multilevel Regulation and the EU: The Interplay Between Global, European, and National Normative Processes, BRILL, 2008. P. 348.

## Part IV. Potential of the European Convention on Human Rights: wage protection and occupational health and safety

In contrast with the individual employment rights and civil liberties at work considered in the previous parts, neither the protection of wages nor the occupational health and safety ("**OHS**") of employees can be directly deduced from the provisions of the Convention.

However, the number of cases concerning issues of remuneration of public and private employees being brought before the ECtHR is growing as time passes. The ECtHR's approach to OHS matters has developed significantly in the most recent two years, based on the interpretation of several ECHR rights. These trends clearly demonstrate the permanent enlargement of the scope of the ECHR, which allows us to presume the possible value of ECHR provisions for the establishment of a decent wage and even for the protection from psychosocial risks although the ECtHR has never dealt with these issues. The research of these topics will be presented in the following two chapters.

### Chapter 1. The protection of wages: current cases and perspectives

*1.1. General approach to the protection of possessions under A1P1*

*1.1.1. Legitimate expectation*

*1.2. Case law on the protection of wages*

*1.2.1.Wage supplements*
*1.2.2.Reduction and deductions*
*1.2.3. Austerity measures*

*1.3. The interconnection between violations of procedural rights under article 6 and A1P1*
*1.4. The potential of the ECHR in the sphere of wage protection*
*1.5. Conclusions*

Article 1 of Protocol 1 to the ECHR ("**A1P1**") provides:

> *Protection of property:*
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of*

> *his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The drafting of this article raised numerous disputes between the representatives of the States concerning the definition and precise scope of the right. In particular, the possibility of interpreting these provisions as providing a social right requiring the States to play a substantial and active role was one of the most controversial points.[1] It is interesting to note that the British representative was worried whether the article would infringe governments' power to implement social policies (for example, to impose taxes on the wealthy). One of the drafters, Sir David Maxwell Fyfe, responded that, "legislation, the object of which is to carry out a social policy in the general interest, would be saved".[2] This statement illustrates the fact that the drafters initially supposed that the provisions of this article would have little impact on States' social policies. Fortunately, time has proven them wrong and the ECtHR has developed, over the years, a very particular approach to the protection of property rights, which has significant implications for social security laws[3] in the member states and has contributed to the protection of wages. "Wage protection" in the context of this part is understood as comprising the issues relating to a decent wage, deductions from wages, its reduction, the lack of its payment and entitlements to additional payments.

### 1.1. General approach to the protection of possessions under A1P1

The ECtHR's approach to cases under A1P1 is largely similar to the way it adjudicates cases relating to other qualified rights. In S*porrong and Lönnroth v.*

[1] R. G. van Banning, The Human Right to Property. Intersentia nv, 2002. P. 79.
[2] Ibid, p. 73
[3] S. Günter Nagel, Francis Kessler, Social Security Law, Council of Europe. Kluwer Law International, 2010; Mel Cousin, The European Convention on Human Rights and Social Security Law. Intersentia, 2008; Ana Gómez Heredero, Social Security as a Human Right: The Protection Afforded by the European Convention on Human Rights, Council of Europe Pub., 2007.

*Sweden*,[4] the ECtHR established three main rules: the principle of one's right to peaceful enjoyment of property; acceptable conditions for the deprivation of one's possessions; recognition of the State's right to control the use of property in accordance with the general interest and by enforcing such laws as they deem necessary for the purpose.[5] Having decided that there is an interference with property within one of these rules, the ECtHR will go on to consider whether such interference can be justified (i.e., serves a legitimate aim and was proportionate). At this stage, the burden of proof is on the state.[6]

As the provisions of A1P1 do not contain any definition of "possessions", it must be explained how the Strasbourg bodies perceive this term. As early as in the *Marckx* case, the ECtHR acknowledged that A1P1 in substance guarantees the right of property.[7] A more complex approach has developed over the years and the ECtHR has formed an autonomous concept of "possession".[8]

In autonomous concept cases, the violation does not at first glance concern whether the state has secured the enabling conditions for the exercise of a right under the ECHR; the problem arises at a conceptual level, where the state has authoritatively qualified a ECHR right such that some instances of it are explicitly excluded from its extension, even though they should not be.[9]

It means that the notion of "possessions" in the A1P1 is independent of the way it is formally classified in domestic law.[10] According to the ECtHR, "possession" is not limited to the ownership of physical goods; certain other rights and interests related to assets can also be regarded as "property rights" and thus be understood as "possession".[11] "Possessions" can be "existing possessions" or claims that are

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[4] ECtHR, Sporrong and Lönnroth v. Sweden (7151/75 and 7152/75) 23/09/1982.
[5] Ibid, para. 61.
[6] Carss-Frisk Monica, The right to property: a guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights. Directorate General of Human Rights, CoE, 2001. P. 8.
[7] ECtHR, Marckx v. Belgium (6833/74) 13/06/1979. Para. 63.
[8] The Inter-American Court of Human Rights has developed a similar approach and the protection of property has become an important tool for the economic, social, and cultural rights. See Lixinski, Lucas. "Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law." European Journal of International Law 21.3 (2010): 585-604.
[9] Letsas, George. "The truth in autonomous concepts: How to interpret the ECHR."European Journal of International Law 15.2 (2004): 279-305. P. 283
[10] ECtHR, Beyeler v. Italy (33202/96) GC 05/01/2000, para. 100
[11] ECtHR, Gasus Dosier- und Födertechnik GmbH v. the Netherlands (15375/89) 23/02/1995, para. 53.

sufficiently established to be regarded as "assets". [12]

The ECtHR emphasised that A1P1 does not include a right to *acquire* property.[13] However, it considered in the light of this article several cases concerning the right to future income.[14] In such cases, the ECtHR stated that the claims of future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable.[15] In *N.K.M. v. Hungary*, the ECtHR had to decide whether severance pay constituted possession in the sense of A1P1. It held that this payment constitutes a substantive interest protected by A1P1 as it is undeniable that it "has already been earned or is definitely payable".[16] In *Stec and others v. UK*, the ECtHR held that an enforceable claim to a social security benefit can constitute 'possession' within the meaning of A1P1.[17]

The Strasbourg approach to "possessions" was classified by prof. Sermet as comprising three categories of property: acquired property; property falling under sufficiently established legitimate expectations; and property resulting from rights to restitution.[18] The second type of protected property is the most relevant to the protection of wages and will be further considered in greater detail.

### 1.1.1. Legitimate expectation

In the Grand Chamber judgment of *Kopecký v. Slovakia*,[19] the ECtHR went to some lengths to define the notion of the legitimate expectation in the context of A1P1, and acknowledged that a legitimate expectation might be protected under the ECHR only if the claim has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. [20] It further noted that no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's

[12] ECtHR, Lelas v. Croatia, (55555/08) 20/05/2010, para. 56.
[13] ECtHR, Stec and others v. UK(65731/01, 65900/01) 12/04/2006, para. 53.
[14] ECtHR, Centro Europa 7 S.r.l. and Di Stefano v. Italy (38433/09) GC 07/06/2012; Anheuser-Busch Inc. v. Portugal [GC] (73049/01) 11/01/2007; Tre Traktörer Aktiebolag v. Sweden (10873/84) 07/07/1989.
[15] ECtHR, Anheuser-Busch Inc. v. Portugal, para. 64
[16] ECtHR, N.K.M. v. Hungary (66529/11) 14/05/2013, para. 35
[17] ECtHR, Stec and others v. UK, see more in S. Günter Nagel, Francis Kessler, Social Security Law, Council of Europe. Kluwer Law International, 2010, p. 40
[18] Sermet, Laurent. The European Convention on human rights and property rights. Vol. 11. Council of Europe, 1998. P. 17.
[19] ECtHR, Kopecký v. Slovakia (44912/98)28/09/2004, para. 45-52.
[20] Ibid, para. 52

submissions in this context have been rejected by the national courts.[21] Therefore, as noted by one commentator, the ECtHR's jurisprudence is clear that relevant expectations should be more than a reasonable hope.[22]

However, in the recent case of *Béláné Nagy v. Hungary*,[23] the ECtHR acknowledged the applicant's legitimate expectation to receive a disability pension once he had met the administrative requirements of the disability pension scheme as in force at the first material point in time.[24] Based on this argument, the ECtHR acknowledged the right of the applicant for the disability pension, despite decisions by the domestic courts not to grant this right.

This judgment demonstrates that it is not easy to draw the line between potential rights not protected by the article, and the legitimate expectation that the right will materialise, as protected by A1P1.[25]

The ECtHR's jurisprudence provides us with some guidelines in this respect. In *Aizpurua Ortiz and Others v. Spain*, the ECtHR acknowledged that the applicants, deprived of the right to access supplementary pensions acquired under an earlier collective agreement, **had at least a legitimate expectation** of continuing to receive this pension.[26] In *Kjartan Ásmundsson v. Iceland*,[27] concerning the abolition of a disability pension as a result of changes in the way the applicant's disability was assessed, the ECtHR held that the applicant could validly plead an individual legitimate expectation that his disability would continue to be assessed on the basis of his incapacity to perform his previous job and found the violation of A1P1.[28] These cases demonstrate that a legitimate expectation might be established

[21] ECtHR, Anheuser-Busch Inc. v. Portugal (73049/01) GC 11/01/2007, para. 65; Sukhanov and Ilchenko v. Ukraine (68385/10, 71378/10) 26/06/2014, para. 35.
[22] Alexander Orakhelashvili, The Interpretation of Acts and Rules in Public International Law. Oxford University Press, 2008. p.275.
[23] ECtHR, Béláné Nagy v. Hungary 53080/13 10/02/2015
[24] Ibid, para. 47.
[25] On this point see also Guðrún Gauksdóttir, The right to property and the European Convention on Human Rights: a Nordic approach. Lund University, 2004, cited from Olsson Petra Herzfeld, Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights. In: "The European Convention on Human Rights and the employment relation edited by Filip Dorssemont, Klaus Lörcher, Isabelle Schömann. Oxford: Hart Publishing, 2013, p. 399.
[26] ECtHR, Aizpurua Ortiz and Others v. Spain (42430/05) 02.02.2010, no violation of A1P1 was found as the interference pursued an aim in the general interest.
[27] ECtHR, Kjartan Ásmundsson v. Iceland (60669/00) 12/10/2004
[28] Ibid, para. 44, 45.

in cases where the lack or reduction of payments were the result of external factors, in other words, when the applicant did not cease to satisfy the requirements to benefit from the payment as it was initially established.

In *Eskelinen and Others v. Finland*,[29] however, the ECtHR held that the applicants had not had a legitimate expectation of receiving an individual wage supplement (cold-area allowance) since the municipality that they worked for, had been removed from the group for which this allowance was to be paid. Therefore, the employees in this case were not removed from the remote and cold area, the municipality itself was cancelled from the list of such places, however, there is a doubt that the conditions of labour changed since that bureaucratic removal. If the conditions of labour had not changed, would not that have been more in line with the ECHR to conclude that the applicants had a legitimate expectation of receiving additional payment?

This example demonstrates that the ECtHR assesses more strictly the legitimate expectation reasonably attributable to the applicant in cases concerning remuneration, than in respect of pension claims.

The concept of "legitimate expectation" makes us question whether an employee's right to be reimbursed for lost wages in case of unfair dismissal might be protected under A1P1. This question was answered in *Baka v. Hungary*.[30]

In that case, the applicant alleged that the State had violated his right under A1P1 as a result of the premature termination of his mandate as the President of the Supreme Court. One of the effects of the termination was his losing the salary he would have been entitled to obtain had he not been terminated from such a position. The ECtHR pointed that the dismissal of the applicant from the post had indeed precluded him from receiving a further salary, however, that income had not been actually earned and was not definitely payable.[31] Surprisingly, the ECtHR did not look at the national law in order to establish if the applicant's claim "had a

[29] ECtHR, Eskelinen and Others v. Finland (63235/00) 19/04/2007, para.94.
[30] ECtHR, Baka v Hungary (20261/12) 27/05/2014.
[31] Ibid, para. 105.

sufficient basis in national law."[32] Such a conclusion is, in fact, in contrast with its usual approach to legitimate expectations, which caused labour scholars to argue that the claim of future income can at least be accommodated in legal systems where unjustified dismissals generate damages based on future earnings or reinstatement.[33] At the same time, this judgment demonstrates the lack of coherence in approach to the protection of claims brought under A1P1. It also demonstrates the ECtHR's unwillingness to protect job property, defined by Davies and M. Freedland, as the interest which a worker has in the continuation of his employment.[34] However, it is necessary to reflect over the reasons why the ECtHR refused to protect the right to receive reimbursement for lost wages in this case, where, in its opinion, the dismissal violated articles 6 and 10 of the ECHR.

This judgment makes us remember the cases where, for example, the ECtHR held that the withdrawal of a licence constituted the violation of A1P1 as the nature of these claims has certain similarity with the claims of lost wage.[35] In *Tre Traktörer Aktiebolag v. Sweden*,[36] it found that the economic interests connected with the running of the restaurant were "possessions" for the purposes of A1P1. In the later case, concerning the granting of a fishing licence, the Commission pointed out that a licence-holder cannot be considered to have a reasonable and legitimate expectation to continue his activity if the conditions attached to the licence are no longer fulfilled or if the licence is withdrawn in accordance with the provisions of the law which was in force when the licence was issued. It further reiterated that expectations for future earnings could only be considered to constitute a "possession", if it had already been earned or where an enforceable claim to it existed.[37]

Therefore, the Commission separated the economic interests of the licence

[32]ECtHR, Kopecký v. Slovakia[GC] (44912/98) 28/09/2004, para 52.
[33] Olsson Petra Herzfeld, supre note 25, p. 397.
[34] Davies and M. Freedland, Labour Law: Texts and Materials. London: Weidenfeld and Nicolson. 1984. P. 428.
[35] It's worth noting that in cases concerning the decrease of income due to legislative changes the ECtHR has been reluctant to find the violation of A1P1: see X v. the Federal Republic of Germany (8410/78) 13/12/1979 (concerning notaries' expectations in respect of fees which had been statutorily reduced), Casotti, Florio and The Consiglio Nazionale Dell' Ordine Dei Consulenti Del Lavoro v. Italy (24877/94) 16/10/1996 (concerning the possible decrease in the income of labour consultants).
[36] ECtHR, Tre Traktörer Aktiebolag v. Sweden (10873/84) 07/07/1989, para. 53.
[37]ECtHR, Størksen v. Norway (19819/92) admissibility decision 05/07/1994.

holder and the expectation for future earnings. This approach of the Strasbourg bodies to the protection of the rights of licence holders make us question whether the application of Mr Baka, who, in the opinion of the ECtHR, had a reasonable and legitimate expectation to continue his activity as the President of the Supreme Court, would have been more successful if he had claimed that his economic interest in keeping the post was infringed instead of claiming rights to future income as he did. It is likely that the ECtHR would still refuse to find the violation of A1P1. The ECtHR's finding that the dismissal violated the ECHR generally provides the possibility to re-consider the case by the national court. The claim under A1P1 is always additional in such cases. The ECtHR's refusal to grant it might be explained by the reference to the margin of appreciation of the States and the subsidiary role of the ECtHR. It consciously leaves the issue of reimbursement for lost wages national courts to address.

### 1.2. Case law on the protection of wages

The interconnection of property rights and labour rights is indisputable. It is curious that political theorists of an earlier era, such as John Locke, Adam Smith and Thomas Paine, argued specifically for the recognition of labour rights as property rights.[38] Davies and M. Freedland defined job property as 'the interest, viewed as proprietary in nature, which a worker has in the continuation of his employment as the result of legal measures or social systems which protect the expectation and security of continued employment'.[39] However, the ECtHR is far from recognising this "property" right, and, as scholars justifiably note, there is not much to say about the protection of wages as property rights under the ECHR.[40] The Strasbourg Court has on several occasions stated that the provisions of the A1P1 do not guarantee the right to continue to be paid a salary of a particular

[38] Novitz Tonia, Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions? Industrial Law Journal (2012) 41. Pp. 137-141.
[39] Davies and M. Freedland, Labour Law: Texts and Materials. London: Weidenfeld and Nicolson. 1984. P. 428.
[40] Koch I. Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights. Martinus Nijhoff Publishers, 2009. P. 225

amount and that it is entirely at the State's discretion to determine what benefits are to be paid to its employees out of the State's budget.[41]

The establishment of a wide margin of appreciation of the states in matters dealing with wage protection is a general peculiarity of the cases considered in the light of A1P1. Even in a case concerning the calculation of a minimum wage, the ECtHR was reluctant to impose any restrictions: in *Nerva and Others v. UK*,[42] the ECtHR declared inadmissible the applications of waiters who argued that the employer's refusal to include the tips paid by cheque or credit card in calculating their statutory minimum remuneration violated their rights under A1P1. The ECtHR' reasoning in this judgment demonstrates that it tends to acknowledge the legitimate expectation of receiving a minimum wage; however, it prefers to leave the calculation of the minimum wage wholly within the margin of appreciation of the State.

The ECtHR left aside the nature of the minimum wage and the nature of tips.[43] Relying on the conclusions of the domestic courts, it found that the applicants could not maintain that they had a separate right to the tips and a separate right to minimum remuneration, and emphasised that the ECHR does not guarantee the right for a higher level of earnings. The ECtHR also noted that it was for the applicants to come to a contractual arrangement with their employer as to how the tips at issue were to be dealt with, from the point of view of their wage entitlements.[44] This statement vividly demonstrates the reluctance of the ECtHR to interfere with relations between private parties of employment contracts and with the establishment of minimum wage regulations. The decision was criticised by British scholars as permitting restaurants to pay down the statutorily mandated UK minimum wage[45] and for not regarding the worker as being entitled to a certain

[41] ECtHR, Baka v. Hungary (20261/12) 27.05.2014; Panfile v. Romania (13902/11) inadmissible 20/03/2012; Vilho Eskelinen and Others v. Finland [GC] (63235/00) 19/04/2007.
[42] ECtHR, Nerva and others v. UK (42295/98)24/09/2002.
[43] Dissenting Judge Loucaides noted that the nature of tips, given directly to the waiters, demonstrated that the tips were a possession in the meaning of A1P1. See Dissenting opinion of Judge Loucaides, Nerva and others v. UK.
[44] ECtHR, Nerva v. UK, para. 43.
[45] Tafreshi Shawn, Here's a Tip, Change the Law-Nerva v. United Kingdom. Loyola of Los Angeles International and Comparative Law Review. 27 (2005), p. 127, available at: http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1581&context=ilr (accessed 20.08.2015)

threshold level of remuneration as a matter of right.[46] Some commentators pointed out that such an approach to the minimum wage ultimately led to the inclusion of customers in the employment relationship, and to the legal precariousness of workers.[47]

It is interesting to note that trade unions have successfully campaigned to amend the UK Minimum Wage Regulations, so the amounts of money paid by customers as a service charge or tip should be subtracted from the total of remuneration which the employer pays to the worker. Those changes were adopted in 2009.[48]

### 1.2.1. Wage supplements

In *Vilho Eskelinen and others v. Finland*,[49] the ECtHR established a general rule thatthe establishment or annulation of wage supplements should be left within the margin of appreciation of the States. In this case, the applicants argued that the abolition of the remote-area supplement to wages of police officers constituted the violation of A1P1. The ECtHR noted that the applicants did not have a legitimate expectation to receive an individual wage supplement as the entitlement to it had ceased. In *Smokovitis and Others v. Greece*,[50] concerning the payment of a research allowance to teachers employed on temporary basis, the ECtHR did find the violation of A1P1, deciding that the applicants had a "legitimate expectation" to receive this supplement as the national courts had on multiple occasions stated that this research allowance applied to all staff.

In *Kechko v. Ukraine*,[51] the ECtHR found in favour of the applicant who claimed that the refusal to pay him a 20% increase in his salary, as required by law, violated A1P1. Therefore, in order to establish a legitimate expectation in remuneration claims brought under A1P1, such a claim must be supported by law or national case law, and, ideally be be acknowledged by decisions of the domestic courts. This approach reflects the ECtHR's general reluctance to consider

[46] T. Novitz, see supra note 38, p. 148.
[47] Einat Albina, A Worker-Employer-Customer Triangle: The Case of Tips. Industrial Law Journal (2011) Vol, 40, No.2, p. 181.
[48] Hugh Collins, Keith Ewing, Aileen McColgan, Labour Law. Cambridge University Press, 2012, p. 259.
[49] ECtHR, Vilho Eskelinen and Others v. Finland [GC] (63235/00) 19/04/2007.
[50] EctHR, Smokovitis and others v. Greece (46356/99) 11/04/2002.
[51] ECtHR, Kechko v. Ukraine (63134/00) 08/11/2005.

remuneration claims under A1P1 unless the circumstances of the case demonstrate very clearly that a debt in favour of the applicant arose in this context.[52]

In *Lelas v. Croatia*,[53] the ECtHR considered a claim about the refusal to pay a wage supplement from a very interesting perspective. The applicant, a serviceman, was entitled to receive a wage supplement for carrying out demining work. For several years this right had been acknowledged by his supervisor. When the applicant brought a claim before the domestic courts, they found that the relevant limitation period had expired and therefore refused his claim. It found that the statutory limitation period continued to operate regardless of any acknowledgment of the debt on the part of the applicant's supervisor, as the supervisor was not an authorised person to extend any statutory limitation periods. The ECtHR considered that the refusal to grant the applicant's claim was an interference with the applicant's rights under A1P1. It further considered whether such interference was lawful and came to conclusion that the failure of the domestic courts to refer to a legal provision justifying its finding that the debt should have been acknowledged by another official was incompatible with the principle of lawfulness and therefore contravened A1P1.

This judgment demonstrates that the ECtHR's approach to the protection of wage claims can expand to cover claims which have been refused by domestic courts. It is important that in such cases it seeks to establish whether such refusal corresponded to the criteria of accessibility and foreseeability as developed in the Strasbourg jurisprudence.

### 1.2.2. Reduction and deductions

In all the cases concerning wage reduction or deductions from wages, the ECtHR has either explicitly or implicitly referred to the wide margin of appreciation of the States in the organisation of the labour market. It is particularly wide in respect of working prisoners when the deductions from their wages have a compensatory role, for example, because the deductions were intended to cover expenses for

[52] ECtHR, Van der Mussele v. Belgium (8919/80) 23/11/1983.
[53] ECtHR, Lelas v. Croatia (55555/08) 20/05/2010.

board and lodging while imprisoned. Thus in *Puzinas v. Lithuania*,[54] the ECtHR found that the deduction of a 25% contribution from a prisoner's salary did not violate A1P1, and in *Stummer v. Austria*[55] it noted that the deduction of 75% of prisoners' wages "appears rather high" but was not found to unreasonable overall. In *Davis v. UK*,[56] the Commission declared inadmissible the application of a prisoner who claimed that the deductions from his wage, used to provide entertainment and other facilities in prison, violated A1P1 of the ECHR.

In *Evaldsson v.Sweden*, the ECtHR established that the margin of appreciation should be limited by a positive obligation of the State to ensure the accountability of trade unions for received compulsory deductions from wages.[57]

As far as the reduction of wages is concerned, the ECtHR has tended to justify such interferences with reference to the public interest. In the last twenty years it has formed an approach to cases involving the reduction of benefits, finding violations in cases where such reductions were aimed at a limited number of individuals and decreased to such a significant extent so as to violate the "safeguard against poverty for persons who lacked basic maintenance from another socially acceptable source".[58]

### 1.2.3. Austerity measures

The recent case law on austerity measures demonstrates largely the same approach to the matters of reduction or deductions from wages. The proportionality exercise is the most significant part of the adjudication of applications under A1P1, and the ECtHR generally prioritises the general interest of the State in decreasing wages. In such cases, it tends to find violations if the applicant succeeds in demonstrating that as a result of the State's interference he or she has suffered

[54] ECtHR, Puzinas v. Lithuania (63767/00) 09/01/2007
[55] ECtHR, Stummer v. Austria (37452/02) 07/07/2011
[56] EurCommHR, Davis v. The United Kingdom (27042/95) inadmissible 17/01/1997
[57] ECtHR, Evaldsson And Others v. Sweden (75252/01) 13/02/2007, para. 63. The case concerned compulsory deductions from the wages of those who are not members of the union.
[58] Compare, for example, ECtHR, Goudswaard-Van der Lans v. the Netherlands (75255/01) 22.9.2005 and Kjartan Ásmundsson v. Iceland (60669/00) 12/10/2004.

from an individual and excessive burden.[59]

The estimation of the burden is very rigorous and this point, again, highlights the wide, but not unlimited,[60] margin of appreciation of the State in this sphere. Let us take as an example the ECtHR's reasoning in *Koufaki and ADEBY v. Greece*,[61] which concerned cuts to pensions and salaries of public servants under national austerity measures.

It is interesting to note that, in contrast with the earlier case such as *Mihăieş and Senteş v. Romania*,[62] the ECtHR did not hesitate as to whether a salary cut might constitute an interference with possessions in the sense of A1P1; therefore it already represents a step forward. The State, justifying its interest in imposing austerity measures, noted that its goals coincided with those of the euro area Member States to ensure budgetary discipline and to preserve the stability of the euro area.[63] The ECtHR decided that the State did not, in this case, overstep its margin of appreciation and thus did not violate the ECHR.[64] The ECtHR did not investigate the first applicant's claims that the reduction of her wage, compounded by the rise in the price of basic essentials such as fuel and public service charges, had led to a drastic fall in her standard of living. Having found that the reduction was about 20%, the ECtHR stated that the extent of the reduction in the first applicant's salary was not such that it would place her at risk of having insufficient means to live on, and thus amounting to a breach of A1P1.[65] It also noted the

[59] This concept was developed in social security cases, see, for example, Kjartan Ásmundsson v. Iceland (60669/00) 12-10-2004; Goudswaard-Van der Lans v. the Netherlands (75255/01) 22.9.2005; Marija Božić v. Croatia (50636/09) 24/04/2014; Khoniakina v. Georgia (17767/08) 19/06/2012.

[60] ECtHR, Da Conceição Mateus and Santos Januário v. Portugal (62235/12, 57725/12) 08 October 2013, para. 23.

[61] ECtHR, Koufaki and ADEDY v. Greece (57665/12 57657/12)07/05/2013.

[62] ECtHR, Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02.03.2012

[63] N. Napoletano pointed out that the coincidence between the objectives pursued internally with those pursued by the European Union strengthened the position of the Government**.** Napoletano N., Estensione e limiti della dimensione economica e sociale della Convenzione europea dei diritti umani in tempi di crisi finanziaria, in Diritti umani e diritto internazionale, 2014 2(8), p. 425

[64] It is interesting to note that the ECSR two months before the decision of the ECtHR decided that Greek austerity measures violated the ESC, its opinion, however, is not mentioned in the decision of the European Court. See ECSR, complaint No. 76/2012, Federation of Employed Pensioners of Greece (IKA–ETAM) v. Greece; ECSR, complaint No. 77/2012, Panhellenic Federation of Public Service Pensioners (POPS) v. Greece; ECSR, complaint No. 78/2012, Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece; ECSR, complaint No. 79/2012, Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v. Greece; ECSR, complaint No. 80/2012, Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece, became public on 22 April 2013.

[65] ECtHR, Koufaki and ADEDy v. Greece, para. 46.

observation of the Greek Court that the applicants had not claimed that they risked falling below the subsistence threshold. This observation might be interpreted as posing a "subsistence threshold" to justify the proportionality of austerity measures.

Examining other "austerity" cases permits us to ascertain with more certainty the permissible threshold by which wages may be decreased at a time of economic crisis. These cases concern both the reduction in pensions or wages and the taxation of severance payments received by public servants. It is particularly interesting to follow the ECtHR's reasoning when addressing the concept of what constitutes an excessive burden. Violation was found in a series of cases against Hungary, where the State introduced extremely high levels of taxation in respect of severance payments to be received by public servants (the level of taxation differed in these cases from 52% in *N.K.M. v. Hungary*[66] to 98% in *R.Sz. v. Hungary*[67]). In the cases concerning a decrease in pensions, the ECtHR found that the loss of 38% of a pension did not impose an excessive burden on the applicant, whilst the loss of 67% did violate A1P1.[68]

Inadmissible applications brought against Georgia, Portugal and Romania, where the pensions or other social benefits were reduced at a level less than 20% might be also referred to as, in the opinion of the ECtHR, a fair balance had been struck between the demands of the general interest and the requirements of the protection of the applicants' rights under A1P1.[69]

This brief overview demonstrates that the violation of A1P1 was found only in cases when the decrease in payment was more than 50%; therefore, it appears that the margin of appreciation of the State is in fact very wide in this context.

The ECtHR, however, pointed out in *Steffanetti and others v. Italy* that the fair balance test cannot be based solely on the amount or percentage of the reduction

[66]ECtHR, N.K.M. v. Hungary (66529/11) 14/05/2013.
[67] ECtHR, R.Sz. v. Hungary (41838/11) 02/07/2013, see also similar cases Á.A. v. Hungary (22193/11), P.G. v. Hungary (18229/11) 23/09/2014.
[68]ECtHR, Stefanetti and Others v. Italy (21838/10 et al) 15/04/2014.
[69] ECtHR, Da Silva Carvalho Rico v. Portugal (13341/14) 24/09/2015; Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02/03/2012, Da ConceiçãoMateus v. Portugal and Santos Januário v. Portugal (62235/12, 57725/12) 08/10/2013, Khoniakina v. Georgia (17767/08) 19/06/2012.

suffered.[70] In this case, it took account of the average and minimum pensions in Italy[71], comparing them with the reduced pensions of the applicants. In contrast with *Koufaki*, the ECtHR referred to the related conclusions of the ECSR in respect of Italy. All these circumstances made the ECtHR conclude that the reductions at issue had imposed an excessive burden on the applicants.

Other "austerity cases" show that the ECtHR only considers significant an applicant's individual background if the level of reduction is more than 50%; otherwise its reasoning in these cases tends to be very brief and largely similar from case-to-case.

The ECtHR's approach to the impact austerity measures have on human rights could arguably be more rigorous; however, it would be impossible for it to take that more rigorous approach without interfering too much with States social policies, and without invading the margin of appreciation of States. The ECtHR's decisionsthat reductions of wages and pensions can constitute an interference with ECHR rights is a valuable conclusion per se. It might provide domestic courts with a new perspective of such cases, by demonstrating the possibility to consider austerity measures in the light of fundamental human rights. National courts, which are in principle better placed than an international judge to appreciate what is "in the public interest",[72] might be more stringent in its assessment of the proportionality of the interference with social rights and might notice details which are imperceptible from Strasbourg. It is remarkable that this approach has already been taken by the Estonian Supreme Court[73], Latvian[74] and Portuguese

[70] ECtHR, Steffanetti v. Italy, para. 58, 59.
[71] Ibid, para. 62-63.
[72] ECtHR, Mihăieş and Senteş v. Romania (44232/11, 44605/11) 02/03/2012
[73] On the 26 June 2014 the Estonian Supreme Court declared the cuts in judges' pensions during the austerity period unconstitutional, see Representing Retired Estonian Judges in Challenge to Austerity Measures. Available at: http://www.ceelegalmatters.com/index.php/over-the-wire/legal-ticker-deals-and-cases-in-cee/item/689-representing-retired-estonian-judges-in-challenge-to-austerity-measures/689-representing-retired-estonian-judges-in-challenge-to-austerity-measures (accessed 20 October 2014)
[74]See Judgment Of The Constitutional Court Of Latvia, 21 December 2009, in the case No. 2009-43-01 that held unconstitutional the reductions of pensions, referring on the judgement of the ECtHR and to the General comments of the ICESCR.

Constitutional Courts[75] in judging pension cuts in those States as being unconstitutional.

### 1.3. The interconnection between violations of procedural rights under article 6 and violations of the A1P1 in the context of employment

Article 6 of the ECHR has a particular value in the context of employment relations. The ECtHR has formulated certain requirements to the procedural rights of employees in labour disputes.[76] This facet of the ECtHR's jurisprudence was intentionally left outside the scope of the present research as it merits a separate profound analysis. However, the cases considered in light of both articles 6 and A1P1 will be researched in this section so far as they complement the ECtHR's approach to the protection of wages.

The ECtHR has dealt with numerousapplications concerning the non-enforcement of judgments awarding social security benefits or salary arrears, and has established that if an applicant is unable to obtain the benefit awarded by the judgment then that inability constitutes an interference with the right to the peaceful enjoyment of possessions.[77] It has affirmed that States may not justify the non-enforcement of such judgments by reference to lack of relevant funds.[78]

Ukraine and Russia appear the most before the ECtHR as respondent states in such cases. In spite of adoptng the pilot judgments against Ukraine[79] and Russia[80] respectively, in which the ECtHR urged each of the respective States to set up an

[75] See the Constitutional Court Decision No. 353/2012, that declared unconstitutional the provisions of Budget Law on salary and pensions cuts for public servants, decision is available at: http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html (accessed 20 October 2014).

[76] ECtHR, Fogarty v. The United Kingdom [GC] (37112/97) 21/11/2001; Waite and Kennedy v. Germany [GC] (26083/94) 18.2.1999; Oleksandr Volkov v. Ukraine ( 21722/11) 09.01.2013; D.M.T. and D.K.I. v. Bulgaria (29476/06) 24/07/2012; Tripon v. Romania( 27062/04) 07/02/2012; Mitrinovski v. "The former Yugoslav Republic of Macedonia" (6899/12) 30/04/2015.

[77] ECtHR, Mykhaylenky and others v. Ukraine (35091/02, 35196/02, 35201/02) 30/11/2004, para. 60; Fuklev v. Ukraine (71186/01) 7/06/2005; Adamović v. Serbia (no. 41703/06) 02.10.2012; Stošić v. Serbia (64931/10) 01.10.2013.

[78] ECtHR, Mykhaylenky and others v. Ukraine, para. 52; Piven and Zhovner v. Ukraine (56849/00, 56848/00) 29/06/2004; The delay in payment also cannot be justified by such a reference, see Voytenko v. Ukraine (18966/02) 29/06/2004.

[79] ECtHR, Yuriy Nikolayevich Ivanov v. Ukraine (40450/04) 15/10/2009.

[80] See ECtHR, Burdov v. Russia(N1) ( 59498/00) 07.05.2002; Burdov v. Russia (N 2)) (33509/04) 15/01/2009.

effective domestic remedy for the non-enforcement or delayed enforcement of domestic judgments, the problem has remained largely unresolved.[81]

The ECtHR recently faced another problem concerning the enforcement of judgments in favour of employees – the execution of such judgments in the course of insolvency proceedings or in case of insufficiency of the employer's property. In this series of cases the leading positions are occupied by Russia, Ukraine and Serbia.

The inability of an employer to cover its debts, acknowledged by national courts, is the most pervasive problem. According to the well-established Strasbourg case-law, the extent of State obligations in cases of non-enforcement of judicial decisions will depend on who the debtor is, in each specific instance.

The situation is often complicated by the processes of privatisation, which meant that owners could change over the course of time. In cases where the privatisation occurred before the domestic courts handed down its judgement awarding salary arrears, the ECtHR tends to refuse employee's applications alleging the lack of payment, pointing out that the State cannot be held responsible for the financial debts of a private legal entity.[82] In such cases, the State is not directly liable for debts of private actors unless it fails to act in order to enforce a judgment.[83]

If the State fails to act then the ECtHR is more likely to attribute to them a failure to meet their responsibilities under the ECHR, particularly if it can be demonstrated that the national authorities did not ensure that the procedures enshrined in the legislation for the enforcement of final judgments and for bankruptcy proceedings have been complied with.[84]

At the same time, the ECtHR has consistently held the States responsible for the non-enforcement of the judgments rendered against companies owned by the State, or where there has been a subsequent change in their respective capital share

[81] See Peter B. Maggs, Olga Schwartz, William Burnham, Law and Legal System of the Russian Federation. Sixth Edition, Juris Publishing, Inc., 2015. P. 389; Ivanna Ilciienko, Pilot Judgement procedure of the European Court of Human Rights: panacea or dead-end for Poland, Russia and Ukraine. LL.M. Human Rights Thesis Central European University, published November 29, 2013; Available at: www.etd.ceu.hu/2014/ilchenko_ivanna.pdf (accessed 20.07.2015).

[82] ECtHR, Lepetyukhov v. Ukraine (5033/07) inadmissible 16/03/2010.

[83] ECtHR, Anokhin v. Russia 25867/02 inadmissible 31/05/2007; Polacik v. Slovakia (58707/00) 15/11/2005;

[84] ECtHR, Fuklev v. Ukraine (71186/01) 07/06/2005, para. 91.

structure resulting in the predominance of the State-owned and socially-owned capital.[85] Thus in *Khachatryan v. Armenia*,[86] the ECtHR found the State liable for the breach of both articles 6 and A1P1 due to the non-enforcement of a judgment which granted damages for salary arrears against a private company, the majority shareholder of whom was the State. The same conclusion was reached in numerous cases against Serbia as far as they concerned the non-enforcement of judgments in the circumstances of on-going insolvency proceedings of state-owned companies.[87]

The most important point of the ECtHR's judgments in these cases is the requirement to pay an employee the sums awarded in the final domestic judgments.[88]

Another significant point is the acknowledgment of the State's liability in cases where the employer's company lacked institutional and operational independence from the State.[89] This conclusion concerns certain types of enterprises where the State under national law retains ownership of the property of that enterprise, approves all transactions with that property, controls the management of the enterprise and decides whether the enterprise should continue its activity or be liquidated.[90]

Under Russian law, for example, such enterprises are not liable for the debts of their owners, and the owners are not generally liable for the companies' debts. In spite of such a clear national provision the ECtHR found has found Russia liable for the debts of such companies in respect of their employees.[91] In the recent case of *Liseytseva and Maslov v. Russia*,[92] the State was also found responsible for the

[85] ECtHR, Sekulic and Kucevic v. Serbia (28686/06 50135/06) 15/10/2013
[86] ECtHR, Khachatryan v. Armenia (application no. 31761/04) 01/12/2009
[87] ECtHR, Marčić and Others v. Serbia(17556/05) 30/10/2007, para. 60; Crnišanin and Others v. Serbia (35835/05 et al) 13/01/2009; Rašković and Milunović v. Serbia (1789/07 and 28058/07) 31 May 2011; Adamović v. Serbia (41703/06) 2/10/2012
[88] See also ECtHR, Janković v. Serbia (21518/09) 18 November 2014; Tomović And Others v. Serbia (5327/11 et al) 24/02/2015; Jovičić and Others v. Serbia (37270/11 et al) 13/01/2015.
[89] ECtHR, Bichenok v. Russia (13731/08) inadmissible 31/03/2015, para. 18.
[90] ECtHR, Aleksandrova v. Russia (28965/02) 06/12/2007 the same line in Veretennikov v. Russia (8363/03) 12/03/2009 see also Filshteyn v. Ukraine (12997/06) 28/05/2009.
[91] ECtHR, Shafranov v. Russia (24766/04) 25/09/2008.
[92] ECtHR, Liseytseva and Maslov v. Russia (39483/05 and 40527/10) 09/10/2014.

non-enforcement of the judgment on the payment of salary arrears in respect of the employees of municipality-owned companies.[93]

The prerequisites of a successful claim are clearly formulated in the Strasbourg case law. The applicant is only required to file a request for the enforcement of a judgment awarding salary arrears with the competent national court or, in case of liquidation or insolvency proceedings against the debtor, to report his or her claims to the administrators of the debtor.[94]

In *Zouboulidis v. Greece*,[95] the Court touched upon another facet of rights under A1P1. The applicant, an official of the Ministry of Foreign Affairs, was refused additional payments which by law he was entitled to, as the limitation period for the claims against the State had already expired. In his application before the ECtHR, he allerged that the establishment of a reduced time-limit for claiming the debts owed by the State as well as the calculation of default interest from the date on which notice of the action was served on the State were in breach with A1P1. The ECtHR emphasised that the mere interest of a state's cash flow could not in itself be regarded as a public or general interest justifying interference with individual rights, through the application of the two-year limitation period and the granting of preferential treatment to the state in fixing the date from which default interest was charged. It found the violation of A1P1 and awarded just satisfaction in respect of the pecuniary damage sustained by the applicant in the sum of the debt calculated on the basis of general rules.

The cases considered above demonstrate that the number of the cases brought before the ECtHR under article 6 and A1P1 is growing with years. Due to the fact that the ECtHR can require the State to pay salary arrears, this body turns out to be the most effective international body in the sphere of wage protection and provides invaluable support to the realisation of the fundamental right for remuneration, even though this right is absent from the text of the ECHR.

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[93] See also ECtHR, Voronkov v. Russia (39678/03) 30/07/2015.
[94] ECtHR, Živković v. Serbia (63694/10) inadmissible 30/06/2015; Lolić v. Serbia (44095/06) 22/10/2013; Nikolić-Krstić v. Serbia (54195/07) 14/10/2014.
[95] ECtHR, Zouboulidis v. Greece (no. 2) (36963/06) 25/06/2009.

## 1.4. The potential of the ECHR in the sphere of wage protection

*"Give him food and shelter, when you have covered his nakedness, Dignity will follow by itself".*
Friedrich Schiller (1798)[96]

It has already been mentioned above that the ECHR, in the opinion of the ECtHR, does not guarantee the right to acquire property. Scholars have added that there is currently no "real substantial movement" towards the acknowledgement of the right to acquire property.[97] However, as also noted earlier, the ECtHR has started to use the notion of "insufficient means to live" in the consideration of cases under A1P1. Therefore, there is a hope, that taking into account a general trend of expaning the ECHR to address social matters and the social policies of the states, the ECtHR could develop even further this concept of the sufficiency of the means to live. This concept, if further elaborated, might be used for the protection of the right for fair remuneration.

Why should the European ECtHR interfere with the issue of wages? There are already provisions in the International Covenant of Economic, Social and Cultural Rights (article 7) and in the ESC. According to the approach adopted by the European Committee of Social Rights (ECSR), fair remuneration must in any event be above the poverty line in a given country i.e. 50% of the national average wage.[98] This clear interpretation of the right for a minimum wage has, regretfully, a very limited practical impact. The protection of social rights through the ECSR has already proven ineffective, taking into account the peculiarities of the collective complaints system[99] and the non-binding legal status of its

[96] Cited from Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights. European Journal of International Law Volume 19, Issue 4. Pp. 655-724.
[97] Olsson Petra Herzfeld, supre note 25, p. 385.
[98] See Digest Of The Case Law Of The European Committee Of Social Rights, 1 september 2008. Council of Europe. available at: https://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf (accessed 30.07.2015)
[99] Churchill, Robin R., and Urfan Khaliq, The Collective Complaints System of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights? European Journal of International Law 15.3 (2004), pp. 417-456.

conclusions.[100] The same could be said in respect of the International Committee of Economic, Social and Cultural rights (ICESCR), which only recently acquired its authority to consider individual claims.[101] None of the five claims brought before the ICESCR since the adoption of the Optional Protocol to International Covenant on Economic Social and Cultural Rights concern the right to a fair wage.[102]

Turning to other possible avenues of protecting the right to a decent wage, we find that "[i]t is barely hinted at in the sphere of the so-called four pillars of the Decent Work Agenda promoted by the ILO on a worldwide scale since 1999, the guarantee of an adequate wage is completely absent from the first EU formulations regarding the objective of (more and) better jobs pursued by the EU since 2000 within the so-called Lisbon strategy".[103]

In fact, the right to a decent wage was left outside the scope of the fundamental principles of ILO.[104] Although the ILO Consitution mentions the necessity of an adequate living wage, but ILO Conventions on wage protection do not mention this notion.[105]

In such circumstances, the potential in any ECtHR elaboration on the concepts of "insufficient means to live" and the possibility of considering relevant claims under article 3, which prohibits (among other things) inhuman and degrading treatment, could provide employees with a new avenue by which to protect their

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[100] See, e.g. Virginia Mantouvalou and Panayotis Voyatzis, The Council of Europe and the protection of human rights: a system in need of reform. In: Sarah Joseph, Adam McBeth, editors. Research Handbook on International Human Rights Law. Edward Elgar Publishing, 2010. Pp. 326 – 352; see also Jean Petaux, Democracy and Human Rights for Europe: The Council of Europe's Contribution. Council of Europe, 2009, p. 263; Bob Deacon, Global Social Policy: International Organizations and the Future of Welfare. SAGE, 1997, p. 83;

[101] The possibility of individual claims was highly anticipated by scholars and their necessity during times of crisis has been consistently emphasised. See O'Connell, Vindicating Socio-Economic Rights: International Standards and Comparative Experiences, London and New York, NY, Routledge, 2012. P. 44.

[102] See the list of pending cases on the official site of the Committee: http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx (accessed on 23.09.2015).

[103] Lo Faro, Antonio, Is a Decent Wage Part of a decent Job? Answers from an Enlarged Europe. WP CSDLE "Massimo D'Antona"(2008):18. Available at: http://aei.pitt.edu/13699/1/lofaro_n64-2008int.pdf (accessed 20.05.2015).

[104] See ILO Declaration on Fundamental Principles and Rights at Work (1998); Zimmer, Michael J., Decent Work with a Living Wage. In: Global Labor Market: From Globalization To Flexicurity, Roger Blanpain and Michele Tiraboschi, eds., pp. 61-80, Kluwer Law International BV, 2008 (the author proposed to complement fundamental principles by the right to living wage).

[105] ILO Minimum Wage Fixing Convention, 1970 (N 131); ILO Social Policy (Basic Aims and Standards) Convention, 1962 (N117). It is interesting to point out that the calculation of adequate earnings is one of thirty criteria elaborated by the ILO for the estimation of decent work, see Anker R. et al. Measuring decent work with statistical indicators //International Labour Review. 2003. T. 142. №. 2. P. 147-178.

right to obtaining fair remuneration on an international level. It could also offer interpretive support to the national courts, dealing with these matters.

As the ECtHR has recently noted in its Grand Chamber judgment in *Bouyid v. Belgium*: "The prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity".[106] In the same judgment it pointed out that respect for human dignity forms part of the very essence of the ECHR.[107]

The ECtHR has already referred to article 3 in cases concerning social rights[108] and scholars predict the strengthening of this trend.[109] In fact, the concept of human dignity has become a very "attractive" normative concept,[110] capable of justifying before the national and international courts the expansion of certain rights. It is widely acknowledged that economic and social rights are essential to the concept of human dignity.[111] In two cases against Russia, the ECtHR stated a very important thing – that a wholly insufficient amount of pension and social benefits may raise an issue under article 3 of the ECHR.[112]

Even though it is rather questionable whether the ECtHR might conclude the same in respect of a "wholly insufficient" wage, these decisions impose a new, positive social obligation on the State in the context of article 3, which, if further developed, might have deepened impact on employment law as well.

It is necessary to mention the general approach of the ECtHR to the violations of this article. According to the Strasbourg case-law, degrading treatment violates article 3 if it attains a "minimum level of severity". This threshold is reached where ill-treatment involves actual bodily injury or intense physical or mental suffering, or humiliates or debases an individual, showing a lack of respect for, or

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[106] ECtHR, Bouyid v. Belgium [GC] (23380/09) 28/09/2015, para. 83.
[107] Ibid, para. 89.
[108] ECtHR, M.S.S. v. Belgium and Greece [GC] (30696/09)21/01/2011; Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05) 18/06/2009.
[109] Tulkens Françoise, The European Convention on Human Rights and the economic crisis: the issue of poverty. EUI Working papers, AEL 2013/8; Napoletano N., see supra note 63.
[110] Weisstub Honor, Dignity, and the Framing of Multiculturalist Values, In: Concept of Human Dignity in Human Rights Discourse, edited by David Kretzmer, Eckart Klein. Springer Netherlands, 2002 p. 265.
[111] See Article 23(3) of the Universal Declaration of Human Rights, see also Oscar Schachter, Human Dignity as a Normative Concept. *The American Journal of International Law (1983)* Vol. 77, No. 4, p. 851, Conor Gearty, Virginia Mantouvalou, Debating Social Rights Bloomsbury Publishing, 2010.
[112] ECtHR, Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05)18/06/2009.

diminishing, his or her human dignity.[113] Applying this principle the ECtHR noted that the applicants in two cases against Russia failed to provide sufficient evidence that the low pension had caused damage to the respective applicants' physical or mental health.[114] The applications were declared inadmissible, even though the sum of the pensions were about 15 euro in *Larioshina*, and about 50 euro in the case of *Budina*.

Let us imagine a civil servant residing in a remote area of Russia, where there is no employment opportunity other than with the civil service, which pays about 35% of the average national wages.[115] As a result of not having sufficient funds to pay for medical treatments, the civil servant's health suffers. The civil servant, having unsuccessfully pursued domestic legal avenues, brings a claim to the ECtHR, claiming that the State violated its article 3 obligations to prohibit degrading treatment. In this hypothetical case, the applicant would bring evidence of the damage to her health and will establish an irrefutable link between the damage and the fact that her low wage directly caused her inability to obtain medical treatment that could have arrested the harm suffered to her health.

Should the ECtHR approach this case in a bold way and find a violation of article 3, or should it rather leave a wide margin of appreciation to the State in establishing the remuneration of civil servants? Obviously, the first option is less probable. However there is an opportunity for the ECtHR to take that bolder option if it follows the tradition to refer to other international instruments (such as they did in the *Demir and Baikara* case). Thus might it find support for such an innovative interpretation of article 3 in the provisions of the ESC and any relevant conclusions of the ESCR.

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[113] ECtHR, Price v. The UK (33394/96)10/07/2001; V. v. UK (24888/94)16/12/1999; T.M. and C.M. v. The Republic of Moldova (26608/11) 28/01/2014, para 35.

[114] ECtHR, Larioshina v. Russia (56869/00) 23/04/2002; Budina v. Russia (45603/05) 18/06/2009.

[115] Recent reports of the Russian Federal State Statistics Service clearly demonstrate that the situation is wide-spread, thus only the possibility to commence a relevant application to the ECtHR remains hypothetical. See: The results of the federal statistical observation in the field of remunerationof certain categories of social workers in 2014 (Itogi federal'nogo statisticheskogo nablyudeniya v sfere oplaty truda otdel'nykh kategoriy rabotnikov sotsial'noy sfery i nauki za 2014 god). Available at: http://www.gks.ru/free_doc/new_site/population/trud/itog_monitor/itog-monitor4-14.html (accessed 20.07.2015).

## 1.5. Conclusions

It has been illustrated in this section that the ECtHR's jurisprudence on the wage protection is rather modest, but nevertheless contributes to the protection of employees' rights. It entitles them to bring claims concerning the lack of payment before the ECtHR, alleging the reduction of wages or excessive deductions. This possibility, even if it is subject to numerous conditions, is very important as it provides an additional chance to confront the State as an employer and make it respect fundamental social rights.

Human rights litigation based on property rights has an ideological purpose, insofar as it has the potential to make workers collectively aware of and reflect upon their legal entitlements and their moral claims.[116] In addition, the ECtHR's jurisprudence urges national courts to consider the issue of proportionality where an interference with the employee's rights is justified by the state on the basis of advancing the public interests. It proposes a concept of "excessive burden" (even if it needs further elaboration), which permits one to outline the margin of appreciation of the states in the adoption of the austerity measures.

[116] Novitz Tonia, Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions? Industrial Law Journal (2012) 41. P. 153

## Chapter 2. Occupational safety in the jurisprudence of the ECtHR: current cases and perspectives



Occupational safety matters are traditionally dealt with in ILO Conventions and in the ESC. Domestic labour legislation stipulates detailed provisions on the safety of employees. However, the ECtHR has in some recent cases determined important gaps in the OSH protection of certain countries, by approaching this matter from the human rights point of view. The ECtHR developed its legal positions on OSH protection on the basis of a wide interpretation of the rights to life; respect for private life; and for fair trial.

In *Brincat and Others v. Malta*[117] it deduced from articles 2 and 8 the right of employees to access information concerning risks they are exposed to and the right to protection from dangerous industrial activities. In *Pereira Henriques v. Luxembourg*[118] and *Howald Moor and others v. Switzerland*,[119] the ECtHR established requirements to investigate workplace accidents and the procedural rights of victims of OHS injuries.

These judgments are a result of the ECtHR's thorough research of the content of the positive obligation to protect employees from dangerous activities, which emerged in the "environmental" cases, and the positive obligation to provide information about the risks and establishment of procedural rights of victims of OSH accidents or diseases caused by one's profession.

The research of OSH matters in the ECtHR jurisprudence will be set out in the following structure: the first section of this part will deal with cases where the

[117] ECtHR, Brincat and others v. Malta (60908/11 et al) 24/07/2014.
[118] ECtHR, Pereira Henriques v. Luxembourg (60255/00) 09/05/2006.
[119] ECtHR, Howald Moor and others v. Switzerland (52067/10 and 41072/11) 11/03/2014.

content of these positive duties was elaborated. The second section will reflect on the potential of the ECtHR's legal positions for the development of protection from emerging psychosocial risks at domestic levels.

### 2.1. Positive obligations of the State in the field of OSH

As early as in 1994, in the case of *Lopez Ostra v. Spain*[120] which concerned severe environmental pollution, the ECtHR interpreted article 8 as including the right to protection from dangerous activities. The scope of the corresponding positive obligation of the States was developed in *Öneryıldız v. Turkey*,[121] which concerned the death of 9 relatives of the applicant caused by a methane explosion. In this decision, the ECtHR stated that where dangerous activities are concerned, "special emphasis must be placed on the regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives".[122] These regulations, in the opinion of the ECtHR, must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."[123] In later cases the ECtHR pointed out that in the context of dangerous activities, the scope of the positive obligations under articles 2 and 8 of the ECHR largely overlap.[124] The general message of these judgements is that an industrial activity (set up by private or public funds) must operate under health and safety standards.[125]

In later cases, the ECtHR specified its approach to the standards of OSH protection. *Vilnes and others v. Norway*[126] concerned complaints by divers that

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[120] ECtHR, López Ostra v. Spain (16798/90) 09/12/1994.
[121] ECtHR, Oneryildiz v. Turkey (48939/99) 18/06/2002.
[122] Ibid, para. 90.
[123] See also Guerra and others v. Italy (14967/89) 19-02-1998; Tatar v. Romania (67021/01) 27.01.2009, Budayeva and others v. Russia (15339/02 et al) 20/03/2008, Fadeyeva v. Russia (55723/00) 09/06/2005.See more about the positive duties of the State in respect of protection from dangerous industrial activities in Xenos Dimitris, Asserting the Right to Life (Article 2, ECHR) in the Context of Industry. German Law Journal, Vol. 8, No. 3, pp. 231-254.
[124] ECtHR, Kolyadenko and others v. Russia (17423/05 et al) 28/02/2012, para. 212; Budayeva and others v. Russia, para.133;
[125] Dimitris Xenos, The Positive Obligations of the State Under the European Convention of Human Rights. Routledge, 2012, p. 3.
[126] ECtHR, Vilnes and others v. Norway (52806/09 22703/10) 05/12/2013

they were disabled as a result of diving in the North Sea for oil companies during a pioneer period of oceanic oil exploration (from 1965 to 1990). The ECtHR, having considered in detail the finding of the national courts, decided that the respondent State had already gone to some lengths in their efforts to secure the divers' safety and health; taking a wide range of measures, and in so doing they acted consistently with their positive obligations not only under article 2 but also under article 8 of the ECHR.[127]

In particular, the ECtHR emphasised that the State had adopted a *regulatory framework* which showed that the authorities sought to protect divers' safety responsibly and to actively improve the protection of their safety; that the publicly funded supervision had not been organised in an irresponsible manner; that the authorities had in the main been aware of the North Sea divers' working conditions;[128] and that the State set up special compensation schemes under which divers were eligible to apply for substantial amounts of compensation.[129] Therefore, the ECtHR's paid special regard to the availability and quality of the OSH legal framework for the protection of the divers, the quality of supervision over OSH matters, and the ability to seek compensation for damages suffered as a result of performing this dangerous work.

In *Brincat and others v. Malta*, the ECtHR developed its views on the due realisation of positive duties of the State in the field of OSH. The judgment concerned 21 applications of former workers of the public ship repair yard who had been exposed to asbestos from the 1950's and 60's to the early 2000's. The State was held responsible for breaching its positive obligations to protect the applicants' right to life and the right to respect for private life. A violation of the right to life was found where the employee's death was caused by exposure to asbestos. Where employees had suffered from different diseases, the ECtHR found a violation of the right to respect for private and family life. It is interesting to follow the arguments of the State and the way the ECtHR considered those

[127] ECtHR, Vilnes and others v. Norway, para. 232.
[128] Ibid, para. 224.
[129] Ibid, para. 231.

submissions.

Malta stated that at the time of the relevant events, it was not aware about the danger of asbestos; however, it had nevertheless provided the workers with protective masks and entitled them to additional payment to work with asbestos. In addition, Malta had adopted special legislation as soon as it became aware of the dangers arising from exposure to asbestos.

The ECtHR did not agree that all three submissions absolved the State of their responsibilities. It emphasised the importance of setting OSH norms in the domestic legislation.[130] Evaluating the Maltese legislative framework for employee protection from dangerous activities, the ECtHR for the first time specified its view on features required of OSH law: they must be well-timed; contain practical measures of protection; and must be implemented in practice.

The ECtHR's view on practical measures was also clarified. The use of protective masks, which the State regarded as a protective measure, was not considered to be sufficient protection for workers. It is interesting to noe that this consideration was based on an expert's conclusions drawn in a national case heard by a Maltese court in 1989. This case concerned the death of a worker in 1979 who was exposed to asbestos in the ship-yard. The ECtHR cited the findings of experts and decided that these masks were of "inadequate quality" and "did not take sufficient account of the state of scientific knowledge about the subject matter at the relevant time".[131] This finding can be understood as imposing an obligation on the States to ensure OSH protection should correspond with the level of scientific knowledge in any given field at a particular time.

According to the ECtHR case law, the violation of the positive obligation of the State to protect rights under article 2 or article 8 of the ECHR might be found in situations where the State knew or ought to have known about the danger.[132] As the ECtHR stated in *Opuz v. Turkey*: "The scope of positive obligations under article 3 must be interpreted in a way which does not impose an impossible or

[130] Brincat and others v. Malta, para. 112.
[131] Ibid.
[132] See for example ECtHR, Keeffe v. Ireland (35810/09) 28/01/2014 (par. 144) or Öneryildiz v. Turkey (48939/99) 18/06/2002, par. 62.

disproportionate burden on the authorities."[133] In *Brincat* Malta argued that it did not know about the danger of asbestos. The ECtHR, however, found that Malta ought to have been aware of the problem of asbestos from the 1970's. This conclusion was based on three main pillars: 1. The ILO Convention and Recommendation adopted in 1986[134] and NOT ratified by Malta; 2. The decision by the domestic courts where the employer was held liable for the death of a ship-yard worker in 1979 as result of exposure to asbestos; and 3. The state of scientific knowledge of the medical problems connected with exposure to asbestos.

Although the ILO Convention on the use of asbestos was adopted only in 1986, the ECtHR took into account ILO activities in this sphere stating that "the adoption of such texts comes after considerable preparatory work which may take significant time, and in the ambit of the ILO after having undertaken meetings with representatives of governments, and employers' and workers' organizations of all member countries of the organization".[135] The ECtHR concluded that Malta as an ILO member could not be unaware of the problematic issue of the use of asbestos even before the adoption of Convention No. 162.

Considering the state of scientific knowledge of the dangers of asbestos, it took account of the list, submitted by the applicants, which contained references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards.[136] The ECtHR found inconceivable that there was no State access to any such sources of information, at the very minimum, by the highest medical authorities in the country who had an obligation to remain abreast of scientific developments and to advise the Government accordingly.

The fact that Malta was found responsible for the damage to the employees' health – in spite of the lack of direct evidence that it was aware of the danger of asbestos – demonstrates that the ECtHR imposes very rigorous requirements in the field of OSH.

### 2.1.1. The scope of the positive obligation to provide information

[133] ECtHR, Opuz v. Turkey (33401/02) 09/06/2009. Para. 129.
[134] ILO Asbestos Recommendation, R172; ILO Asbestos Convention C 162 (1986).
[135] ECtHR, Brincat and others v. Malta, par. 105.
[136] Ibid, para. 106.

The positive duty of the State to provide information about the risk that the person is exposed to was deduced from article 8 of the ECHR, which guarantees the right to respect for private and family life. This wide interpretation did not originate immediately but was rather the result of a slow and developmental process. It began with the "environmental" case of *Guerra and Others v. Italy*,[137] where the ECtHR indirectly mentioned the right to assess risk factors connected with the activity of a nearby chemical factory. In *McGinley and Egan v. UK*, the ECtHR was more firm and directly stated that "where a Government engages in hazardous activities …respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[138] The same conclusion was reached in the later case of *Roche v. UK*.[139]

The most significant development of the ECtHR's approach to a person's right to access information concerning the risks he or she is exposed to can be found in *Vilnes and others v. Norway*. Both the divers in this case, as well as the respondent State, were not provided with information about decompression periods used by private enterprises, as decompression tables were recognised as confidential. The ECtHR stated that the State's positive obligation to provide access to essential information enabling individuals to assess risks to their health and lives may, in certain circumstances, also encompass a duty to provide such information.[140] The State argued that at the relevant time it did not possess enough information about the influence of decompression periods upon the health of divers. The ECtHR held that "it would therefore have been reasonable for the authorities to take the precaution of ensuring that the companies observe full transparency about the diving tables used and that the applicants... receive information on the differences between tables, as well as on their concerns for the divers' safety and health, which constituted essential information that they needed to be able to assess the risk to

[137] ECtHR, Guerra and others v. Italy (14967/89) 19/02/1998.
[138] ECtHR , McGinley and Egan v. UK (21825/93, 23414/94) 09/06/1998, para. 101.
[139] ECtHR, Roche v. UK (32555/96) 19/10/2005, para. 167.
[140] ECtHR, Vilnes and others v. Norway, para. 235.

their health and to give informed consent to the risks involved".[141] It concluded that there had been a violation of article 8 of the ECHR on account of the failure of the respondent State to ensure that the applicants received essential information regarding decompression tables enabling them to assess the risks to their health and safety.[142] It is interesting to note that the decision of majority was criticised by dissenting judges as imposing an "unrealistic burden" on the authorities due to the lack of medical information at the relevant time.[143]

In the *Brincat* case the ECtHR took a step forward, developing the scope of the right for OSH information under the ECHR. The ECtHR noted that the State, seemingly oblivious to the obligations arising from the ECHR, opted to consider that it was not their responsibility to provide information at the outset and that anyone in such a work environment would in any case be fully aware of the hazards involved.[144] It emphasised that Maltese legislation failed to establish a duty to provide information on the dangers of exposure to asbestos and that the State had not undertaken any research about asbestos specifically. Considering the State's submissions, the ECtHR found that neither the distribution of the protective masks nor the reference to the OHS activities could be regarded as a sufficient source of information. Thus, the ECtHR focused again on the importance of the legislative framework and made clear that studies or reports on OSH dangers should form a part of the positive obligation to provide information.

### 2.1.2. The requirement to investigate occupational accidents and the procedural rights of victims

The ECtHR has stated on numerous occasions that the right to life involves a primary duty of the State to put in place effective criminal-law provisions to deter the commission of offences against persons which must be backed up by adequate law-enforcement machinery to prevent, suppress and punish breaches of such

[141] ECtHR, Vilnes and others v. Norway, Para. 244.
[142] Ibid, para. 245.
[143] Partly Dissenting Opinion Of Judge Nordén, Joined By Judge Lorenzen to the judgments in Vilnes and others v. Norway.
[144] ECtHR, Brincat and others v. Malta. Para. 114.

provisions.[145] In *Pereira Henriques v. Luxembourg*,[146] it established the necessity of effective investigations in respect of occupational accidents. The applicants complained that there had been no effective investigation into the circumstances of the death of their husband and father, who was killed during such an occupational incident. They also argued that they had been denied access to a court (article 6) that there was a lack of effective remedy (article 13) because the Social Insurance Code of Luxemburg did not give the victims of occupational accident or their successors standing to sue for damages against an employer in relation to that accident, except in the case of accidents at work caused intentionally.

The ECtHR noted that authorities were required to take any reasonable steps available to them to ensure relevant evidence relating to the facts in question is taken, including such matters as, inter alia, testimonies, expertise and, if necessary, conducting an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.[147] It considered that the prosecution, deciding not to appoint an expert, prevented the clarification of the cause of the occupational accident and found that the State's investigation was therefore not effective, violating the procedural aspect of article 2 of the ECHR.[148]

It also found the violation of article 13 as the State had failed to show that the applicants had had an effective remedy by which to seek compensation following the State's ineffective investigation.[149] The ECtHR emphasised that article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of the persons responsible for the death and including effective access for the complainant to the investigation procedure.[150]

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[145] ECtHR, Osman v. The United Kingdom (23452/94) 28/10/1998, para. 115; Keenan v. The United Kingdom (27229/95) 03/04/2001, para. 89; Slimani v. France (57671/00) 27/07/2004, para. 29.
[146] ECtHR, Pereira Henriques v. Luxembourg (60255/00) 09/05/2006
[147] Ibid, para. 57
[148] Ibid, para. 62.
[149] Ibid, para. 91.
[150] Ibid, para. 87.

Therefore article 13, in conjunction with article 2, imposes on States the duty to effectively investigate occupational accidents and to ensure the rights of victims or their next-of-kin to legal protections including access to relevant procedures.

The right to fair trial was also found relevant to OSH matters in several cases. The ECtHR has considered factors including the length of proceedings related to establishing the existence of occupational disease[151] and the impossibility to challenge conclusions of special medical commissions on the non-occupational character of an applicant's disease.[152]

In *I.D. v. Bulgaria*, the ECtHR found the violation of the right for fair trial as the Bulgarian courts were precluded from conducting their own examination of the causal link between the applicant's working conditions and her illness, and were not free to determine its occupational or non-occupational character after it had been declared not work-related by the special medical commissions.[153]

In *Howald Moor and others v. Switzerland*,[154] the ECtHR deduced from article 6 a rule which is particularly important for OSH protection. The applicants were the next-of-kin of a worker who had been exposed to asbestos from 1965 until at least 1978. The worker died in 2005 from malignant pleural mesothelioma. They claimed that the limitation periods stipulated by the domestic law applicable at the time violated their right to fair trial, as there was no real opportunity for persons suffering from asbestos-related diseases to claim damages before the expiration of the limitation period.

The ECtHR considered that in cases where it was scientifically proven that an individual could not know that he or she was suffering from a particular disease, that fact should be taken into account in calculating the limitation period.[155] It held that the systematic application of the rule on limitation periods, to persons suffering from diseases which could not be diagnosed until many years after the

[151] ECtHR, Bykov v. Ukraine (26675/07) 16/04/2009; Vaas v. Germany (20271/05) inadmissible 26/03/2009.
[152] ECtHR, I.D. v. Bulgaria (43578/98) 28/04/2005.
[153] Ibid, para. 46-50.
[154] ECtHR, Howald Moor and others v. Switzerland (52067/10 and 41072/11) 11/03/2014.
[155] Ibid, para, 78.

triggering events, deprived those persons of the chance to assert their rights before the Courts and thus violated the right guaranteed under article 6 of the ECHR.[156]

The ECtHR's view as expressed in *Moor* might enhance the chances of judicial protection of the rights of employees who were exposed to dangerous or harmful conditions at work, which have a long-term effect upon their health and who suffer from occupational diseases. It is important to note that the revision of the provisions of the Swiss Code of obligations on limitation periods is on-going.[157] The analysis of the ECtHR's case law on OSH matters was based on several judgments, much fewer than in respect of discrimination or the protection of employee privacy in the workplace. However, judgments considered in this section clearly demonstrate that the ECtHR is willing to deal with OSH matters in light of the rights to life, to respect for private life and for fair trial. It has established the set of the basic positive duties of the States in the field of OSH, which are equally applicable to all the countries of the CoE. Such a wide coverage makes us question whether the ECtHR's approach might be helpful for the development of OSH protection, for example, in establishing protection from psychosocial risks (PSR) in countries where such risks are not recognised yet.

## 2.2. Potential of the ECtHR's legal positions for the development of protection from psychosocial risks on the domestic level

Psychosocial risks are acknowledged by OSH specialists and policymakers as one of the growing key challenges in Europe.[158] There are European Directives[159] related to the ability to treat harassment as discrimination, soft law instruments on stress and harassment.[160] Domestic approaches to the protection of employees from

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[156] ECtHR, Howald Moor and others v. Switzerland, para. 77.

[157] Peter Loser, Switzerland. European Tort Law Yearbook. 2014, Vol. 3(1), pp. 673–698.

[158] See Survey of Enterprises on New and Emerging Risks (ESENER). European Risk Observatory Report: European Agency for Safety and Health at Work 2010. Available from: https://osha.europa.eu/en/publications/reports/esener1_osh_management/view. (accessed March 20, 2014)

[159] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**;** Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[160] European framework agreement on harassment and violence at work (2007); European framework agreement on work-related stress (2004)

these types of risks, which are far from being exhaustively defined, continue to differ within Europe states. Most evidently, they differ within the CoE, where some countries have a well-elaborated mechanism of protection from harassment and stress (e.g., France, Belgium) while others have not yet recognised such risks as being inherent at the workplace (e.g., Russia, Ukraine).

The ILO has contributed to the scientific research of this topic;[161] however, ILO Conventions on OSH do not explicitly recognise PSR as inherent in the workplace.

Are there any international norms which could be used for the development of protection from PSR in the countries where such risks are not recognised? The ECHR stipulates such norms and certain legal positions taken by the ECtHR represent general pillars of protection from PSR, that might be used by the members of the CoE.

Although there are no cases on the protection of employees from PSR to date, important premises for such protection can be found in the ECtHR's jurisprudence on articles 2, 3 and 8 of the ECHR. In order to determine the possible approach of the ECtHR to workplace PSR we will analyse cases that have similar features and compare them with the national jurisprudence on protection from harassment and work-related stress.

- **Article 2**

First, article 2 of the ECHR should be referred to as the recent case-law on OSH, discussed in the previous chapter, has formulated a very wide interpretation of this right, imposing on the State a positive duty to ensure employees are protected against occupational risks.[162] But can PSR be considered as inherent risks that endanger lives of employees? Though PSR are the most problematic types of occupational risks, being neither immediate nor evident or clearly predictable, still we can conjecture that cases of suicides at work (e.g. suicides in France Telecom,

[161] Psychosocial Factors At Work: Recognition and control. Report of the Joint ILO/WHO Committee on Occupational Health. Occup Saf Health Ser. No. 56; 1986; Mental health in the workplace. Geneva: ILO; 2000; Global strategy on occupational safety and health. Conclusions adopted by the International Labour Conference at its 91st Session, 2003. Geneva: ILO; 2004.

[162] ECtHR,Vilnes and others v.Norway, Brincat and others v. Malta.

Orange and Renault[163]) or deaths from heart attacks caused by stress[164] clearly demonstrate the necessity of enlarging the notion of inherent risks.

For this reason we consider that the ECtHR's legal position that the State is positively obliged to supervise activities which may cause danger for human life, together with the obligation to take practical measures to ensure effective protection from such dangers, must be taken into account by States subject to the ECtHR's jurisdiction when protecting employees from PSR as well as from any other occupational risks.

The ECtHR's approach developed in *Brincat* and *Vilnes* can be applied in cases where PSR threatens the lives of employees. This might be particularly important for the countries where there is presently no other mechanisms by which employees are protected from PSR, such as Russia, Ukraine or other Eastern European countries of the CoE.

Based on the ECtHR case law, the components required to effectively protect against PSR at work might be as follows: (a) the States' obligation to prevent dangers to life (where it ought to have known about those dangers); (b) the State's obligation to properly investigate the accident; and (c) the State's obligation to ensure there are appropriate avenues by which the victim (or their next-of-kin) may seek redress.

In my opinion, these positive obligations of the State should be fulfilled by recognising PSR as a part of occupational risks. Such recognition would extend the occupational health standards of monitoring and prevention over risks of employee's stress or harassment.

Let us imagine a hypothetical case of a public servant who suffered severe damage from work-related stress and did not succeed in obtaining remedy in her national courts. The ECtHR in such a case should establish whether the State

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[163] Willsher K. Orange France investigates second wave of suicides among staff. The Guardian. March 23, 2014 Available from: http://www.theguardian.com/business/2014/mar/19/orange-france-investigates-second-wave-suicides(accessed December 20, 2014); Decision of the Court of Appeal of Versailles No. 10/00954, May 19, 2011.

[164] Decision of the Italian Supreme Court of Cassation No. 9888, October 5, 1998; Decision of the Italian Supreme Court of Cassation No. 14085, October 26, 2000.

knew, or ought to have known, about the risk of stress in respect of a particular employee. The answer to this question is obvious where the domestic law of the respondent state requires the risk of stress at the workplace to be assessed, as in Italy or France. The situation would be more complicated if the state did not recognise stress as an inherent risk in the workplace and did not provide any legislative framework for protection against such concerns. In my opinion, the ECtHR in such a case could refer to the comparative review of other CoE member states' laws. Comparative research in such hypothetical cases could lead the ECtHR to the analysis of the European Framework Directive on work-related stress and the experience of its implementation in EU member states.

This kind of research could reveal that the recognition of stress as an occupational risk is a gaining traction in European countries. In such circumstances, the ECtHR might decide that the State ought to have known about the risk of stress even in the absence of relevant legislation. In this context the ECtHR's judgment in the *Brincat* case is very helpful. The respondent State was held responsible for damages to the employees' health caused by their work with asbestos, even though the domestic occupational health provisions did not recognise the danger to health arising from asbestos exposure.

This theoretical example demonstrates the possible application of article 2 to cases involving PSR at work. This article can be read as entitling employees to make an appeal to the ECtHR claiming the State's failure to ensure his right to a life that was challenged by PSR at work, such as stress or harassment. It seems possible for applicants who fail to obtain remedy in ordinary domestic criminal or civil proceedings, in cases of death or any other grave consequences of PSR, to lodge an application for review by the ECtHR. Such an application could be lodged, e.g., against Russia. Some shortcomings of Russian investigation processes have been acknowledged by the ECtHR.[165] Russian researches claim serious defects in the system of investigation and judicial approach to the cases of bringing

[165] ECtHR, Denis Vasilyev v. Russia (32704/04) 17/12/ 2009.

to suicide.[166]

This theoretical possibility is more tangible when public employees are concerned. In these cases the State, as the contracting party responsible for the health and life of employees, has a negative obligation to abstain from actions that may endanger the life of dependents, as well as a positive obligation to ensure its effective protection.

▪**Article 3**

Article 3 of the ECHR, prohibiting degrading treatment or punishment, is usually deemed as providing an absolute right for protection from such actions.[167] It might be used as another pillar for protection of employees against workplace PSR.

It is important to analyse the ECtHR's approach to the cases of degrading treatment and punishment as it might be used for the protection of employees from such PSR as moral harassment (mobbing). This provision was initially designed to provide protection against degrading treatment by the State. But as the ECHR is used as a living instrument which must be interpreted in the light of present-day conditions, the ECtHR has reserved to itself sufficient flexibility to address the application of that article in other contexts which might arise.[168] The ECtHR's flexibility is expressed in granting protection from degrading treatment caused by private persons, e.g., in cases of violence against children or domestic violence.[169]

The notion of inhuman or degrading treatment is understood as such treatment that deliberately causes severe suffering, whether it be mental or physical.[170] In recent cases the ECtHR considered that emotional suffering caused by humiliation can amount to a breach of article 3 of the ECHR.[171] In *Đurđević v. Croatia* it recognised the violation of this provision deciding that the continued harassment of

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[166] Chukaeva N.G. Ugolovnaya otvetstvennost' za dovedeniye do samoubiystva ili do pokusheniya na samoubiystvo: problemy zakonodatel'nogo regulirovaniya [Criminal liability for bringing to suicide or to attempt to commit suicide: problems of legislative regulation] [dissertation]. Tyumen, 2011.

[167] Addo M.K., Grief N., Does article 3 of the European Convention on Human Rights enshrine absolute rights? Eur J Int Law. 1998(9), pp. 510-524.

[168] De Schutter O. The Protection of Social Rights by the European Court of Human Rights. In: Van der Auweraert P., De Pelsmaeker T., Sarkin J., Vande Lanotte J., editors. Social, economic and cultural rights. An appraisal of current European and international developments. Antwerpen: Maklu; 2002. P. 217.

[169] ECtHR, A. v. The United Kingdom (25599/94) 23/09/1998; O'Keeffe v. Ireland (35810/09) 28/01/2014; Opuz v. Turkey (33401/02) 09/06/2009.

[170] ECtHR, Treholt v. Norway (14610/89) 09/07/1991; Toth v. Croatia (64674/01) 09/07/2002.

[171] ECtHR, R.R. v. Poland (27617/04) 26/05/2011.

a disabled person which caused the applicant to feel fear and helplessness amounted to degrading treatment.[172] In *Vincent v. France* the ECtHR held that non-intentional degrading treatment can also amount to a violation with the ECHR.[173] According to the ECtHR's case-law, ill-treatment must attain a minimum level of severity in order to fall within article 3 of the ECHR. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, and its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[174]

The requirement of severe suffering as a consequence of inhuman behavior is the main point of difference between the ECtHR's interpretation of degrading treatment, and the notion of moral harassment set out, e.g., in the European directives on discrimination. National approaches to harassment based on other than discriminatory grounds differ: in France employees do not have to provide evidence on the severe consequences of harassment on employees' health,[175] but Italian Courts require employees to prove these consequences in case of mobbing.[176]

This brief comparison makes us presume that actions recognised as harassment or mobbing might constitute a violation of article 3 of the ECHR if the ECtHR finds that the minimum of severity was reached. There are cases of degrading treatment that seem to have common points with the possible cases of harassment at work. Harassment at work provokes severe suffering as the victim is obliged to stay in the hostile environment. In the cases of vertical harassment the victim is obliged to fulfill the orders of his tormentor and strongly depends on him. These characteristics of harassment have similarities with cases of domestic violence where victims are often considered vulnerable, taking into account their

[172] ECtHR, Dorđević v. Croatia (41526/10) 24/07/2012.
[173] ECtHR, Vincent c. France (6253/03) 24/10/2006.
[174] ECtHR, T.M. and C.M. v. The Republic Of Moldova (26608/11) 28/01/2014.Para. 35.
[175] Lerouge L., Hebert C. The law of workplace harassment of the United States, France, and the European Union: comparative analysis after the adoption of France's new sexual harassment law. Comp Labour Law Policy J. 2013, 35(1), pp.110-113.
[176] Decision of Italian Supreme Court of Cassation, Social Chamber No. 09-72541, March 15, 2011; Decision of Italian Supreme Court of Cassation, Social Chamber No. 09-42097, January 25, 2011; Decision of the Italian Supreme Court of Cassation No. 2038, January 29, 2013.

dependence on the perpetrators.[177] These traits are also present in situations where applicants were in a vulnerable position by virtue of being under an authority's control, e.g., conscripted servicemen,[178] who could be compared to some extent with contractual servicemen. In these cases the ECtHR, taking into account the vulnerability of victims, narrows the margin of the appreciation left to of the State and imposes a stricter obligation to create effective protection of the rights under article 3 of the ECHR.

Therefore, the applicant's vulnerability might strengthen the claim of protection against degrading treatment (harassment) before the ECtHR. There are cases where some employees were considered vulnerable, e.g., HIV-positive employees.[179] The ECtHR's estimation of an applicant's vulnerability depends largely on the circumstances of the case;[180] however it is rather evident that minors, disabled persons or pregnant women would fall within the category of vulnerable persons in cases about harassment at work. Considering the cases of degrading treatment committed by private individuals, the ECtHR observed that there could be no direct responsibility of the States for the acts of the private individuals.[181] However, the ECtHR's case-law leads us to conclude that the States have an obligation to ensure effective protection from degrading and inhuman treatment, also against the violence of other individuals.

In *T.M. and C.M. v. The Republic of Moldova*, the ECtHR stated that States are obliged to maintain and apply in practice an adequate legal framework affording protection against acts of violence by others.[182] In *Opuz v. Turkey*, the ECtHR noted that the scope of positive obligations under article 3 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, as not every claimed risk of ill-treatment can entail a requirement for

[177] ECtHR, Opuz v. Turkey; Hajduova v. Slovakia (2660/03) 30/11/ 2010; Bevacqua and S. v. Bulgaria (71127/01) 12/06/2008.
[178] ECtHR, Placì v. Italy (48754/11) 21/01/2014, Chember v. Russia (7188/03) 03/07/2008.
[179] ECtHR, I.B. v. Greece (552/10) 03/10/2013.
[180] Peroni L., Timmer A. Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law. Int J Constitutional Law. 2013(4), pp. 1056-1085
[181] ECtHR, Beganović v. Croatia (46423/06) 25/06/2009, para. 69.
[182] ECtHR, T.M. and C.M. v. The Republic Of Moldova, para. 39.

authorities to take operational measures to prevent that risk from materialising.[183] For a positive obligation to arise, it must be shown that the authorities knew or ought to have known, at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party, and that they failed to provide practical and effective protection.[184]

The ECtHR emphasised the importance of ensuring that acts of ill-treatment do not remain ignored by the relevant authorities and that national courts should not, under any circumstances, be prepared to allow life-endangering offences and grave attacks on physical and moral integrity to go unpunished.[185]

Considering the above-mentioned positive obligations of the State in the context of harassment at work, two points of particular importance might be revealed:

(a) The State's liability under article 3 of the ECHR in cases of harassment is possible, if national authorities knew, or ought to have known, about the ill-treatment or the danger of ill-treatment. In countries where there is no legal framework requiring the protection against workplace PSR, employees could appeal to a competent authority asking it to investigate any relevant criminal offence. The absence of an adequate response on the part of those authorities might constitute the violation of the State's positive obligations.

The application of article 3 might be particularly interesting in cases concerning harassment of public employees. As the States have a negative obligation not to behave in inhuman or degrading manner, acts of harassment of subordinate public employees might be considered a violation of this article.

This conclusion may be especially curious in the case of France. According to French case-law, the employer has to secure theoccupational security of employees ("sécurité de résultat"); this principle also applies to the protection from PSR at

[183] ECtHR, Opuz v. Turkey (33401/02) 09/06/2009.
[184] ECtHR, Muta v. Ukraine (37246/06) 31/07/2012.
[185] Ibid.

work.[186] In these circumstances the question arises whether the presumed responsibility of an employer, in cases involving the harassment of public servants, can be interpreted by the ECtHR as if the State ought to have known about all actions of harassment, which reached the minimum level of severity? The positive answer to this question might enable public employees to seek protection from harassment by applying to the ECtHR if domestic avenues for redress have been exhausted.

(b) According to the ECtHR's case-law, inhuman or degrading treatment must be treated as criminal offences in domestic law. States may be found to have violated their obligations to ensure protection from inhuman or degrading treatment if the crime was reported to the relevant authorities and was poorly investigated or granted insufficient judicial protection was not adequate. These are the prerequisites for claiming State's liability for harassment under article 3 of the ECHR.

Bringing to suicide andinsults are recognised as criminal offences in the majority of the members of the CoE. However, harassment is a broad term and encompasses a wide spectrum of ill-treatments, which by themselves may not amount to criminal offences. European countries have different approaches to penalising harassment: in France, harassment at work is prohibited by article 222-33-2 of the Criminal Code, which defines "harcelement moral" in the same way as French Labour Code.[187] In Italy, there is no unique crime that would correspond with harassment, but there is case–law on articles of the Criminal Code prohibiting defamation (article 595), violence or threat (article 610), ill-treatment (article 572). Article 572 of the Italian Criminal Code is particularly interesting as it was designed to protect persons from domestic violence and was entitled "Maltreatment of family and household members". This article punishes the

[186] Lerouge L. Suicide du salarié et faute inexcusable de l'employeur: quelles évolutions juridiques? Revue de droit sanitaire et social. 2012(2), pp.373-387; Lerouge L. Droit de la santé-sécurité et risques psychosociaux au travail: où situer le système français au regard des systèmes étrangers? In: Lerouge L., editor. Les risques psychosociaux au travail en droit social: approche juridique comparée. France - Europe - Canada – Japon. Paris: Dalloz; 2014. p. 4-19.

[187] Lerouge L. Workplace bullying and harassment in France and few comparisons with Belgium: a legal perspective. JILPT Report. 2013 (12), pp.39-59.

mistreatment of family members or other cohabitants, or a person who is under the authority of the perpetrator or entrusted to him for the sake of education, supervision or custody, or in the exercise profession. In a recent case, the ECtHR considered that this article may apply to cases of harassment where the relationship between the employee and the chief are stringent, intense, frequent and characterised by strict subordination of victim to the perpetrator.[188] In Russia, the basis for prosecuting acts of harassment can be found in article 117 of the Criminal Code, prohibiting cruel treatment; article 128.1, prohibiting slander; and article 138 on violations of privacy.[189]

The ECtHR's case-law on domestic violence reveals that the investigation and judicial protection from ill-treatment has numerous shortcomings in the countries of the CoE, especially in the former Soviet bloc countries.[190] Therefore, the failure of the States to ensure due protection from inhuman or degrading treatment might also be a basis for the ECtHR to consider moral harassment.

▪**Article 8**

The ECtHR's interpretation of the respect for private life is a key for opening new dimensions of protection under this article. In cases dealing with domestic violence, the ECtHR has stated that the right to respect for private life covers the physical and psychological integrity of a person.[191] The requirement of a State's protection of physical and psychological integrity of the person is particularly important for establishing a system of protection from workplace PSR. It is also used in very open manner. The ECtHR's jurisprudence includes certain cases which have common points with the protection from PSR. For example, the concept of the physical and psychological integrity of a person was used in the

[188] Decision of the Tribunal of Milan No. 34, section Dist. Cassano d' Adda, March 14, 2012.
[189] Chernyaeva D. V. Legal framework for workplace mobbing and harassment prevention in Russia: problems and prospects. E-J Int Comp Labour Stud. 2014(2), pp.14-31.
[190] ECtHR, Valiulienė v. Lithuania (33234/07) 26/03/2013; Eremia and Others v. the Republic of Moldova (3564/11) 28/05/2013; E.S. and Others v. Slovakia (8227/04) 15/09/2009; A. v. Croatia (55164/08) 14/10/2010; Kalucza v. Hungary (57693/10) 24/04/2012.
[191] ECtHR, G.B. and R.B. v. The Republic Of Moldova (16761/09) 18/12/2012.

case concerning the right to protect one's reputation[192] or in a case involvingprotection from menacing behavior.[193]

This formulation is consonant with the text of the Italian Civil code (article 2087) that requires employers to ensure the protection of the physical integrity and moral personality of employees. These words serve as a basis of judicial protection of employees from PSR in Italy. In particular, article 2087 is widely used in the cases of mobbing[194] and in the cases of work-related stress.[195] Therefore we can hypothesise that the system of protection of employees from PSR in the countries where this type of occupational risks are not addressed in domestic labour law, might be founded upon the obligation of the States to protect the physical and psychological integrity of persons, the latter having been acknowledged by the ECtHR in numerous judgments.

The ECtHR's interpretation of article 8 doesn't impose any general requirements in regards to the severity of the illegal conduct. For example, in *Hajduova v. Slovakia*,[196] the ECtHR found the violation of the right to respect for private and family life, as the State failed to protect the applicant from the menacing behavior of her ex-husband – even though these threats were not carried out. This case leads us to suppose that article 8 might be more applicable for claims of protection from PSR than articles 2 or 3 of the ECHR. The right of the employee to assess the risks to his health and life might be another pillar for protection from PSR. It was acknowledged by the ECtHR in *Vilnes* and further developed in *Brincat and others v. Malta* and might extend also to psychosocial risks. It can be interpreted as setting out corresponding positive obligations of the State to create a system of assessing these risks at the workplace and dealing with them appropriately.

The binding character of the ECtHR's judgments is the main peculiarity of the

[192] ECtHR, Somesan and Butiuc v. Romania (45543/04)19/11/2013.
[193] ECtHR, Opuz v. Turkey (33401/02) 09/06/2009.
[194] Decision of the Italian Court of Cassation No. 18093, July 25, 2013; De Matteis A. Infortuni sul lavoro e malattie professionali. Milan: Giuffrè Editore; 2011. p. 553.
[195] Decision of the Tribunal of Trieste October 6, 2010, Corsalini G. La responsabilita del datore di lavoro per infortunio conseguente a stress lavorativo. Danno e responsabilità. 2008, p.1061.
[196] ECtHR, Hajduova v. Slovakia (2660/03) 30/11/2010.

Strasbourg mechanism of human rights protection. According to its jurisprudence, the States are required to remedy the situation, providing individual redress and establishing general measures to prevent further similar violations. Once a case on protection from PSR is brought before the ECtHR, it might even prescribe the need for adoption of a special policy in respect of addressing workplace PSR.[197] It would be possible, for example, if the majority of European countries recognise workplace PSR and adopt legal frameworks aimed at addressing these risks. The ILO's activities in this field, in particular, the adoption of a Convention or Recommendation explicitly recognising PSR, could also contribute to the establishment of an evident tendency towards including PSR within standard OSH policies.

Another interesting facet of the right to assess the risk to one's health in the context of PSR can be found in *Roche v.UK*.[198] The applicant claimed the violation of article 8 as he was denied access to information relating to his participation in the testing of nerve gas and mustard gas on military personnel during his military service. The ECtHR found the violation of the right to respect for private life noting that the anxiety and stress caused by his uncertainty could also be considered a violation of his right for respect of private life.

The ECtHR's reasoning in this case makes us think that stress and anxiety are seen as challenges to psychological integrity, though it was not expressed this way by the ECtHR. It is rather unclear whether the ECtHR considered the stress of the applicant as a separate violation or whether it was mentioned to constitute violation only to emphasise the aggravating circumstance of the case. In any case, the ECtHR's position on stress, read together with the necessity to protect the psychological integrity of a person, constitutes a certain basis for the possibility to apply to the ECtHR for protection from workplace PSR.

- **The right to establish and develop relationships with other human beings**

[197] Among judgments where the Court urged the respondent States to change national policy incompatible with the ECHR should be mentioned: ECtHR, Oleksandr Volkov v. Ukraine (21722/11) 09/01/2013; Lustig-Prean and Beckett v. The UK (31417/96, 32377/96) 27/09/1999; Konstantin Markin v. Russia (30078/06) 22/03/2012.

[198] ECtHR, Roche v. The United Kingdom (32555/96) 19/10/2005.

The ECtHR's legal positions on the right to establish and develop relationships with other human beings[199] could also contribute to the development of protection from workplace PSR. The ECtHR's willingness to extend protection on activities of a professional or business nature is particularly important for the present research as it might provide us with the necessary basis for claiming protection from harassment at work even in cases where article 3 would be inapplicable (e.g., where the minimum level of the severity of suffering was not reached).

The ECtHR has not defined the notion and the components of the right to establish and develop relationships. Applying the "*Demir and Baikara* method"[200] in the case of protection from workplace PSR, the ECtHR could take into account the fundamental principle of the ILO set out in the Declaration of Philadelphia. According to this document, employment policies must ensure the material well-being and spiritual development of employees in conditions of freedom and dignity. Therefore, freedom and dignity can be seen as fundamental characterisations of workplace relations. The lack of freedom or an infringement of dignity could be considered a violation of the right to establish and develop relationships. It is obvious that harassment at work would be in breach of this right, guaranteed by article 8 of the ECHR.

These theoretical findings give us scope to argue the theoretical possibility of appealing to the ECtHR if national authorities fail to provide effective protection from workplace PSR. However, it is difficult to foresee if the ECtHR will be ready to interpret the ECHR with such boldness as to recognise PSR as a part of occupational health and safety risks.

## 2.3. Conclusions

The present research of the ECtHR jurisprudence demonstrated that the provisions of the ECHR could be valuable in protecting the OSH of employees. The ECtHR's most important contribution here is its elaboration of the set of

[199] ECtHR, Niemietz v. Germany (13710/88) 16/12/1992.

[200] Lörcher K., The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up. In: Dorssemont F. and Lörcher K., Schömann I., editors. The European Convention on Human Rights and the Employment relation. Oxford: Hart Publishing; 2013. p. 3-47.

minimum positive duties of the States in this sphere.

This analysis of the potential of the ECHR in this field demonstrates that the ECtHR, based on existing case law, might support protection from workplace PSR. It would be more likely if with the course of time more European states includes PSR in the way OSH risks are addressed. Another important conclusion is the possibility to apply to the ECtHR in cases where PSR has caused severe and domestic remedies are exhausted by the applicant.

Although these findings are purely theoretical, there is a possibility of their implementation in national practices in future. Taking into account the increasing European tendency to include PSR in the category of occupational risks and the growing awareness of the problem it causes, we can be rather optimistic in this regard and expect that the ECtHR's recognition of the right for protection from PSR will not be far away.

# Conclusions

This study has attempted to provide a conceptual reading of individual rights at work, as guaranteed by the ECHR. It was an ambitious project to reveal the ECtHR's interpretation of the rights to work, which is binding upon the States and might be used for the protection of the employees from 47 CoE countries, from both the public and private sectors. The goal was also to demonstrate the growing applicability of the ECHR to the protection of the individual rights at work both on the domestic and international levels.

In the course of this study its scope was gradually enlarging; new facets of protected rights has emerged in the ECtHR's case law in the last three years, such as the possibility to claim reinstatement, the opportunity to bring a claim concerning occupational safety, or to protest wage cuts in the result of austerity measures. This research was much like exploring a treasure island, where jewels were found in the most unexpected places. Having begun with few famous cases, it was difficult to imagine how many labour law points of the ECtHR's reasoning were hidden from the eyes of labour law scholars. The constant monitoring of the ECtHR's case law during last three years made me affirm the ECtHR's trend of enlarging the ECHR scope and the ever-widening coverage of individual rights at work.

It was particularly interesting to follow the history of the development of the ECtHR' perception of certain rights; to feel "the wind of change" in its approach to discrimination, the protection from unfair dismissal and many other points. The initial inspiration even strengthened as I researched hundreds of cases which provided priceless support to the protection of individual rights at work.

The applicability of the ECHR to the protection of both private and public employees' rights is one of the most important general conclusions of the present work. The ECtHR has elaborated a set of positive obligation of the State in the employment sphere, including requirements:

- to ensure effective protection from slavery and servitude and human trafficking,

corresponding to the qualitative requirements elaborated by the ECtHR;

▪ to create a system of judicial protection and to guarantee the right to bring a civil action against discrimination;

▪to adopt regulations protecting employees' privacy;

▪ to provide practical and effective protection of employees' privacy, preventing unauthorised access to the personal data stored by her employer;

▪ to ensure that all interferences with the employee's privacy (monitoring such activities as telephone calls, e-mail, correspondence, use of the internet from work premises, searches of personal items placed at the workplace, and private data) are lawful and proportionate to the legitimate aim pursued by the employer;

▪ to ensure the respect for private life and freedom of religion, expression and association of employees, fairly balancing these freedoms with the rights of employers when considering employment disputes;

▪ to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact that an employee belongs to a particular political party;

▪ to ensure the proportionality of austerity measures to the general interest, avoiding placing excessive burdens on employees;

▪ to adopt a legislative framework to protect employees from dangerous activities, which must be well-timed andinclude practical measures of protection and effectively implementing these in practice;

▪ to effectively investigate workplace accidents and to provide victims or their next-of-kin with adequate avenues of redress;

▪ to ensure due judicial protection of the rights of persons who suffer from occupational diseases.

The most significant aspect of the ECtHR's approach to the protection of the rights at work is imposing a requirement on States to ensure proper balancing of employees' rights with the rights of employers, or with the general interest of the State and to estimate in all cases the proportionality of the interference to the legitimate aim pursued. The research demonstrate that the ECtHR urges the States

to adopt the same approach to employment disputes considered on domestic levels and to take account of the fundamental rights of employees in the context of employment.

This study, being inspired by the evolutionary character of the ECHR, attempted to draw attention to the potential of the ECHR provisions. The reflections on the possible contribution of the ECtHR's legal positions to the protection of the right to a fair wage or to the protection from workplace PSR, despite being speculative, and possibly, being too optimistic, suggests that there is a clear legal basis for such developments.

The research highlighted the impact of the ECtHR's judgments on the national policies of certain States. This impact happens in three main ways: 1) through the adoption of general measures, required by a particular judgment; 2) through the application of the ECtHR's legal positions by domestic supreme courts; 3)through the reference to the ECtHR's jurisprudence by advocates and the trade union in domestic judicial proceedings. The impact from policy changes in the result of adoption of general measures is clear and absolutely tangible; it allows us to argue that the ECtHR has become a strong player in the field of employee rights protection.

However, the effect of the Strasbourg jurisprudence might be much more significant, if two other ways were followed and ECtHR's legal positions were referred to in domestic courts. In this regard it is pleasing to observe that the Italian Supreme Court of Cassation has issued a summary of Strasbourg jurisprudence relating to labour and social security rights.[1]

Virginia Mantouvalou once wrote that human rights law can show new paths for the protection of workers' rights.[2] The research demonstrated that the ECtHR does show these paths, notwithstanding they are little appreciated and rarely followed by labour law advocates.

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[1] Corte suprema di cassazione rel. n. 112, 7 giugno 2012. "Il diritto del lavoro e della previdenza sociale nella giurisprudenza della corte europea dei diritti dell'uomo".

[2] Virginia Mantouvalou, Human Rights and Unfair Dismissal: Private Acts in Public Spaces.The Modern Law Review. Vol.71: Issue 6, 2008. P. 939.

Research carried out by Russian human rights organisations demonstrate that domestic courts are generally unaware of the ECtHR jurisprudence; however, human rights activists succeed in raising such awareness by steadily and continuously referring to ECtHR decisions in applications to domestic courts and throughout legal proceedings.[3] This experience shows that the lawyer's role is very important in introducing ECtHR values into the national legal system, particularly in systems where the ECtHR's legal positions are directly applicable.

In the course of the present study, several issues which were canvassed should be separately and thoroughly researched. One example is the ECtHR's approach to the estimation of the proportionality of interference with individual and collective labour rights as well as with the security rights, both of which deserve profound study. The comparative research of the impact of Strasbourg jurisprudence upon the domestic policies of the member states are also of great interest. The research of the ECtHR's approach to inhuman and degrading treatment in the context of social claims would contribute significantly to the justification of the indivisibility of human rights.

[3] Burkov Anton, The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006. Stuttgart, 2007. Pp. 56-58.

## The list of cases (ECtHR, EurCommHR)

Title of the case (number of application) date of judgment/decision (day/month/year)

1. A. v Croatia (55164/08) 14/10/ 2010
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3. A. v The United Kingdom (25599/94) 23/09/1998
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17. Baka v Hungary (20261/12) 27/05/2014
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20. Beçaj v Albania (1542/13) 24/06/2014
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22. Beganović v Croatia (46423/06) June 25, 2009
23. Béláné Nagy v. Hungary (53080/13) 10/02/2015
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28. Blumberg v Germany (14618/03) 18/3/2008
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61. Delfi As v Estonia **(**64569/09) Grand Chamber 16/06/2015
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