# EUROsimA 2017

## EUROPEAN COURT OF HUMAN RIGHTS

## FREEDOM OF RELIGION

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## Letter from the Secretary General

Honorable Participants,

It is my utmost pleasure to welcome you all to the 12th session of our conference. I am Deniz Ayyıldız, a senior student at Middle East Technical University in International Relations department. As the member of METU Foreign Policy and International Relations Club with a MUN career since my freshman year and the former Under Secretary General of this very conference, it is my honour to serve you as the Secretary General of EUROsimA 2016.

Since 2005, EUROsimA has been a prestigious conference aiming to strengthen the participants' knowledge of the institutions of European Union and European politics. In addition to traditional EU committees, the Conference aimed to broaden the perspective with international associations and organizations that have significant importance in world politics. This year, as the Academic Team, we prepared the content of our committees under the theme of *Development within Harmony.*

In addition to its traditional EU committees and EU based structure, EUROsimA aimed to allow its participants to observe the European politics from the perspective of other international organizations such as Council of Europe. Bearing in mind that EUROsimA has never simulated court before, we, as the Academic Team, are excited that European Court of Human Rights is the first court to be simulated this year in EUROsimA 2016.

Participants of European Court of Human Rights are asked to simulate a fictional case between Sultanovac v. Bulgaria under the Article 9 "Freedom of thought, conscience, and religion." In this well-prepared study guide, you will be able to find all the related terms, similar cases, and details of the case.

In conclusion, I would like to express my sincerest gratitude to our Academic Advisor Mustafa Emre Selek who always supported me and without whom this conference would not be possible, and to Kübra Küçük, the Under Secretary General responsible from the European Court of Human Rights, whose great knowledge of European Law and invaluable efforts created this document.

Kind Regards,

Deniz Ayyıldız

Secretary General of EUROsimA 2016

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## Letter from the Under Secretary General

Dear Participants,

My name is Kübra Küçük and I am a senior student at Faculty of Law, Ankara University, and a member of FLAUMUN since four years. I am more than honored to serve you as the responsible Under-Secretary-General for European Court of Human Rights in its first simulation at EUROsimA.

Being very excited about simulating the only court of the conference, as an international court which allows individuals' voices being heard, the ECHR will deal with a case that will concern a fragile topic, namely freedom of religion in the shape of Sultanovac v. Bulgaria. The participants of the Court will answer controversial questions that will enlighten future cases regarding freedom of religion. Where do the contracting State's duty of protecting rights of the individuals provided by the Convention start? How can freedom of religion be protected without the right of expression being revoked? Where is the line for the margin of appreciation of a contracting State for interference with regular religious events?

In conclusion, I would like to thank to all members of EUROsimA team who have undertaken a brave job organizing this twelfth session of the conference. Having seen their amazing jobs, I am convinced our participants cannot be disappointed. Particularly, I am grateful for meeting them and becoming a part of their family; Under-Secretaries-General of twelfth EuroSima who have created respected committees within their structure and agenda items during sleepless nights, and of course to Mr. Secretary-General, Deniz AYYILDIZ, who has been always kind to me since the very first day of our journey and become a dear friend, for not letting us down whenever we needed assistance and never losing his ambition.

I have no doubt that this conference will become a significant place of your memories. Please do not hesitate to contact me via kucuk@eurosima.org if you have any questions.

Kindest Regards,

Kübra Küçük

kucuk@eurosima.org

# PART I: EUROPEAN COURT OF HUMAN RIGHTS

## A. INTRODUCTION

### I. Development

> *"We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living."*[1]

The Council of Europe (the Council) was founded on 5 May 1949 by the Treaty of London[2] by the ten states present at the Congress of Europe.

The Council originated the European Convention on Human Rights in Rome in 1950 and came into force in 1953 as the *"first real human rights treaty"*[3] with the purpose of protecting *the crushed rights during the Second World War*[4] . The Convention and the rights it contains are "*directly based on the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948"*[5] but it differs in its creation by means of enforcement of obligations entered into it by the High Contracting Parties (HCPs)[6] that are bound upon them, namely the European Commission of Human Rights (the Commission) and the **European Court of Human Rights (the Court).**[7]

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[1] Council of Europe, "Winston Churchill, speech delivered at the University of Zurich, 19 September 1946", accessed November 3, 2015, http://www.coe.int/t/dgal/dit/ilcd/Archives/Selection/Churchill/ZurichSpeech_en.asp#TopOfPage

[2] *The Treaty of London*, London, 5 May 1949, *the Statue of the Council of Europe*, available from http://www.ehu.eus/ceinik/tratados/1TRATADOSSOBREORGANIZACIONESINTERNACIONALES/16TratadosdeOrganizacionesInternacionalesRegionales/OI163ING.pdf

[3] Hart, James W., The European Human Rights System, *Law Library Journal Vol.102:4* (2010-31), at p.537

[4] Van Dijk, Pieter and van Hoof, Godefridus J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd Ed., the Hague, Kluwer Law International, (1998), at p.1

[5] The European Court of Human Rights, *Spotlight on the European Convention on Human Rights*, at p.1

[6] The Open University, *The development of the European Convention on Human Rights*, accessed November 3. 2015, http://www.open.edu/openlearn/society/the-law/human-rights-and-law/content-section-3.4

[7] European Convention on Human Rights, "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*", Rome, 4 November 1950, Art. 46, available from <http://www.echr.coe.int/Documents/Convention_ENG.pdf>

After the amendment of the Convention with Protocol 11, only the Court was held responsible to evaluate both admissibility and merits of the case.[8]

## II. Structure

The European Court of Human Rights has 47 judges, corresponding precisely to the number of contracting states to the European Convention on Human Rights.[9] The candidate judges are nominated by member states of the Council of Europe in groups of three and the Parliamentary Assembly selects judges of the Court from these groups of candidates.[10]

The Court has evolved within its structure with the additional Protocols, especially Protocol 14, that came into force on 1 June 2010 and changed the rule of judges, being elected for a six-year term including a term-renewal option, with four new different compositions that were established within the Court's structure.[11]

The judgment process starts with a single judge's decision of admissibility about the filed complaint, which is final[12], and continues, if it is found admissible, with a committee of three judges for further evaluation of the admissibility of the application. The Committee might also decide upon the merits of the cases, if the case is subject to the 'well-established case law' of the Court (if the case is concerning the traditional case law). [13]

In case of the Committee coming up with a judgment regarding both the admissibility and merits of the complaint, the judgment will be final. Nevertheless, if the Committee comes up with the conclusion on the admissibility of the case but not being covered by "well-established case-law" of the Court, it is possible to transmit the case to a chamber of seven

[8] Ovey, Clare and White, Robin C.A., *European Convention on Human Rights*, 3rd Ed., New York, Oxford University Press, (2002), at p.6

[9] ibid.

[10] Council of Europe, *The ECHR in 50 Questions*, at p.4

[11] Council of Europe, *Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force*, Conference of High Contracting Parties of Protocol No.14, Madrid, 12 May 2009

[12] Council of Europe, Protocol No. 194, 13 May 2004, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

[13] Council of Europe, Protocol No. 14, Article 8

judges.[14] The Chamber examines again on the application's admissibility and if it is found admissible, the Chamber rules on both the admissibility and merits of the case.[15]

If the Chamber renounces its jurisdiction or if a request to referral gets accepted (which are exceptional situations); a Grand Chamber, which is composed of seventeen judges, hears the case.[16]

## III. Decision and Judgment

The question of the difference between a 'decision' and a 'judgment'[17] should be asked and answered as follows: a decision can be given by a single judge, a Committee or a Chamber of the Court only on the admissibility of the case.[18] A judgment is the conclusion of the Court on the case followed by its evaluation by the Chamber on merits.[19] The contracting states are bound upon these judgments.[20]

The application will be deleted by having a "friendly settlement": when the parties of the case reach an agreement during the case and end proceedings before the court with the approval of the Court.[21]

Appeal is not possible if the Court decides upon the inadmissibility of the case or to a judgment delivered by the Committees or the Grand Chamber. Nevertheless, the Chamber

[14] House of Lords & House of Commons, Joint Committee on Human Rights, Protocol No. 14 to the European Convention on Human Rights First Report of Session 2004–05, at p. 9

[15] Hart, James W. "The European Human Rights System." *Law Library Journal* 102, no. 4, 548.

[16] Council of Europe. *The European Convention on Human Rights*. Article 30.

[17] Hart, James W. "The European Human Rights System." *Law Library Journal* 102, no. 4, 548.

[18] Council of Europe, *The ECHR in 50 Questions*, at p.9

[19] ibid

[20] ibid

[21] Council of Europe. *The European Convention on Human Rights*. Article 39

judgments are appealable within a three months period for reconsideration of the case with referral to Grand Chamber.[22]

The Court might conclude that the applicant has sustained damage. This conclusion is to be followed by a decision of "just satisfaction" and ruling of a payment **by the respondent State** *of a certain amount to the applicant*.[23]

If the judges disagree with the majority's opinion, they might either write a "dissenting opinion" including their reasons to disagree or a "concurring opinion", in case of agreeing with the opinion of the majority but with different reasons, while explaining these reasons. Dissenting and concurring opinions are to be added to the end of the judgment.[24]

## IV. Effects of its Judgment and Enforcement

If the judgment finds violations of one or more of the rights guaranteed by the Convention (the States concerned are bound); the case is sent to the Committee of Ministers of the Council of Europe since the States are obliged to execute the judgment and the corresponding discussion of how to manage the case's execution is required. The Committee also discusses how to avoid such violations in the future.[25]

The respondent State shall provide trust regarding the non-recurrence of the violation within the change or amendment of its legislation.[26]

The Council of Europe can observe whether the needed steps are taken by the respondent state for the judgment's execution or if the legislation of the state has been harmonized with the Convention regarding the issue at the judgment.[27]

[22] Council of Europe, *The ECHR in 50 Questions*, at p.10

[23] ibid

[24] ibid

[25] ibid, at p.9

[26] ibid, at p.10

## V. Jurisdiction

Application to the Court can be made either as individual applications lodged by individuals, group of individuals, non-governmental organizations (NGOs), companies and inter-state applications brought by one State against another who claims the violation of one or more of their rights guaranteed in the Convention.[28]

After the file of an application, the Court evaluates:

a. the *admissibility of the Case* which requires three conditions to be fulfilled:

i. Exhaustion all the domestic remedies in the national system with the Court being the "highest possible level of jurisdiction".[29]

ii. Guarantee of the related right to the complaint of the applicant within the provisions of the Convention.[30]

iii. Latest judgment given by national authorities not before six months.[31]

Following this evaluation, the Court reaches the conclusion on the case as admissible or inadmissible. When the Court finds an application inadmissible, it is not seen by the Court for merits stage.[32]

[27] ibid

[28] ibid, at p.6

[29] ibid

[30] ibid

[31] ibid

[32] ibid

# PART II: FREEDOM OF THOUGHT CONSCIENCE AND RELIGION

## A. INTRODUCTION TO THE CASE

### I.Overview

Throughout history, religious mechanisms have preserved their importance in Europe. Most Roman Catholic kingdoms kept a tight rein on religious expression throughout the Middle Ages.[33] *In the aftermath and over several centuries, the Christian church played a decisive role in constituting what became known as the res publica Christiana.*[34] Since kingdoms had religious leaders at administrative level, they also had Christian leaders, whilst leaders who were not Christian were referred to as "infidels". The Catholic Church developed a body of theology dealing with the problem of infidelity, making a clear division between the faithful who are baptized and follow the teaching of the church and those who are outside the faith, clearly showing the intolerance for other religions.[35] Later on the position of religious minorities during the history will be further expressed. The following sections will be based upon the applicable law on the case and claims of the parties will be also stated regarding the case.

### II. Background

#### *a. History*

Abraham, who was promised a land for his believers and is the ancestor of Jesus, had the alternate respect of Christians. The Jews were tolerated as the public who did not have land until the expulsion of all Jews from Spain in 1492. The expulsion was an act which was moved by the Reformation -the first opposition against the Catholic Church. At the 14th

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[33] *Religious Liberty The Legal Framework in Selected OSCE Countries*. Rep. Law Library US Library of Congress.

[34] Little, David. "Christianity and Religious Freedom in the Medieval Period (476 – 1453 CE)." Religious Freedom Project. Berkley Center for Religion, Peace & World Affairs. http://berkleycenter.georgetown.edu/essays/christianity-and-religious-freedom-in-the-medieval-period-476-1453-ce.

*Res publica Christiana means the Christian republic in English, latin-dictionary.net*

[35] *International Encyclopedia of the Social Sciences*: Encyclopedia.org, "Infidels"

century, the Bible was translated in English, but the Church did not approve and burned these books.[36]

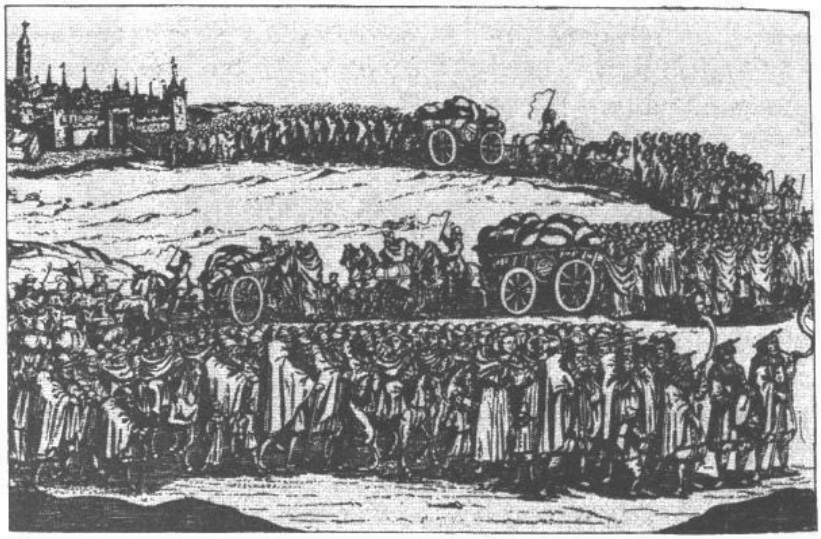

Figure 1. Engraving showing the expulsion of the Jews from Vienna, 1670. Munich, Kupferstichkabinett. [37]

The Muslims were the first religious minority, who were promised religious freedom with the Treaty of Granada in 1492, but they could not utilize from it for long. They received an ultimatum to either convert to Christianity or to emigrate in 1501. They converted superficially and kept practicing Islam secretly resulting in their expel by Philip III from 1609 to 1614.[38]

Protestantism, which was against the Christian church, had declared its dogmas on 31 October 1517 by Martin Luther as:

- The Bible only is infallible.

[36] *Britannica Academic*, s. v. "John Wycliffe," accessed, http://academic.eb.com/EBchecked/topic/650168/John-Wycliffe

[37] Encyclopaedia Judaica: Vienna, vol.16, col.129, death penalty by hanging and fire for Jewish criminals in 1642: Engraving showing the torture and execution in Vienna of Jewish thieves, including a relapsed convert, 1642. Hanging by the heels over a pyre was a common form of execution for Jews in the Middle Ages. Nuremberg, Germanic Museum ("Germanisches Museum")

[38] EDC Foundation, *Notes On Entering Deen Completely: Islam as its followers know it*, 2015.

- Every Christian can interpret.
- Human sins are so wrongful that no deed or merit, only God's grace, can lead to salvation.

His main aim was to stop the sale of indulgences and to reform the Church. When he refused the chance to recant in 1521, he was being declared as "heretic". However he found the chance to translate the "New Testament" into German in Wartburg, which let the reformation continue.[39]

In Switzerland as the follower of Martin Luther, Huldrych Zwingli also opposed the sale of indulgences, celibacy, pilgrimages, pictures, statues, relics, altars, and organs which was followed by the discussion between the Swiss cantons who accepted Protestantism and the Catholics. Zwingli was killed by Catholics in 1531.[40]

In 1533, Henry VIII of England established a church whose bishops were appointed by the crown and executed his Lord Chancellor Thomas More in 1535.[41]

In 1536, *the Reformation was officially adopted in Geneva, Switzerland*.[42] King James I of England commissioned a Bible and published in 1611 which accepted the Protestantism and banned Catholicism.[43]

Throughout these events, Protestants and Catholics made peace with the Treaty of Saint Germain in 1570 which also did not stay in effect too long. In 1567, at the "Michelade" of Nîmes, Protestants had killed the local clergy and following, many of Protestants in France were killed in the Massacre of Saint Bartholomew's Day in 1572.[44]

There were also kingdoms who had religious tolerance. As one of the most liberal kingdoms of the Christian world during the 15th and 16th century, Bohemia has seen the Basel Compacts of 1436 as a declaration for peace and freedom of religion between Catholics and Utraquists which was followed by the Emperor Rudolf II's grant for a greater religious liberty

[39] Randell, Keith, and Russel Tarr. *Access to History: Luther and the German Reformation 1517-55*. 3rd ed. Hodder Education, 2008.

[40] Miller, Jessica Elam. "Religious Reform in Switzerland: Calvin & Zwingli's Teachings in the Reformation." Lecture. Available from http://study.com/academy/lesson/religious-reform-in-switzerland-calvin-zwinglis-teachings-in-the-reformation.html

[41] "Henry VIII." BBC History. Available from: http://www.bbc.co.uk/history/people/henry_viii/

[42] "Timeline Switzerland." *Timelines of History*. Available from: http://www.timelines.ws/countries/SWITZERLAND.HTML

[43] "King James I (1603 - 1625)." Royal Family History. http://www.britroyals.com/kings.asp?id=james1.

[44] "The Wars of Religion." Huguenot Memorial Museum. Available from: http://www.museum.co.za/wars.html.

with his "Letter of Majesty" until the Battle of White Mountain in 1620 which caused Protestants flee or expelled from the country. [45]

In 1555, Peace of Augsburg was agreed by Charles V, in the Holy Roman Empire, which accepted the religious diversity with the acknowledgment of existence of Lutheranism and Catholicism.[46] This treaty also guaranteed that the rulers of each State in the Holy Roman Empire had the sovereignty to decree the religion within his realm (in clauses 15 and 16). This principle of ruler's determination the religion within his territory was later termed as the *"Cuius regio, eius religio"*[47]. Also the clause 24 of the Peace of Augsburg guaranteed the right to move of the subjects of Kingdom to different states whose official religion is the religion of the subject (even the lowest peasant) where he could freely practise his religion.[48]


Abschied
Der Römischen Königlichen
Maiestat / vnd gemeiner Stendt / auff
dem Reichstag zu Augspurg / Anno Do-
mini M. D. LV. auffgericht.
Sampt /
Der Keyserlichen Maiestat Cammergerichts Ordnung /
wie die auff diesem Reichstag / durch die Königliche
Maiestat / vnd gemeine Stendt / widerumb ersehen /
erneuert / vnd an vilen orten geendert.
Mit Röm. Königlicher Maiestat gnad vnd
Priuilegio, inn sechs Jaren nicht nach zütrucken.
Getruckt inn der Churfürstlichen Stadt
Meyntz / durch Franciscum Behem / Anno
Domini M. D. LV.

Figure 2: Text of the "Peace of Ausgburg"[49]

[45] Brown, Christopher Boyd. *Singing the Gospel: Lutheran Hymns and the Success of the Reformation (Harvard Historical Studies)*. Harvard University Press, 2005.

[46] "Documents - Part III: Section E – Imperial Reformation." Available from: http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=4386.

[47] Cuius religio - EU ius regio?: komparative Betrachtung europäischer staatskirchenrechtlicher Systeme, status quo und Perspektiven eines europäischen Religionsverfassungsrechts, Lasia Bloss,Mohr Siebeck, 2008

[48] Minorities, Minority Rights and Internal Self-Determination, Ulrike Barten

[49] Available at, http://skepticism.org/

In France, at late 16th century, attempts to establish tolerance between Catholics and Protestants failed due to a period of political crisis just before the Early Wars.[50] This aim was achieved with the victory of protestant Prince Henry IV of France's accession to the throne within the Edict of Nantes in 1598. It was revoked in 1685 by Louis XIV of France until Louis XVI signed the Edict of Versailles (1787), then the Constitutional Text of 24 December 1789, which granted civilian rights to Protestants. These acts were followed by the French Revolution and its abolition of state religion and confiscation of all Church property.[51]

The "Thirty Years' War" (1618-1648) in the Holy Roman Empire which was one of the most destructive wars in Europe and a gradual transition, started with the revolt of the Protestant Bohemians against Catholic Habsburg rule in 1618[52] and the Eighty Years' War (1568-1648) between Spain and the Dutch Republic, which is the longest rebellion in modern European history towards Spain coming from the Netherlands for independence[53], were the crucial wars having also the agenda of religious freedom, were ended with the Peace of Westphalia which concerned two treaties: the Treaty of Münster and the Treaty of Osnabrück because of the refusal of the Christian and Protestant parties to meet, thus, the Emperor of the Holy Roman Empire met with France and its Catholic allies in Münster and for negotiations with Sweden and its Protestant allies in Osnabrück. The Peace of Westphalia confirmed the principle of *"Cuius regio, eius religio"* and guaranteed the right to freedom of religion as individuals and a prohibition against discrimination for religious reasons at its Article VII (clause 24 and 25).[54] The treaties expanded protection for reformed and regulated the status of Protestant religion in the Holy Roman Empire, but other groups remained excluded from protection. [55]

The origin of the **Bulgarian Orthodox Church** has set up in the Balkans as early as the first centuries of the Christian era and was established at first century Anno Domino. Following the peace treaty between Bulgaria and the Byzantine Empire in 927, the autocephalous status of the Bulgarian Orthodox Church has been recognised and acknowledged its patriarchal dignity by the Patriarchate as the first autocephalous Slavic Orthodox Church. It survived

[50] Konnert, Mark W. *Local Politics in the French Wars of Religion: The Towns of Champagne, the Duc De Guise, and the Catholic League, 1560–95*. Canada: University of Calgary.
[51] The Oxford Handbook of the French Revolution, David Andress, OUP Oxford
[52] The Causes of the Thirty Years War 1618–48, Professor Peter H. Wilson, Department of History,University of Hull
[53] The War Chronicles: From Chariots to Flintlocks
[54] Treaty of Osnabrück

[55] ibid art. 5 (58), art 7 (1 & 2)

until its destruction in 1767 by the Greeks. Even if the Ottoman Empire has recognised the Orthodox Church, a new Bulgarian Orthodox Church was not allowed until 11th of March 1876.

In 1878, The Berlin Congress had divided Greater Bulgaria into an autonomous Bulgarian principality and a province of Eastern Rumelia under a Christian governor-general. The official Bulgarian Orthodox Church was established as the national religion of the nation with the Tarnovo Constitution in 1895. Bulgaria has gained its independence with the Balkan Wars (1912-1913). (The exarch of that time, Joseph I, died in 1912, and the Church could not provide the conditions to elect a new exarch until the after age of the World War II.)[56] [57] [58] Following the independence, Bulgaria has set the goal of creating a unified nation-state within its territory, culture and language via assimilating/ migrating country's ethnic minorities to eliminate the cultural diversity.[59]

The autocephaly of the Bulgarian Church has been recognised by the Patriarch of Constantinople in 1945.[60] [61]

People's Republic of Bulgaria was founded in 1946 as a communist state.[62] The years between 1944 and 1956, minorities in Bulgaria were recognised within the guarantees of their rights by the constitution.[63]

In 1947, communist rulers have imposed the Dimitrov Constitution. This act has approved following actions:

- *Article 78:* the Church was separated from the state.
- *Article 79:* the study of religion was removed from state schools.
- *Article 76:* marriage and the family were put under state control.

[56] Catholic Encyclopedia (1913), Volume 3, Bulgaria, *by* Joseph Lins

[57] Bulgarian History - A Concise Account by Martin Miller-Yiann

[58] State-nationalisms in the Ottoman Empire, Greece and Turkey: Orthodox and Muslims, 1830-1945, edited by, Benjamin C. Fortna, Stefanos Katsikas, Dimitris Kamouzis, Paraskevas Konortas

[59] Turkish and Other Muslim Minorities in Bulgaria, Ali Eminov

[60] Catholic Encyclopedia (1913), Volume 3, Bulgaria, *by* Joseph Lins

[61] Ibid.

[62] http://bulgariatravel.org/en/dynamic_page/76

[63] Ibid.

(Further development of these restrictions was accepted by the 1971 Constitution, which introduced the freedom of anti-religious propaganda (Article 53 §1) to remove religion from both public and private life.) Afterwards, in 1949, an act had been imposed by the State which governed the religious life under communism: Law of Religious Denominations. This law gave the State the right of granting or withdrawing the status of judicial entity with the Article 6, while placing the religious leaders under the communist government with the Article 8. These leaders were elected by a national conference whose delegates are appointed by the communist party. They had the responsibility of representing the country at the international arena. This gave them the chance of protesting the government's acts about religious minorities with the obligation for appearing satisfied about the state's actions back in Bulgaria at the international arena. If they have not fulfilled this de facto obligation, they would be simply removed or replaced.[64] [65]

From the year 1984 to 1985, the Bulgarian government had started a campaign claiming that the "ethnic Turks" are actually the "ethnic Bulgarians" who had converted to Islam during the Ottoman rule, thus, they could and should be converted to their Bulgarian roots. This campaign of assimilation had failed and the Bulgarian Turks had protested this campaign. The government then started to expel these protesters mostly consisting of educated persons in 1989. Several thousands of Bulgarian Turks were expelled directly without any legal reasoning.[66]

In the end of 1984, an underground organization "National Liberation Movement of the Turks in Bulgaria" was formed in Bulgaria aiming to lead the Bulgarian-Turks' anti-governmental movement. They were responsible of terrorist acts in 1985-1986 and captured a hotel "Zlatni Piasaci" in the summer of 1986 taking its guests as hostages to establish political claims.[67]

[64] Eastern Christianity and Politics in the Twenty-First Century by Lucian N. Leustean

[65] Muslim Lives in Eastern Europe: Gender, Ethnicity, and the Transformation of Islam in Postsocialist Bulgaria, Kristen Ghodsee, Princeton University Press, 27 Jul 2009

[66] Mass Expulsion in Modern International Law and Practice by Jean-Marie Henckaerts

[67] The Populist Radical Right in Central and Eastern Europe: Ideology, Impact, and Electoral Performance,Andrea Pirro, (https://books.google.bg/books?id=dEnLCQAAQBAJ&printsec=frontcover&hl=tr#v=onepage&q&f=false)


Figure 3: Bulgarian Turks at the Turkish border[68]

On 10 November 1989, following the collapse of the Eastern Bloc, Zhivkov resigned and the Communist Party gave up its political monopoly. In June 1990, first free elections were held and The Bulgarian Socialist Party won leading a transition to a parliamentary democracy.[69]

> *On January 4, 1990 the activists of the movement registered an organization with the legal name «Movement Haykaram Nahapetyan «21-st CENTURY», № 1, 2007 40 for Rights and Freedom» (MRF) (in Bulgarian: Движение за права и свободи: in Turkish: Hak ve Özgürlükler Hareketi) in the Bulgarian city of Varna.[70]*

A new Constitution was adopted in 1991 which granted the citizens who has non-Bulgar, an origin a wide range of rights and it lifted the legislative ban of teaching Turkish. Until 2004, 150 mosques were built in Bulgaria and the general number of mosques reached 1150. The Sofia authorities reconsidered their stance radically following the dramatic improvement of Bulgarian- Turkish relations in the Post-Soviet period*, Bulgaria's integration into NATO, Bulgaria's Euro-integration course and its obligations assumed before the EU in protecting the rights of minorities. The relations with Turkey become close both within the framework of bilateral political-economic ties and partnership in NATO. In 2004 the amount of Turkish investments into Bulgaria reached $500 million.*[71]

[68] http://www.dw.com/image/0,,15963843_303,00.jpg

[69]Bulgarian Politicians Discuss First Democratic Elections 20y After - See more at: http://www.novinite.com/view_news.php?id=117822#sthash.XykNzuOu.dpuf

[70] THE TURKS OF BULGARIA: THE 5TH COLUMN OF ANKARA Haykaram Nahapetyan

[71] THE TURKS OF BULGARIA: THE 5TH COLUMN OF ANKARA Haykaram Nahapetyan (https://web.archive.org/web/20080229172208/http://www.noravank.am/file/article/257_en.pdf)

A new border check point was opened between the two states by the Prime Ministers of Bulgaria and Turkey in 2005.

After Bulgarian Turks' influence has rose significantly on minorities of Eastern Europe[72], other persons in Bulgaria started to state that these Bulgarian Turks will be made an instrument for Turkish lobbying. The Bulgarian "Ataka" party was established appointing the resistance of the Turkish Party as one of the main reasons of its establishment. "Ataka" can be translated as "attack".

At the elections for the National Assembly in 2009, the Movement for Rights and Freedoms Party have taken 14.45% of the votes and became the 3rd party and the National Union Attack (Ataka) Party have taken 9.36% of the votes as the 4th party.[73]

### *b. Fictional Case "Sultanovac v. Bulgaria"*

The case originated against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Sultanovac ("the applicant"), on 30 April 2015. He was born in 1980 and lives in Sofia. On 3 December 2015 the Government were given notice of the application.

On 20th of August, 1994, at around noon of Friday, worshippers, including the applicant, began to gather in and around the Banya Bashi Mosque in Sofia for the regular prayer. At the same time, gathering of over a hundred members and supporters of Ataka Political Party in front of the mosque has started for protesting against the calls for prayer coming from the loudspeakers on the mosque. Among the demonstrators, there were also a Member of the Parliament for the party and a Member of the European Parliament for the party.

Most demonstrators, wearing black t-shirts and many of them carrying flags and signs featuring "Let's get Bulgaria back.", shout at the worshippers and insult with phrases such as: "Turkish stooges", "filthy terrorists", "scum", "janissaries", "cut-offs" and "Islamists" who can bee seen at the video recordings. One of the demonstrators can be seen cutting a Turkish fez with a pocket knife, saying "Can you hear me? We shall now show you what will happen to each one of you!"

[72] axisglobe.com

[73] http://www.electionguide.org/elections/id/1536/

Once the prayer had started, many demonstrators climbed onto the mosque, some were carrying wooden flagpoles and metal pipes, and hit the worshippers. The worshippers were also pelted with eggs and stones by the demonstrators. The incidents ended at around 2.05 pm, when the demonstrators left the mosque. Four of the demonstrators piled some of the worshippers' prayer rugs before leaving and set fire to the before leaving.

After the event, on 28 August 1994, the Parliament of Bulgaria adopted a declaration condemning the incident.

There were two sets of investigations which followed. The police carried out the first series of investigations and one of them was into the violence towards the worshippers. Throughout this investigation, seven people were charged with aggravated hooliganism; however, no information was given on if they had been prosecuted.

The other investigation which was opened by the Sofia City Prosecutor's Office under the Criminal Code provision prohibiting hate speech motivated by religion. Nevertheless, no charges have been brought against any person.

Afterwards, applicants brought the case before the European Court of Human Rights and it is found admissible by the single judge. Later, the Committee found the case admissible. Chamber decided that the application has fulfilled the admissibility criteria on 01 April 2016.

## B. APPLICABLE LAW

### I. Conventions

#### *a. European Convention on Human Rights*

As mentioned above, the Court gets its jurisdiction from the Convention, thus, it holds great importance.

1. (Art. 9) Freedom of thought conscience and religion

Article 9 of the Convention reads as follows:

*"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

*2. 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."*

Article 9 of the Convention is named as freedom of thought, conscience and religion. It actually brings a broader freedom for personal, political, philosophical[74], moral and religious beliefs and convictions. However, the difference between an opinion and personal beliefs or convictions should be expressed. Personal beliefs or convictions need to reach a certain level of seriousness, cohesion, and importance.[75] Their content must be identifiable and formal[76] also leading to uncertainty, thus, personal integrity related ideas are protected under Article 9[77] without cultural or language preferences.[78] *"A belief is different from a personal motivation (however strong) inasmuch as it must be possible to construe it as the expression of a coherent view of basic issues."*[79] Moreover, "philosophical convictions" are interpreted within the whole Convention, including Article 17, thus it refers to convictions which are

*worthy of respect in a democratic society and which are not incompatible with human dignity.*[80]

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[74] ECmHR, 12 October 1978, Arrowsmith v. the United Kingdom, Appl. No. 7050/75, 19 DR 5. The concept of philosophical belief is taken in the broad sense, since it encompasses an individual's conception of life and, more specifically, of man's behaviour in society: G. Cohen-Jonathan, "Convention européenne des Droits de l'Homme, Droits garantis, Libertés de la pensée", JC, Fascicule 6522, No. 60.

14 C. Bîrsan, "Le juge européen, la liberté

[75] ECtHR, 25 February 1982, Campbell and Cosans v. the United Kingdom, Series A, No. 48, § 36: CDE, 1986, p. 230, comments G. Cohen-Jonathan; JDI, 1985, p. 191, comments P. Rolland and P. Tavernier.

[76] ECmHR, 15 May 1980, T. McFeeley v. the United Kingdom, 20 DR 44.

[77] ECmHR, 12 October 1978, Pat Arrowsmith v. the United Kingdom, op.cit.

[78] ECtHR, 23 July 1968, Belgian 'language' case, Series A, No. 6; V. Berger, Jurisprudence de la Cour européenne des Droits de l'Homme, Sirey, 9th ed., 2004, p. 503 and bibliography.

[79] ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme (CEDORE-IDPD); ECmHR, 1 December 1981, X v. FRG, 24 DR 141. Cf. also: P. Rolland, "Ordre public et pratiques religieuses", in J.-F. Flauss (ed.), La protection internationale de la liberté religieuse/International Protection of Religious Freedom, op. cit., pp. 231-271 (p. 245)

[80] Campbell and Cosans judgment, op. cit., § 36. On this point, cf. M. de Salvia, "Liberté de

- Freedom of Religion

The Convention's institution does not define religion and does not have the authority to do so. It should be expressed that they do not draw the lines restrictively and not only limit it with "popular" religions. Nevertheless, given religion must still have the identifiable content[81], although if the applicant wishes to refer their belief as a religion, the Court considers favorably when unjustified interference by the state is the case.[82] The cases are rarely related to majority religions because of their well-known tenets and already established relations with the state[83], thus the main issue comes up when it comes to minority religions and new religious bodies.[84]

- Manifest religion or belief

Religious freedom is firstly related with one's individual conscience of course, although it is also concerning freedom to "manifest their religion" alone and in private or in community with others, in public with the people who share the same belief. Existing religious convictions includes witnessing words and deeds regarding them.[85] This freedom comes with,

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religion, esprit de tolérance et laïcité", in Libertés, justice, tolérance : Mélanges en hommage au Doyen Gérard Cohen-Jonathan, Bruylant, 2004, pp. 591 et seq. (p. 595).

[81] Although entry of a prisoner's religion in the prison register entails the granting of certain facilities, the religion must, at least in individual cases, be identifiable: ECmHR, 4 October 1977, X v. the United Kingdom, 11 DR 55.

[82] G. Gonzalez, La Convention européenne des Droits de l'Homme et la liberté des religions, op. cit., p. 53.

[83] Usually these are cases relating simply to internal discipline and relations with employees (ECmHR, 8 September 1988, Jan Ake Karlsson v. Sweden, 57 DR 176), although sometimes the matter may be more serious: ECtHR, 9 December 1994, The Holy Monasteries v. Greece, Series A, No. 301-A (transfer of ownership to the state). Cf. also cases relating to schools: ECmHR, 6 January 1993, Yanasik v. Turkey, No. 14524/89.

[84] G. Gonzalez, La Convention européenne des Droits de l'Homme et la liberté des religions, op. cit., p. 54 and references.

[85] ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme

(CEDORE-IDPD)

freedom to hold a religious belief or to practise a religion[86] or the right to be able to observe one's believes regardless the circumstances, also in prison[87] and at work.[88] These are the principles which not only be applied to freedom of religion, but also to all beliefs and convictions.

Even if freedom to manifest beliefs and convictions hold great importance, it should be limited regarding the matters of public order. Thus, establishment of this freedom is applied with some restrictions if they are necessary and a needed circumstance exists.

Differing individual conscience from its manifestation is not always easy even if Article 9.1 of the Convention already lists various forms of a conviction being manifested, since it does not give answer to every question. Therefore, the Court specified that participating in the community life is a manifestation of religion protected by Article 9 and organisational life of the community is not protected by it because it would make other aspects of the individual's freedom of religion vulnerable.[89]

Freedom of manifest beliefs and convictions has been sacralised in Article 9.1 taken alone or within other rights guaranteed by the Convention.[90]

When Article 9.1 taken alone, the phrasing guarantees the freedom to manifest religion, beliefs or conviction, also explicitly refers to every person's freedom to manifest religion "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". Furthermore, a duty of authorities to remain neutral is implied since they do not have the authorisation determining legitimacy of religious beliefs or the means for expressing such beliefs or interfering with the leadership of

[86] ECtHR, 13 December 2001, Metropolitan Church of Bessarabia and Others v. Moldova, op. cit., § 114. See also the following judgments: Kokkinakis v. Greece, 25 May 1993, op. cit., § 31, Buscarini and Others v. San Marino, op. cit., § 34, Reports 1999-I.

[87] ECmHR, 5 March 1976, X v. the United Kingdom, 5 DR 8.

[88] ECmHR, 12 March 1981, X v. the United Kingdom, 22 DR 27

[89] ECtHR (Grand Chamber), 26 October 2000, Hasan and Chaush v. Bulgaria, Reports 2001-XI, § 62: JDI, 2001, p. 211, comments E. Decaux and P. Tavernier; JCP, 2001-I-191, No. 37, comments F. Sudre; RTDH, 2001, p. 185 et seq., comments J.-F. Flauss.

[90] ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme (CEDORE-IDPD)

a religious community.[91] In the case of necessity of this neutrality for the freedom to hold convictions[92], it is less essential than the freedom to manifest these convictions. Regarding this matter, the Commission has held that an act must be a *direct* manifestation of a belief to be protected under Article 9. The Arrowsmith case[93] indicates the pacifistic approach of the European institutions. Even if pacifist attitude evaluates "belief" within the meaning of Article 9[94], an act motivated by this belief is not protected by this article automatically.[95] It was also held that compulsory vaccination does not form interference with the rights guaranteed by Article 9 if it is applied to everyone regardless their beliefs.[96] Moreover, manifesting beliefs at a commercial nature cannot be seen as extension of freedom to manifest one's belief and is not protected under Article 9 of the Convention.[97]

The Court also referred to related principles in the case of Pichon and Sajous: The pharmacists refusing selling contraceptive pills because of their religious convictions is not one of the acts or forms of behaviour which can be regarded under the definition of word "practice" stated at Article 9.1 since manifesting belief can be also done outside the professional area.[98] *The Court has also stated in the Kalaç case that Article 9 lists a number of forms which manifestation one's religion or belief might take, namely worship, teaching, practice, and observation.*[99]

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[91] ECtHR (Grand Chamber), 26 October 2000, Hasan and Chaush v. Bulgaria, op. cit.

[92] ECmHR, 15 May 1980, T. McFeeley v. the United Kingdom, 20 DR 44.

[93] ECmHR, 12 October 1978, Pat Arrowsmith, op. cit., § 71.

[94] C. Bîrsan, "Le juge européen, la liberté de pensée et de conscience" in Massis et Pettiti (eds.), La liberté religieuse et la Convention européenne des droits de l'homme, Droit et Justice, No. 58, 2004, p. 45 et seq. (p. 50).

[95] EcmHR, 6 July 1987, Le Cour Grandmaison and Fritz v. France, 53 DR 150 (pacifists distributing leaflets encouraging soldiers to disobey orders).

[96] ECmHR, 15 January 1998, Boffa and Others v. San Marino, 92 DR 27; 20 August 1993, B.B. v. Switzerland, 75 DR 223.

[97] ECmHR, 5 May 1979, Pastor X and the Church of Scientology v. Sweden, 16 DR 68.

[98] ECtHR, 2 October 2001, Pichon and Sajous v. France, Reports 2001-X (admissibility decision).

[99] Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme (CEDORE-IDPD), op. cit.

In many cases of the Court regarding freedom of religion, applicants allege violation of other articles with Article 9 of the Convention creating conflict of rights. The Convention institutions can consider the violation of rights separately,[100] or set aside Article 9: in contrast to the former Commission in most cases, the Court considers other articles with attributing greater importance than Article 9.

As an example for Article 8 being given over Article 9, the Hoffman case can be given. In the case, *applicant complains the Austrian Supreme Court had awarded parental rights over the children to their father in preference to herself because she was a member of the religious community of Jehovah's Witnesses.* The Court considered that no different violation existed within Article 9 either taken alone or in conjunction with Article 14 after the applicant had obtained satisfaction under Article 8 since the facts of the complaint which a violation had been found under Article 8 taken in conjunction with Article 14 were same.[101]

### *b. Universal Declaration of Human Rights*

Article 18 of the Declaration reads as follows:

*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*[102]

### *c. Vienna Convention on the Law of Treaties*

Article 31(1) of the Vienna Convention on the Law of Treaties reads as follows:

"*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[103]

The Court found the Vienna Convention on the Law of Treaties applicable first time in the Golder case in 1975.[104]

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[100] For example, the Arrowsmith case, op. cit, ECtHR, 29 April 2002, Pretty v. the United Kingdom, Reports 2002-III, § 82: JDI, 2003, p. 535.

[101] ECtHR, 23 May 1993, Hoffmann v. Austria, op. cit., § 38. Cf. similarly ECtHR, 16 December 2003, Palau-Martinez v. France, D. 2004 IR, p. 108, § 46.

[102] United Nations General Assembly resolution 217 A

[103] Article 31 of the Vienna Convention on the Law of the Treaties 1969

## II. Related Doctrines

### *a. Margin of Appreciation Doctrine*

#### 1. Overview

The phrase "margin of appreciation" itself refers to the span of a government which is used in cases of factual situations and applied to the provisions enumerated in international human treaties. In this context, the doctrine is parallel to the concept of judicial discretion, in which, the judges following a specific line with certain procedures commanded by legislation, precedent or custom, could rule on a case within a range of possible solutions. The role of discretionary power is mandatory for both bringing together the law and changing realities of dynamic social organisms at the same frame and for giving an answer to the specific questions of a given case in situations of not-existing overall enacted or case law. In other words, the judges can use their discretion to make even decisions in a particular case, without sticking to a formula which is not applicable to every scenario.[105]

Despite the arguments of various authors[106], the legal ground of this doctrine can be found in the jurisprudence both of the French *Conseil d'Etat*, in which the term was used as "*margé d'appréciation*" and of the system of administrative law within every civil law jurisdiction.[107] Even if the most cultivated and composite doctrines of administrative discretion have been developed in Germany, the German theory (*Ermessensspielraum*) is not as wide as the doctrine (margin of appreciation) as used in the Convention and European Community (EC) Law.[108]

The doctrine was firstly used at the international level under the European Convention system and the Strasbourg organs largely improved it. The margin of appreciation has been transferred to the jurisprudence of other international human rights instruments. As an example, whilst the United Nations Human Rights Committee has indirectly operated the

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[104] Van Dijk, P. and Van Hoof, at p. 72

[105] The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases By Onder Bakircioglu

[106] See also, F. Jacobs, *The European Convention on Human Rights,* Clarendon, Oxford, (1980), at 201-1 and; Macdonald (1987), *supra* 1, at 187

[107] F. Matscher, *supra* n. 1, at 76.

[108] See Y. Arai-Takashi, "Administrative Discretion in German Law: Doctrinal Discourse Revisited", (2000) 6 *European Public Law* 69

doctrine[109]; Inter-American Court of Rights has openly used it by referring to the judgments of the Court.[110]

The "margé d'appréciation" was first used for applying of derogation clauses. In this context, the doctrine's design was for responding to the concerns of Member States which their national security could be threatened by international policies.[111] The application of the doctrine for the first time came with the Greece v. United Kingdom case[112]; but the concept "discretion" instead of "margin of appreciation" was used. In Greece v. the UK case, it was noted by the Commission that the Contracting Parties "*should be able to exercise a certain measure of discretion in assessing extent strictly required by the exigencies of the situation.*"[113] The term was first used by the Commission in the Lawless v. Irland case[114], in which the Strasbourg organs expressed: "in determining whether or not there is a public emergency threatening the life of the nation, Contracting States would have a certain margin of appreciation."[115] It was the Ireland v. UK case, however, in which the margin of appreciation first comprehensively mentioned.[116] Stated by the court:

> "It falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a public emergency and, if so,

[109] In Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius, where discriminatory legislation targeting married Mauritian women was under consideration, the Human Rights Committee underlined the margin of states in regulating family life: "…the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions." Communication No. R.9/35 (2 May 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), para. 9.2(b)2(ii), available at http://wwwserver.law.wits.ac.za/humanrts/undocs/session36/9-35.htm.

[110] See Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (Jan. 19 1984) Inter-American Court of Human Rights (Ser. A) No. 4, paras. 56-59

[111] Benvenisti, supra note 2, at 845.

[112] Greece v. United Kingdom, App. No. 176/56, 2 YEARBOOK EUROPEAN COMMISSION ON HUMAN RIGHTS 174 (1959)

[113] Id.; PIETR VAN DIJK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 84 (3rd ed., 1998)

[114] Lawless v Ireland, App. No. 332/57, 2 YEARBOOK EUROPEAN COMMISSION ON HUMAN RIGHTS 318 (1960); see also Michael O'Boyle, The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?, 19 HUMAN RIGHTS LAW JOURNAL 23, 24 (1998).

[115] Lawless, supra note 12, at paras. 28-30; Ronald Macdonald, a former judge of the European Court, notes that: "it is possible to say that the margin is probably at its widest when the Court is considering whether derogations are strictly required at a time of grave public emergency and at its narrowest when there is alleged violation of a person's very private and personal life." Ronald J. MacDonald, The Margin of Appreciation in the jurisprudence of the European Court of Human Rights, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOR OF ROBERTO AGO 187, 207 (1987).

[116] Ireland, ibid

how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation."[117]

In case of Branningan and McBride, an identical train of thought was followed[118], which combined the regardful attitude towards the Contracting Parties not only respect to their decisions including the presence of an urgent situation but also, to the needed measures to deflect that situation.[119] The doctrine was applied gradually, becoming an essential part of the jurisprudence of Strasbourg Organs.[120] Put differently, the doctrine has been enlarged and developed to cover other areas of the Convention. As an example, in Belgian Linguistic case, in which French-speaking parents challenged the educational system where the country was divided into four linguistic regions, a certain margin of appreciation enjoyed by Contracting Parties, was accepted by the court.[121]

The Court stated that "*the right to education guaranteed by the first sentence of Article 2 of the Protocol (P1-2) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals*."[122] As a similar case, the detained applicant's correspondence during his internment being supervised was not regarded as a violation of Article 8 in *De Wilde, Ooms &*

[117] Ireland, ibid, at para. 207.

[118] See Brannigan and McBride v. the United Kingdom, App. No. 14553/89, at para. 43 (May 26, 1993), http://cmiskp.echr .coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=brannigan%20%7C%20mcbride&sessionid=1119576&skin=hudoc-en

[119] See Oren Gross and Fionnuala Ni Aolain, From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights, 23 HUMAN RIGHTS QUARTERLY 625, 633 (2001)

[120] See Michael R. Hutchinson, The Margin of Appreciation Doctrine in the European Court of Human Rights, 48 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 638 (1999).

[121] Belgian Linguistic Case, App. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (July 23, 1968), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight= Belgian%20%7C%20linguistic%20%7C%20case&sessionid=1119576&skin=hudoc-en.

[122] Id. at para. 5

*Versyp v. Belgium (Vagrancy Case).*[123] It was ruled by the court as: *"Belgian authorities did not transgress the limits of the power of appreciation which Article 8 (2) of the Convention leaves to the Contracting States.*"[124]

In *Handyside*, the development of the margin of appreciation doctrine reached a significant point, in which the publication of the "The Little Red Schoolbook" was adjudged by the Court on obscenity charges.[125] A violation of Article 10 was not found by the Court in this important judgment which the state had a legitimate aim for protecting morals. Even if the Court actively stated that freedom of expression "is also applicable to those ideas and information that offend, shock, or disturb the State or any sector of the population,"[126] the Court, in this important judgment, did not find a violation of Article 10 on the ground that the state had a legitimate aim to protect morals. Although the Court vigorously stated that freedom of expression "is also applicable to those ideas and information that offend, shock, or disturb the State or any sector of the population," it held that:

> *…[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and farreaching evolution of opinions on the subject.*[127]

It is a fact that in specific areas, extreme difficulty exists for finding or creating a common dominator among different societies. The Court, when it faces such delicate issues, favours not to rule, especially in which a common European standard does not exist.[128] The most obvious

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[123] Handyside v. United Kingdom, App. No. 5493/72, at paras. 48-49 (Dec. 7, 1976), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Handyside&sessionid=1119576&skin=hudoc-en.

[124] Takahashi, supra note 1, at 7.

[125] Handyside v. United Kingdom, App. No. 5493/72, at paras. 48-49 (Dec. 7, 1976), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Handyside&sessionid=1119576&skin=hudoc-en.

[126] Handyside, supra note 23, at para. 49

[127] Handyside, supra note 23, at para. 48

[128] In Cossey, Judge Martens, in his dissenting opinion, rightly points out that "in my opinion States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements. It is, therefore, up to the Court to decide, in every case or in every group

example of this lies within the concept of public morality.[129] However, if it is compared to the different areas of the Convention, there exists a certain extent, a consistency whilst applying the doctrine with respect matters including public morals. Certainly, the Court, in cases of dealing public morals, mostly submits that the Contracting Parties have a wide margin of appreciation, therefore, refers to the national authorities' judgments.[130]

At the Convention, Articles 8 to 11 are drafted in a common form. The right is stated at the first paragraph whilst a number of legitimate exceptions are listed at the second. As an above mentioned example, Article 10 (2), states that the right to freedom of expression 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*". On the other hand, the margin of appreciation is constrained by two elements which can be found in the text of these provisions, and a third element is collected from one of the main principles of interpretation. The first element is clarifying that the interference in question was necessary in a democratic society within one or more of these exceptions. Nevertheless, an unclear point is that when defendant parties have the obligation to prove that this was the case[131] or applicant parties to show that it was not.[132] Secondly, the restriction in question must be in accordance with, or prescribed by, law[133]. Last but not least, the interference must be proportionate to a pressing social need.

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of cases, whether a "margin of appreciation" should be left to the State and, if so, how much.…" Cossey v. United Kingdom, App. No. 10843/84, at para 3.6.3 (Aug. 29, 1990), http://cmiskp .echr.coe.int/tkp197/view.asp?item =1&portal=hbkm&action=html&highlight=Cossey&sessionid=1119576&skin=hudoc-en; see also Schokkenbroek, supra note 32, at 31.

[129] Handyside, supra note 23.

[130] The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases By Onder Bakircioglu

[131] See S. Greer, The Exceptions to Articles 8 to 11 of the European Convention on Human Rights (Strasbourg: Council of Europe Human Rights Files No. 15, 1997) 14-17.

[132] This will be further explained at the Principle of Legality.

[133] This will be further explained at the Principle of Legality.

Even if the text of Article 8 to 11 brings an objective test of necessity, the principle of proportionality allows wide margins of appreciation. The extent of these regarding each of these provisions is well attested[134], besides, their figure is principally decided by the assessment which was made at Strasbourg of the related importance of the right and the exception in the specific occasions, especially within any relevant common European standard.

Not many generalisations can be made about the decision made by the Court regarding principles of margin of appreciation, however, it should be stated that the Court's point of view of proportionality of the official behaviour, within its assessment of the fundamental importance of the right and this specific public interest in the situation, have played crucial roles to determine the outcome.[135]

### 2. Principles of the Interpretation

Even if the case-law studies have greatly assisted in exposing how the margin of appreciation has been applied in particular contexts, it is also needed to identify types of the doctrine via differentiating interpretive processes which are obvious or implied in the Convention system. When the issue is twisting, many issues regarding this matter emerge from the shadows. The language of the text, first, generally and discretely, bears in mind that the Convention already requires interpretation within its complete purpose and meaning, makes the application of discretion not only by national authorities but also the Court unavoidable.[136]

Therefore, it cannot be justified for the view that Contracting States should be allowed any discretion whatever in interpreting their obligations.[137] Additionally, it is clearer now that the

[134] See, for example, Yourow (1996), op. cit., Chapter 3.C.; Arai, op. cit., Chapters 4- 7. Other studies have focused on the limitation clauses across the range of these provisions. See, for example, Greer, op. cit.; F.G. Jacobs, "The 'Limitation Clauses' of the European Convention on Human Rights" in A. de Mestral, The Limitation of Human Rights in Comparative Constitutional Law (Cowansville: Les Éditions Yvon Blais Inc., 1986) 21-40; B. Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?" (1985) 17 Ottowa Law Review 213-61.

[135] See S. Greer, The Exceptions to Articles 8 to 11 of the European Convention on Human Rights (Strasbourg: Council of Europe Human Rights Files No. 15, 1997) , pp 29-32

[136] K. Hawkins (ed.), The Uses of Discretion (Oxford: Clarendon Press, 1992) and D. Galligan, Discretionary Powers: A Legal Study of Official Discretion (Oxford: Clarendon Press, 1990)

[137] P. Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism" (1998) 19 Human Rights Law Journal 1-6 and J. Schokkenbroek, op. cit., p. 1 and Schokkenbroek, op. cit., p. 35.

parameters of the Court's discretion should also be considered.[138] The third issue is that different kinds of discretion come into the question in various contexts, for different reasons and under the protection of the various interpretive principles which will be discussed below.[139] It is sometimes vague in the case-law and in the commentaries upon it. Instead, the margin of appreciation has been applied by the Court for substituting careful and painstaking reasoning[140] that makes the impression of these principles obvious. This is certainly one of the main sources of confusion in, and about, Convention jurisprudence regarding this matter. Fourthly, every admissible exercise of judgment or decision by national authorities in not self-evidently an addition of the "margin of appreciation", since the doctrine arose in a specific context for particular reasons throughout its history.[141] Lastly, the Strasbourg organs favour only to refer to the doctrine when a decision is delicately balanced. In which, the organs does not have any doubt about accepting or rejecting the state's case, it is tended to make no reference at all.[142] The search for answers to the main question, which is "*what patterns of discretion and constraint are produced for national authorities and the Court by the processes of interpretation the Convention permits in the contexts raised by specific litigation*, should start with Article 31 (1) of the Vienna Convention on the Law of Treaties 1969. It is provided within this article those international conventions should be interpreted in bona fide consistent with the regular meaning of their terms in their regard and considering their overall aim and purpose. Many core principles regarding the interpretation of the Convention start from this "*teleological principle*". These principles which have a specific bearing on the topic in have will be discussed below.[143]

[138] Mahoney, op. cit., p. 2

[139] J. Schokkenbroek, "The Basis, Nature and Application of the Margin-of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1998) 19 Human Rights Law Journal pp. 30-36 also distinguishes between the margin of appreciation and other kinds of discretion, but for different reasons

[140] As noted by others, for example 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 (Strasbourg: Council of Europe, 1995) 227, 236-37

[141] Schokkenbroek, op. cit., pp. 31-34

[142] ibid., p. 34

[143] General discussions of the principles of interpretation relating to the Convention can be found in F. Ost, "The Original Canons of Interpretation of the European Court of Human Rights" in M. Delmas-Marty and C. Chodkiewicz (eds.), The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions, (Dordrecht/Boston/London: Martinus Nijhoff, 1992) 238-318

### i. Principle of Effective Protection

The principle of effective protection, which explains itself within its name, holds that, since the Convention has its overriding function with the effective protection of human rights, not the enforcement of mutual duties between Contracting Parties, its supplies should not be interpreted restrictively in respect to national sovereignty.[144] It has also been expressed by the Court that, for instance, provisions regarding rights should not disable their "very essence",[145] and the Convention's manner should not lead to unreasonable or absurd consequences.[146] Whilst the principle of effective protection in itself establishes a potentially important limitation upon state discretion, it is not excluded by this principle that procedural and technical dissimilarities between states in the detailed implementation of Convention duties - such as their judicial, educational and electoral systems - which provided the principle of proportionality is observed.[147] As Schokkenbroek states, even if these differences could be referred to lie within state's margin of appreciation, it is more accurate to use a term such as "implementation discretion" (or "implementation freedom") which is not the same thing at all.[148]

### ii. Principle of Legality

The principle of legality, or in other words the rule of law, is one of the foundational ideals of the Council of Europe, holds that states actions should be subject to functional formal legal restraints against the exercise of inconsistent executive or administrative power. The significance of this value can be found further explained in various parts of the Convention.

It was already mentioned that the provisions on the rights to respect for private and family life, home and correspondence, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association found in the second paragraphs of Articles 8 to 11 are dependent on being "prescribed by" or "in accordance with law" and "necessary in a democratic society". Provided at Article 12 of the Convention that "right to marry and found a family according to the national laws governing the exercise of this right".

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[144] See Van Dijk and Van Hoof, ibid., pp. 74-76

[145] See for example E. Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1996) 56 Zeitschrift für Auslandisches Offentliches Recht und Volkrecht 289-290;

[146] F. Ost, "The Original Canons of Interpretation of the European Court of Human Rights" p. 304

[147] Schokkenbroek, op. cit., p. 32

[148] ibid.

One of the main tasks of the Strasbourg institutions, which is defining what "law" means, comes into question at this point,[149] therefore, the Court has developed four questions which provide a test in cases following one to another as:[150]

1. *Does the domestic legal system sanction the infraction?*
2. *Is the relevant legal provision accessible to the citizen?*
3. *Is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail?*
4. *Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights?*

Limiting the room for manoeuvre of national executive and administrative bodies in favor of the discretion of national courts, the concept of margin of appreciation is too unrefined for reflecting this deep allocation of responsibility. The way drawn by the Strasbourg institutions for the "deference to national judicial authority" has various consequences: first being the vagueness of the definition of "law" amongst states. For this aim, states' legal restrictions, both legislation and case-law created by judges -typical for common law jurisdictions-[151], international legal duties applicable to the state in question,[152] and also multiple "secondary" sources such as royal decress, emergency decrees and specific domestic regulations based on law.[153] Secondly, it has been clarified by the Court shortly after the Convention was proclaimed that an application which claims that an error of fact made by a national court is inadmissible under the Convention.[154] Thirdly, with the reason of them being best placed to judge, it is permitted by the Court and Commission to national judicial authorities a broad

[149] Schokkenbroek, op. cit., p. 33

[150] Huvig v. France, judgment of 24 April 1990, A 176-B, paragraphs 26-35; Kruslin v. France, judgment of 24 April 1990, A 176-B, paragraphs 27-36; Malone v. the United Kingdom, judgment of 2 August 1984, A 82, paragraphs 66-68; Leander v. Sweden, judgment of 26 March 1987, A 116, paragraphs 50-52;Sunday Times v. the United Kingdom, judgment of 26 April 1979, A 30, paragraphs 46-49

[151] Sunday Times, judgment, op. cit., paragraph 47. However, this is not by any means confined to common law jurisdictions. See the extensive discussion about French case-law in Kruslin, judgment, op. cit., paras 28-29 and about German case-law in Barthold v. the Federal Republic of Germany, judgment of 25 March 1985, A 90, paragraph 46 and in Markt Intern Verlag GmbH and Klaus Beerman v. Germany, judgment of 20 November 1989, A 165, paragraphs 28-30

[152] See Groppera Radio AG v. Switzerland, judgment of 28 March 1990, A 173, paragraphs 65-68 and especially the dissenting judgment of Judge Bernhardt

[153] See De Wilde, Ooms and Versyp (the "Vagrancy cases"), judgment of 18 June 1971, A 12, paragraph 93; Appl. No. 101761, X v. the Netherlands, Coll 8 (1962) 1, 4; Appl. No. 1983/63, Wallace v. the Netherlands, Yearbook VIII (1965) 228, 246 and 264; Appl. No. 7736/76, X v. Switzerland, D R 9 (1970) 206, 207; Appl. No. 7308/75, X v. the United Kingdom, D R 16 (1979) 32, 34-35

[154] X v. the Federal Republic of Germany, No 254/57, (1957)

discretion in construing domestic law and in determining if national procedure for law-making have been followed.[155] At fourth place, any given law requiring the degree of precision will devolve on the specific subject-matter[156] and the Court also accepted that predicting consequences may require expert advice.[157] Regulations that grant discretion on executive or administrative bodies must point out its range, even if this can be correctly be found in administrative guidelines or instructions but not in legal text itself.[158] It was recognised by the Strasbourg organs in which a wide discretion is conferred on the executive, particularly where this is exercised in secret, it carries specific necessity. For instance, it has been ruled in various cases that whilst secret surveillance is justified under several of the exceptions in Article 8(2), there must be sufficient formal, not necessarily judicial though, controls which supply efficient mechanisms to protect against arbitrary targeting or "fishing expeditions".[159] On the other hand, it can be argued that a clearer presumption in favor of judicial supervision in such cases is needed, therefore where it has not been instituted, the respondent state should be required to explain why.[160]

### iii. Principle of Democracy

It should be noted that the principle of democracy, being another foundational ideal of the Council of Europe, can contradict with the principles of effective protection and legality. Affirming at the Preamble to the Convention that Contracting Parties has the belief that human rights and fundamental freedoms are best assured by "an effective political

[155] Kruslin, judgment, op. cit., paragraph 29; Barthold, judgment, para 48. In Campbell v. the United Kingdom, the Court held that "it is not, in principle, for the Court to examine the validity of secondary legislation. This is primarily a matter which falls within the competence of national courts.." (judgment of 25 March 1992, A 233, paragraph 37). However, where the Court decides that the law itself violates the Convention, it will not hesitate to include relevant court decisions in its review of the necessity and proportionality of an impugned measure (Kokkinakis v. Greece, judgment of 25 May 1993, A 260-A, paragraph 47).

[156] Herczegfalvy v. Austria, judgment of 24 September 1992, A 242, paragraph 68; Sunday Times, judgment, paragraph 49. In Herczegfalvy the Court held that such specifications were particularly important where, as in this case, a psychiatric patient under detention alleged improper interference with correspondence, since such persons were "frequently at the mercy of the medical authorities so that their correspondence is their only contact with the outside world." (paragraphs 89-91).

[157] Groppera Radio AG v. Switzerland, judgment of 28 March 1990

[158] Herczegfalvy, judgment, op. cit., paragraph 89; Observer/Guardian, judgment of 26 November 1991, A 217, paragraph 65 and in Sunday Times, judgment of 26 November 1991, A 217, paragraph 63; Kruslin, judgment, op. cit., paragraph 33; Malone, judgment, op. cit., paragraphs 67 and 68

[159] Leander, judgment, op. cit., paragraph 51; Malone, judgment, op. cit.; Kruslin, judgment, op. cit.; Leander, judgment, op. cit.; Klass, judgment, op. cit.; Kopp v. Switzerland, judgment of 25 March 1998, Reports of Judgments and Decisions, 1998-II, 524; Halford v. the United Kingdom, judgment of 25 June 1997, Reports of Judgments and Decisions, 1997-III, 1004

[160] See Greer, op. cit., pp. 22-23

democracy", democratic interests and the protection of human rights can conflict. A point of view argued by some rights theorists is that an individual right is a claim or an interest, and naturally, must take precedence over claims which extract from the collective interest.[161] Another one suggested by the other theorists, even if the term "right" intends a specially important interest deserving strong institutional protection, this does not justify prioritising it over democratic considerations.[162] The main point is that, even as the conception of democracy found in the early law of the Convention organs was completely different with the idea of 'totalitarianism', later on it was more archly contrasted with the "absence of adequate safeguards against arbitrary exercises of power even by the more benign welfare state".[163] Since then, it has been further refined to comprise such notions as the trias politica and the principle of accountability.[164] It was declared by the Court recently that "democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[165] There were attempts by both the Court and Commission for identifying those Convention rights that are most central to democratic society, especially in regard to litigation on Articles 8 (2) to 11 (2) which embraces a "democratic necessity" test. The Court also held that the "essential features" of democratic society include "pluralism, tolerance and broadmindedness,"[166], that "democracy does not simply mean that the views of a majority must always prevail",[167] and an achievement of a balance which ensuring the fair and proper treatment of minorities and avoiding any abuse of a dominant position is needed.[168] However, beyond this, efforts has been given to formulate a distinguishing theory of democracy[169] with the Strasbourg organs or else choosing to focus on the necessity of a given interference on

[161] See, for example, R. Dworkin, Taking Rights Seriously (London: Duckworth, 1977)

[162] See, for example, J. Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986)

[163] S. Marks, "The European Convention on Human Rights and its 'Democratic Society'" (1995) 66 British Yearbook on International Law, 209-238, 211

[164] ibid., p. 212

[165] United Communist Party of Turkey v. Turkey, judgment, paragraph 45

[166] Handyside, judgment, op. cit., paragraph 49

[167] Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, A 44, paragraph 63

[168] ibid.

[169] A notable exception has been the Schermers opinion in the Commission's decision in Appl. Nos. 14234/88 and 14235/88 Open Door Counselling Ltd and Dublin Well Woman Centre, report of 7 March 1991, A 246, pp. 64-66

public interest grounds regarding related issue.[170] It should be noted that since constructing one coherent and consistent conception of the general relationship between rights, democracy and the public interest established by the Court is an enormously difficult task, it has not been completely achieved, only with few perception from jurists and others to move on.

### iv. Principle of Commonality, Autonomous and Evaluative Interpretation

As some of the Convention's key terms, the principle of autonomous interpretation, although it's definition varies member state to member state, an independent definition should be made by the Court[171], possibly limiting the discretion of the Defendant State. Nevertheless, this principle is forced by the principle of commonality which shows itself in four different forms in the Convention. First being the "unity principle", which can be found in the Preamble, stating that "the aim of the Council of Europe is the achievement of greater unity between its members" and as the way for achieving this is stated: "the maintenance and further realisation of human rights and fundamental freedoms"? The other being the "common understanding principle" states that one of the best securing way fundamental freedoms is through a "common understanding and observance" of human rights. Besides as the penultimate principle, the "common heritage principle", maintains that the Convention comes into existence from the "common heritage of political traditions, ideals, freedom and the rule of law" of European countries. Lastly, the "principle of evaluative or dynamic interpretation" allows the Court to leave outmodes conceptions of how terms were originally inferred as evidenced, such as by the travaux préparatoires, and consequently to approve particular and durable changes in the environment of public opinion within Europe.[172] Regardless how, since the diversified manifestations of the commonality principle, even when they are combined, cannot justify fixed similarity, and it is still left an unclear scope for national variation in the interpretation of Convention duties by these manifestations.[173]

### v. Principle of Subsidiary and Review

In the Convention system, it is indicated by various norms that the role of the Court is subsidiary to that of Contracting Parties and is basically one of reappraisal rather than that of

[170] See Greer, op. cit., pp. 14-17

[171] Ost, op. cit., p. 305

[172] P. Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" [1990] 11 Human Rights Law Journal 57, 62-66

[173] THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS by Steven Greer Reader in Law, University of Bristol, United Kingdom Council of Europe Publishing

final court of appeal of "fourth instance".[174] Articles 1 and 13, individually states that primary responsibility to secure the rights and freedoms which is provided by the Convention lies with national authorities, who also have the duty to make effective remedies available. Applicant parties are also mandated by Article 35 to exhaust domestic enforcement procedures before applying the Court. The principle of legality constitutes one of the clearest illustrations about how these principles affect national discretion since it includes the discretion accorded domestic courts for finding facts and interpreting domestic law.[175] Article 19 maintains most clearly the principle of review, which states that "the observance of the engagements undertaken by the High Contracting Parties shall be ensured by the European Court of Human Rights".[176]

### vi. Proportionality

The principle of proportionality, in a way a sub-principle of the effective protection, has had a penetrating influence within the Convention case-law, in which relationships amongst the different concepts, norms, interests, and rights, which the Convention substantiates, have had to be determined.[177] To arbitrate if an interference with a right is proportionate, the impact upon the right in question, the reasons for interference, the effects upon the applicant and the context should be considered. There are mainly two important factors for the grounds for interference concerning the importance of local knowledge and the obstacle of weighing competing policy goals with an objective way. The issue is, deciding the party who has the burden of proof load regarding the interference's proportionality. A number of phrases for expressing the idea that the rights in the Convention which should take priority regarding the state carrying the burden of justifying the interference by the Court and the Commission[178] such as the grounds *which must be "relevant and sufficient,*[179] *the necessity for a restriction*

[174] H. Petzold, "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald and et al. (eds.), pp. 41-62

[175] R. Bernhardt, "The Convention and Domestic Law" in R.St.J. Macdonald et al. (eds.), ibid

[176] Schokkenbroek, op. cit., p. 30; Mahoney (1990), op. cit., pp. 58-59; Van Dijk and Van Hoof, op. cit., p. 84

[177] M.-A. Eissen, "The Principle of Proportionality in the Case-Law of the European Court of Human Rights" in R.St.J. Macdonald et al. (eds.), op. cit., pp.125-146; J. McBride, "Proportionality and the European Convention on Human Rights" in E. Ellis (ed.), The Principle of Proportionality in the Laws of Europe (Oxford: Hart Publishing, 1999) 23-35

[178] See the partly dissenting opinion of Judge Martens in Observer/Guardian, judgment, op. cit., paragraph 11.2

[179] ibid., paragraph 72

*that must be "convincingly established",*[180] *the exceptions which should be narrowly construed*[181]*, and the interference must be justified by a "pressing social need".*[182] Although this principally restricts the scope of national discretion, specific facts of any given case and situations present in the country in question at the time, can widen it in practice.[183] Then again, other decisions refer to the necessity for a "balance" between rights and exceptions.[184]

### 3. The Contexts in which the Margin of Appreciation Doctrine is Invoked

#### i. Margin of Appreciation on Article 9

All the rights which have been guaranteed by the European Convention on Human Rights are conditional rights, therefore they can be restricted and state interference is possible. The European judges consider it as interference any *inter partes* intervention by a court either if this intervention challenges a de facto situation protected by the Convention[185] or if when an effect is given to a law conflicting with the Convention.[186] Interference is mostly an affirmative act but it can shift to a failure complying with a positive obligation, interference can create rules allowing individuals bona fide chances to exercise their rights[187] without impeding exercise of those rights[188]. *These restrictions shall not be applied for any purpose other than those for which they have been prescribed:*[189] *as regards interference with basic safeguards, these various restrictions must be interpreted in the narrow sense.* However, since settled rights are conditional, they can be regulated.

About manifest of freedom thought, belief or religion explicitly, the Court grants that states have a certain room for manoeuvre to determine the extent of interference and its necessity, but it is under close observation of European supervision both the legislation and decisions

[180] Autronic AG v. Switzerland, judgment of 22 May 1990, A 178, paragraph 61; Weber v. Switzerland, judgment of 2 May 1990, A 177, paragraph 47

[181] See Klass, judgment, op. cit., paragraph 42; Sunday Times (1979), judgment, op. cit., paragraph 65

[182] See e.g. Observer and Guardian, judgment, op. cit., paragraph 71

[183] Lingens, judgment, op. cit., paragraph 43. Ezelin v. France, judgment of 26 April 1991, A 202, paragraph 51; Sunday Times (1991), judgment, op. cit., paragraph 50

[184] See, for example, Klass, judgment, op. cit., paragraph 59; Gaskin v. the United Kingdom, judgment of 7 July 1989, A 160, paragraph 40; Barfod v. Denmark, judgment of 22 February 1989, A 149, paragraph 29

[185] ECtHR, 23 June 1993, Hoffmann v. Austria, op. cit., § 29.

[186] ECtHR, 20 April 1993, Sibson v. the United Kingdom, Series A, No. 258-A, § 27.

[187] V. Coussirat-Coustère, "Article 8 § 2", op. cit., p. 331 and references.

[188] ECtHR, 21 February 1975, Golder v. the United Kingdom, Series A, No. 18, § 43.

[189] ECHR Article 18 is applicable here.

enforcing it. Thus, state interference is subject to strict supervision even if it is legitimate, not to let states cause any inconsistent intervention.

According to Article 10 (2) of the Convention, a state has the authority to restrict the exercise of rights and freedoms guaranteed by the Convention when these three conditions are met:

- ➔ the interference must be prescribed by law,
- ➔ the interference must pursue a legitimate aim
- ➔ the interference must be necessary in a democratic society.[190]

In the Manoussakis case, the Court has held that being convicted for having used premises that had been rented without the prior authorisation which is required under Law No. 1363/1938 was an interference with the exercise of their "freedom ..., to manifest [their] religion ..., in worship ... and observance" and this conviction breached Article 9 unless it was "prescribed by law", pursued one or more of the "legitimate aims" referred to in paragraph 2 and was " necessary in a democratic society" to accomplish such aims. This law is clearly prescribed and pursued a legitimate aim "protection of public order" but it is not clearly necessary in a democratic society. The Court stated with the given facts that the Government could not depend on the applicant's failure to follow a legal formality to legitimate their conviction; it held that the refuted conviction had had a direct effect on the applicants' freedom of religion *that it could not be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society*. Thus, there had been a violation of Article 9.[191] *The European judges have had occasion to specify that when the exercise of the right to freedom of religion or one of its aspects is subject, under domestic law, to a system of prior authorisation, intervention in the procedure for granting authorisation by a recognised ecclesiastical authority cannot be reconciled with the requirements of Article 9.2.* [192] Nevertheless in the Vergos case, it was consolidated that it had already viewed the reconciliation with Article 9 of the statutory provisions of Greek national legislative body of a place of worship subject to prior authorisation by local government.

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[190] Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme

(CEDORE-IDPD), op. cit.

[191] ECtHR, 26 September 1996, Manoussakis and Others v. Greece, op. cit.

[192] ECtHR, 24 June 2004, Vergos v. Greece, No. 65501/01, § 34. See, mutatis mutandis, Pentidis

and Others v. Greece, 9 June 1997, Reports 1997-III.

In the Manoussakis case, thus, the Court held that Article 9 had been violated since it found that the Greek authorities used their power supplied by the law to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by *certain non-Orthodox movements*, in particular by *hindering the construction of places of worship by Jehovah's Witnesses*. Nevertheless, the Vergos case is not the same even if they do look so: to exercise his freedom of worship, the applicant's request was a derogation from the already existing planning regulation of his town and the question was whether Article 9 was coherent with present legal provisions regarding the criteria for adapting a land-use plan for the purposes of constructing a public building, as explained by the Greek administrative courts. Considering that the contracting states' margin of appreciation related with town and country planning[193], it was held by the Court that mentioned measure was justified in principle and proportionate to the aim which was pursued. Therefore, Article 9 of the Convention was not violated in the present case.[194]

## III. EU Law

### *a. Charter of Fundamental Rights of the European Union*

Article 10 of the Charter reads as follows:

*"1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*

*2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."*

## IV. Relevant Domestic Law and Practice

a. Article 21 § 2 of the 1993 Ordinance on public order and protection of municipal property in the Sofia metropolitan area

*"1. Organisers of assemblies are obliged to ensure the respect of public order ... and the prevention of damage to public property.*

*2. Municipal authorities, in co-operation with the police, shall take all necessary measures to ensure that the events are carried out without disruption to public order and to traffic."*

[193] ECtHR, 25 September 1996, Buckley v. the United Kingdom, Reports 1996-IV, §§ 74-75.

[194] ECtHR, 24 June 2004, Vergos v. Greece, op. cit., §§ 37-41.

a. Article 325 of the Criminal Code

*"1. Any person who carries out indecent actions which grossly violate public order and show overt disrespect for society shall be punished for hooliganism by up to two years' imprisonment or by probation, as well as by public reprimand.*

*2. If the actions are accompanied by resistance against [a law enforcement officer], or are characterised by exceptional cynicism or arrogance, the penalty shall be up to five years' imprisonment."*

## V. Case-law of the European Court of Human Rights

### *a. Austin and Others v. the United Kingdom [GC], nos. 39692/09, 40713/09 and 41008/09, § 55, ECHR 2012*

The European Court of Human Rights held, by a majority, that there had been:

*No violation of Article 5 (right to liberty and security) of the European Convention on Human Rights.*

The case concerned a complaint by a demonstrator and some passers-byes that they were not allowed to exit a police cordon for almost seven hours during a protest against globalisation in London.

Notably, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of the Convention. In particular, the police had imposed the cordon to isolate and contain a large crowd in dangerous and volatile conditions. This had been the least intrusive and most effective means to protect the public from violence.

Although the police tried to start dispersing the crowd throughout the afternoon, they had been unable to do so as the danger had persisted.

#### Principal facts

The four applicants are Lois Austin, a British national who was born in 1969 and lives in Basildon; George Black, a Greek and Australian national who was born in 1949 and lives in Melbourne; Bronwyn Lowenthal a British and Australian national who was born in 1972 and lives in London; and, Peter O'Shea, a British national who was born in 1963 and lives in Wembley.

The police became aware that on 1 May 2001 activists from environmentalist, anarchist and left-wing protest groups intended to stage various protests based on the locations from the Monopoly board game. The organisers of the "May Day Monopoly" protest did not make any contact with the police or attempt to seek authorisation for the demonstrations.

By 2 pm on that day there were over 1,500 people in Oxford Circus and more were steadily joining them. The police, fearing public disorder, took the decision at approximately 2 pm to contain the crowd and cordon off Oxford Circus.

Controlled dispersal of the crowd was attempted throughout the afternoon but proved impossible as some members of the crowds both within and outside the cordon were very violent, breaking up paving slabs and throwing debris at the police. The dispersal was completed at around 9.30 pm.

Ms Austin, a member of the Socialist Party and a frequent participant in demonstrations, attended the protest on 1 May 2001 and was caught up in the Oxford Circus cordon. Mr Black wanted to go to a bookshop on Oxford Street but, diverted by a police officer on account of the approaching demonstrators, met a wall of riot police and was forced into Oxford Circus where he remained until 9.20 pm.

Similarly, Ms Lowenthal and Mr O'Shea had no connection with the demonstration. Both were on their lunch break and held within the cordon until 9.35 pm and 8 pm, respectively. In April 2002 Ms Austin brought proceedings against the Commissioner of Police of the Metropolis, claiming damages for false imprisonment and for a breach of her rights under Article 5 (right to liberty and security) of the European Convention of Human Rights.

In March 2005 her claims were dismissed. Her subsequent appeals were then also dismissed both by the Court of Appeal and finally in January 2009 by the House of Lords.

The House of Lords concluded that Ms Austin had not been deprived of her liberty and that Article 5 of the Convention did not therefore apply.

### Complaints procedure

The applicants complained that they were deprived of their liberty without justification, in breach of Article 5 § 1. The applications were lodged with the European Court of Human Rights respectively on 17 and 27 July 2009.

### Decision of the Court

**Article 5**

The Court observed that this was the first time it was called to consider the application of the Convention in respect of the "kettling" or containment of a group of people carried out by the police on public order grounds. In that connection, it first had to assess whether the applicants had been deprived of their liberty, within the meaning of Article 5 § 1.

In deciding whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1, the Court referred to a number of general principles established in its case law.

First, the Convention was a "living instrument", which had to be interpreted in the light of present day conditions. Even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Article 5 did not have to be construed in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.

Secondly, the Convention had to be interpreted harmoniously, as a whole. It had to be taken into account that various Articles of the Convention placed a duty on the police to protect individuals from violence and physical injury. Thirdly, the context in which the measure in question had taken place was relevant. Members of the public were often required to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match.

The Court did not consider that such commonly occurring restrictions could properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond

the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose.

The Court further emphasised that, within the Convention system, it was for the domestic courts to establish the facts and the Court would generally follow the findings

of facts reached by the domestic courts. In this case, the Court based itself on the facts found by Mr Justice Tugendhat from the High Court, following a three week trial and the consideration of substantial evidence.

It was established that the police had expected a hard core of between 500 and 1000 violent demonstrators to gather at Oxford Circus at around 4 pm. The police had also anticipated a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. Given that, about two hours earlier, over 1,500 people had already gathered there, the police had decided to impose an absolute cordon as the only way to prevent violence and the risk of injured people and damaged property.

There had been space within the cordon for people to walk about and there had been no crushing. However, the conditions had been uncomfortable with no shelter, food, water or toilet facilities. Although the police had tried, continuously throughout the afternoon, to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon.

As a result, the police had only managed, at about 9.30 pm., to complete the full dispersal of the people contained. Nonetheless, approximately 400 individuals who could clearly be identified as not involved in the demonstration or who had been seriously affected by being confined, had been allowed to leave before that time.

The Court found that the cordon was imposed to isolate and contain a large crowd in dangerous and volatile conditions. Given the circumstances that had existed at Oxford Circus on 1 May 2011, an absolute cordon had been the least intrusive and most effective means available to the police to protect the public, both within and outside the cordon, from violence.

In this context, the Court did not consider that the putting in place of the cordon had amounted to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty.

Furthermore, the Court was unable to identify a moment when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to start a controlled dispersal.

Shortly afterwards, and fairly frequently thereafter, the police had made further attempts to start dispersing people and had kept the situation under permanent close review. As the same dangerous conditions at the origin of the absolute cordon had continued to exist throughout the afternoon and early evening, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of Article 5 § 1.

Notwithstanding the above finding, the Court emphasised the fundamental importance of freedom of expression and assembly in all democratic societies and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but rather only when necessary to prevent serious injury or damage.

Since Article 5 did not apply, the Court held – by 14 votes to three – that there had been no violation of that provision.

### Separate opinion

Judges Tulkens, Garlicki and Spielmann expressed a joint dissenting opinion, the text of which is annexed to the judgment.[195]

[195] March 15, 2012 - European Convention of Human Rights, *Judges reject police "kettling" human rights appeal,* available at http://www.humanrightseurope.org/

*b. K.U. v. Finland, no. 2872/02, § 48, ECHR 2008*

### The circumstances of the case

The application was lodged with the European Court of Human Rights by an applicant, a Finnish citizen, who was born in 1986.

The applicant complained under Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights (Convention).

He claimed that an invasion of his private life had taken place and that no effective remedy existed to reveal the identity of the person who had put a defamatory text on the Internet in his name.

The case concerned the applicant's complaint that an advertisement of a sexual nature was posted about him on the Internet dating site. In March 1999 an unknown individual posted the ad on an Internet dating site in the name of the applicant without his knowledge. The applicant was 12 years at the time. The advertisement mentioned his age and year of birth and gave detailed description of his physical characteristics. There was also a link to the applicant's web page where his picture and telephone number, accurate save for one digit, could be found. The advertisement announced that he was looking for an intimate relationship with a boy of his age or older insinuating that he would "show him the way".

The applicant became aware of that announcement when he received an e-mail from a man, offering to meet him and "to then see what he wanted".

The applicant's father requested the police to identify the person who had posted the ad in order to press charges against him. However, the service provider refused to divulge the identity of the holder of the IP address regarding itself bound by the confidentiality of telecommunications as defined under the Finnish law.

The police then asked the Helsinki District Court to oblige the service provider to disclose the required information pursuant to section 28. of the Criminal Investigations Act.

The police had the right to obtain telecommunications identification data in cases concerning certain offences, notwithstanding the obligation to observe secrecy. However, calumny was not such an offence.

Under the Finnish legislation in force at the time, the police and courts could not require the Internet provider to identify the person who had posted the advertisement.

In a decision issued on 19 January 2001, the Helsinki District Court also refused the police's request under the Criminal Investigations Act to oblige the service provider to reveal the identity of the person who had posted the advertisement. It found that there was no explicit legal provision in such a case, considered under domestic law to concern calumny, which could oblige the service provider to disregard professional secrecy and disclose such information.

Subsequently, the Court of Appeal upheld the decision and the Supreme Court refused leave to appeal.

Therefore, the applicant asked the European Court of Human Rights ("Court") to judge if the fake advertisement did not constitute a violation of his right to a private life under Article 8 of the Convention and if he had not been denied an effective remedy for that violation under Article 13 of the Convention (the right for an effective remedy before the national authorities).

The application was lodged with the ECHR in January 2002 and after being declared admissible.

### The judgment of the European Court of Human Rights

1. The Court held unanimously that there had been a violation of Article 8 (a right to respect for private and family life) of the Convention.

2. The Court held that, having regard to the finding relating to Article 8, there is no need to examine the complaint under Article 13 of the Convention.

3. The Court holds that the respondent state is to pay the applicant 3,000 EUR in respect of non-pecuniary damage and dismisses the remainder of the applicant's claim for just satisfaction.

4. The Court notes that no requisite documentation as required by the Rules of the Court has been submitted, and therefore rejected the applicants claim for costs and expenses.

## The Court's assessment

Although in the terms of the national law (Finland) the applicant's case was considered from the point of calumny, the Court preferred to highlight the notion of private life, given the potential threat to the boy's physical and mental welfare and his vulnerable age.

The Court considered that the posting of the Internet advertisement about the applicant had been a criminal act which had resulted in a minor having been a target for paedophiles. It recalled that such conduct called for criminal law response and that effective deterrence had to be reinforced through adequate investigation and prosecution. Besides, children and other vulnerable individuals were entitled to protection by the State from such grave interferences with their private life.

The Court notes that the incident took place in 1999, that is, at a time when it had been well known that the Internet, precisely because of its anonymous character, could be used for criminal purposes. The widespread spread of child abuse had also become well known over the preceding decade, so it could not therefore be argued the respondent Government did not have the opportunity to put in place a system to protect child victims from being exposed as targets for approaches by paedophiles via the Internet.

The legislature should have provided a framework for reconciling the confidentiality of Internet services with the prevention of disorder or crime and the protection of the rights and freedoms of others.

However, such a framework was not in place in Finland at the material time and this deficiency was later addressed, with the result that Finland's positive obligation with respect to the applicant could not be discharged. It came too late for the applicant.

The Court considers that serious privacy infringements need to be considered by the legal framework of the states, and while the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.

The Court considers that practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case such protection was not provided. An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. It is the task of the legislator to provide such a framework.

The Court therefore found that there had been a violation of Article 8 concerning the Finnish authorities' failure to protect a child's right to respect the private life following an advertisement of a sexual nature was posted about him on an Internet dating site.

Given these findings under Article 8, the Court considered that there was no need to examine the complaint under the Article 13.[196]

*c. Kurić and Others v. Slovenia [GC], no. 26828/06, § 384, ECHR 2012 (extracts)*

**Facts of the case**

The case was brought by eight applicants some of whom were stateless and others of whom were nationals of states which had formerly constituted part of the Socialist Federal Republic of Yugoslavia (the SFRY). The Respondent in the case was Slovenia. On 25 June 1991, Slovenia declared independence. The applicants, as nationals of the SFRY, had gained permanent residence. As part of the process of independence, Slovenia passed a number of laws including the Aliens Act 1999. Under the new laws permanent residents such as the applicants were entitled, under a number of conditions, to apply for citizenship of Slovenia and were given 6 months in which to do so. The applicants did not do this. On 26 February 1992, two months after the expiry of the six month deadline, their names were erased from the civil registry, resulting in their statelessness and implying that they were now

[196] Summary judgment of the case K.U. V. FINLAND, available at http://www.poverenik.rs/

residing illegally in Slovenia. The impact of this change of status was significant, with the applicants' personal documents being removed and their passports revoked and destroyed. They faced numerous difficulties, including struggles to keep their jobs and obtain pensions and being unable to leave the country. The treatment of the applicants and other ex-nationals of the SFRY, as a result of the Aliens Act, was different from the treatment faced by "real" aliens (non-SFRY nationals) who had obtained their status prior to independence. The plight of the "erased" was taken to the Constitutional Court in 1999, who held that section 81 Aliens Act was unconstitutional as it had not set out the conditions for acquisition of permanent residence of the "erased" and left them in a less favourable position than aliens who had lived in Slovenia since before independence. As a result of the judgment of the Constitutional Court, Slovenia passed the Legal Status Act in 1999 to rectify the gap and regulate the position of the "erased". However, in 2003 the Constitutional Court also found this Act to be unconstitutional because, amongst other things, it did not grant retrospective permanent residence from the date of the "erasure" or regulate the position of those who had been deported following "erasure". The Act was further amended to deal with these deficiencies and in 2010 the Constitutional Court found the Act as amended to be constitutional. In 2006 the applicants, together with a number of others, brought claims before the ECHR for breaches of Articles 8, 13 and 14 in relation to the situation. In its judgment of 3 March 2009, the Chamber had held that some applicants' claims were inadmissible as the retroactive provision of permanent residence was an adequate and sufficient remedy so they could no longer claim to be victims. As to the substantive complaints the Chamber held:

- There was a violation of Article 8 of the Convention.
- There was a violation of Article 13 of the Convention.
- In view of finding of a violation of Article 8, it was not necessary to rule on the applicants' complaint under Article 14 of the Convention.

Pursuant to the Slovenian government's request, the case was referred to the Grand Chamber in 2010 and a hearing was held in July 2011.

## Law

Relevant domestic law of the Republic of Slovenia included:

- Sections 10, 19, 39 and 40 of the Citizenship Act 1991 (as amended 2002)

- Sections 13, 16, 23, 28, 81 and 82 Aliens Act 1999 Sections 1 and 2 of the Legal Status Act 1999
- Articles 8, 13 and 14 of the European Convention on Human Rights (the Convention).

## Legal Arguments

*Applicants' arguments*

The applicants argued that domestic law was in breach of their Article 8 rights as the "erasure" irremediably affected their private life or family life or both. The Aliens Act was neither foreseeable in effect nor accessible. In addition, the conduct of the authorities was arbitrary. At the time of the dissolution of the SFRY, the government had been under an obligation to give all persons living in Slovenia a choice between Slovenian citizenship and a residence permit.

With regard to Article 14, the applicants argued that, in the enjoyment of their right to respect for private and family life under Article 8, they had been discriminated against on the ground of their national origin, when compared to other foreign citizens, having been treated less favourably than "real" aliens who had lived in Slovenia since before independence and whose permanent residence permits had remained valid under the Aliens Act. The applicants argued that the continuous right to residence of the "erased" should also be recognised. They also refuted the government's assertion that they had benefited from positive discrimination by not being deported. The applicants stated that five of them had in fact been deported.

Finally, the applicants contended that the Respondent had failed to provide an effective remedy to the "erased" as required by Article 13 of the Convention. None of the remedies available at the material time were capable of addressing the substance of their complaints under Article 8. The Legal Status Act was an insufficient legal remedy.

*Respondent's arguments*

The Respondent made a number of preliminary arguments. It argued that the applicants were not "victims" for the purposes of the Convention; the applicants had not exhausted domestic remedies; the ECHR did not have temporal jurisdiction to

hear the case; and the Convention did not protect a right to citizenship or permanent residence.

As to the substantive claims, the Respondent argued that it had given very favourable conditions to permanent residents of Slovenia who were citizens of former republics following independence, enabling them to acquire Slovenian citizenship. However, it argued that this treatment could not last indefinitely due to the need to form a corpus of Slovenian citizens. It stated that the legislation it had enacted had been necessary and constituted a proportionate means of achieving the legitimate aim of ensuring security post-independence. The Respondent acknowledged that the "erasure" had been illegal and had led to an unconstitutional situation. However, it argued that the enactment and implementation of the Legal Status Act constituted an appropriate, comprehensive and general measure for ensuring the Article 8 rights of the "erased".

The Respondent denied a violation of Article 14, arguing that the applicants had been treated the same as other aliens without residence permits and, further, that the applicants had never been in a comparable situation to "real" aliens for the purposes of the Aliens Act. Additionally, it argued that the applicants had benefited from positive discrimination since they had not, in principle, been deported.

Finally, the Respondent argued that sufficient legal remedies were available and were both accessible and effective in compliance with Article 13.

## Decision

On the preliminary points raised by the Respondent, the Grand Chamber determined that it could not reconsider cases that the Chamber had held to be inadmissible. It also held that two of the applicants' cases were inadmissible due to their failure to exhaust domestic remedies. However, it found that it did have jurisdiction to hear the cases of six of the applicants.

On the substantive complaints, the Grand Chamber held that there had been a violation of Articles 8, 14 (taken in conjunction with Article 8) and 13 (taken in conjunction with article 8) of the Convention. It also ruled that Article 46 of the

Convention had not yet been sufficiently complied with and invoked the pilot judgment procedure under Rule 61 of the Rules of Court.

*Article 8*

There was no dispute that the "erasure" had impacted on the private and family life of the applicants as protected by Article 8(1).

On the question of whether this interference with the applicants' Article 8 rights could be justified under Article 8(2), the Grand Chamber noted that the "erasure" occurred in pursuance to national law contained in the Citizenship Act and Aliens Act which were accessible to the applicants. However, in order to be "in accordance with the law" for the purposes of Article 8(2), the law had to be sufficiently foreseeable and accessible. The Grand Chamber found that this test was not satisfied because the applicants could not have reasonably expected, in the absence of an express legal clause, that their status as aliens would entail the unlawfulness of their residence and result in the "erasure". In addition, the Court held that, whilst the Legal Status Act of 1999 had partially regularised the situation of the "erased", this was not done until 7 years later and did not go far enough.

Due to the number of people affected, the Grand Chamber took a thorough approach to its judgment and also considered other matters of potential Article 8(2) justification. It held that the desire to create a corpus of Slovenian citizens was in the interests of national security and so was a legitimate aim. However, the interference was not "necessary in a democratic society" as the Respondent had not ensured that the laws enacted to pursue this aim did not disproportionately affect the rights of the "erased".

*Article 14*

The Grand Chamber noted the importance of the discrimination issue in the case and so, unlike the Chamber, examined the complaint under Article 14.

It held that, after the declaration of independence, the situation of the "real" aliens and those who had been citizens of the former federal state (later the "erased")

became at least comparable and there had been a difference in treatment between the two groups. The Grand Chamber rejected the Respondent's arguments that the necessity of forming a corpus of Slovenian citizens justified any difference in treatment. It considered that the difference in treatment was based on national origin and that it had not pursued a legitimate aim. Accordingly, the Grand Chamber found a violation of Article 14 taken with Article 8.

*Article 13*

The Grand Chamber noted the significant years of hardship that had been faced by the applicants. It held that the retroactive provision of permanent residence was not an "adequate" or "effective" remedy for this suffering and that there was, therefore, a breach of Article 13.

*Article 46*

The Grand Chamber held that, although there have been some shortcomings identified in the amended Legal Status Act, it would be premature to determine whether the Act has satisfactorily regulated the status of the "erased". However, the Grand Chamber did hold that the failure to award proper financial redress for the years of insecurity was a shortcoming. It invoked the pilot judgment procedure under Rule 61 of the Rules of Court and ordered that the Respondent set up an ad hoc domestic compensation scheme within a year of the date of the judgment.[197]

*d. Öllinger v. Austria, no. 76900/01, ECHR 2006 IX*

The applicant, a Green Party member of parliament, was refused permission to hold a meeting at the Salzburg municipal cemetery war memorial on All Saints' Day (when Austrians traditionally go to cemeteries to commemorate the dead) to remember Jews killed by the SS – since their meeting would coincide with a gathering of *Kameradschaft IV* to commemorate SS soldiers: the Constitutional Court ruled that the prohibition was justified by the State's positive obligation under Article 9 ECHR (thought, conscience, and religion) to protect those practising their religion from deliberate disturbance by others was rejected, since it gave too little weight to the applicant's interest in holding the intended assembly and protesting against the meeting of *Kameradschaft IV*, and too much to protecting cemetery visitors from

[197] Case summary of the Kurić and others v Slovenia, available at http://www.equalrightstrust.org/

limited disturbances: there had therefore been a violation of Article 11 (peaceful assembly).[198]

*e. Ouranio Toxo and Others v. Greece, no. 74989/01, § 45, ECHR 2005-X (extracts)*

**Complaints**

The applicants complained of the length of the proceedings in the indictment division and a breach of the right to freedom of association. They relied on Articles 6 and 11 of the Convention.

**Decision of the Court**

*Article 6 § 1*

The Court noted that the proceedings in question had lasted more than seven years and one month, solely for the investigation of the case. In the light of the circumstances, it found that that period was excessive and did not comply with the "reasonable time" requirement. It therefore held that there had been a violation of Article 6 § 1.

*Article 11*

The Court noted that Ouranio Toxo was a lawfully constituted party, one of whose aims was the defence of the Macedonian minority living in Greece. Affixing a sign to the front of its headquarters with the party's name written in Macedonian could not be considered reprehensible or to constitute in itself a present and imminent threat to public order. The Court was prepared to accept that the use of the term "vino-zito" had aroused hostile sentiment among the local population, as its ambiguous connotations were liable to offend the political or patriotic views of the majority of the population of Florina. However, the risk of causing tension within the community by using political terms in public did not suffice, by itself, to justify interference with freedom of association.

As regards the authorities' conduct, the Court noted that two days before the incidents, the town's council had clearly incited their citizens to gather in protest against the applicants and some of its members had taken part in the protests. It had thus helped through its conduct to arouse the hostile sentiment of a section of the

[198] Visit http://www.law.cf.ac.uk/

population against the applicants. The role of State authorities was to defend and promote the values inherent in a democratic system, such as pluralism, tolerance and social cohesion. In the case before the Court, it would have been more in keeping with the aforementioned values for the local authorities to advocate a conciliatory stance, rather than to stir up confrontational attitudes.

With regard to the conduct of the police, the Court found that they could reasonably have foreseen the danger that the tension would boil over into violence and clear violations of freedom of association. The State should therefore have taken adequate measures to avoid or, at least, contain the violence. However, they had not done so. Despite being contacted repeatedly, the police, who were stationed in the vicinity, did not intervene on the night of the attack, allegedly because of a lack of manpower. The Greek Government had not provided any explanation for the lack of police officers when the incidents were foreseeable. Nor had it escaped the Court's attention that the public prosecutor had not considered it necessary to start an investigation in the wake of the incidents to determine responsibility. It was only once the applicants had lodged a complaint that the investigation had begun. In cases of interference with freedom of association by individuals, the competent authorities had a duty to take effective investigative measures.

In those circumstances, the Court found that by both their acts and omissions the Greek authorities had violated Article 11.

Judges Lorenzen and Vajić expressed a joint partly dissenting opinion, which is annexed to the judgment.[199]

*f. Svinarenko and Slyadnev v. Russia [GC], nos. 32541/08 and 43441/08, § § 113-15, ECHR 2014 (extracts)*

The case concerned the practice of keeping criminal defendants detained on remand in metal cages during hearings on their cases. The applicants, Aleksandr Svinarenko and Valentin Slyadnev, are Russian nationals who were born in 1968 and 1970 and live in the settlement of Sinegorye in the Yagodninskiy District of the Magadan Region (Russia). Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), both applicants, accused of violent crimes including robbery,

[199] Summary of the judgment Ouranio toxo and others v. Greece, available at wcd.coe.int

alleged that they had been subjected to humiliating treatment when having to appear in court in a metal cage during their trial. They also complained under Article 6 § 1 (right to a fair trial within a reasonable time) about the excessive length of the criminal proceedings against them.[200]

## C. PROCEDURAL HISTORY OF THE CASE

### 1. Ataka's notification of the demonstration and the authorities' response

The Government of Bulgaria provided the information in the course of proceeding before court that on 19 August 1994, Ataka had notified the municipality that, pursuant to Article 8(1) of the Assemblies, Meetings and Demonstrations Act 1990, it intended to hold an assembly in the park behind the mosque (i.e., between the mosque and the Central Mineral Baths). This was scheduled for 1-5 pm on 20 August with 300 participants. This notification was received by the municipality at 10 am on 19 August 1994..

The Government also provided copies of three letters which they had received from various authorities in the course of the proceedings.

The first, from the municipality, stated that the Sofia Directorate of the Ministry of Internal Affairs was notified of the planned demonstration on 19 August 1994 at 10.55 am.

The second, from Ministry of Internal Affairs, stated that the Sofia Directorate only learned of the demonstration at 11.40 am on 20 August 1994 when they received information that supporters of Ataka had started to gather in the park beside the mosque. Until that moment, the Sofia Directorate had received no information about the demonstration. At this point, specialist police officers were dispatched to scene. A request for co-operation from the municipality was then received by the directorate by fax at 12.34 pm.

The third, from Directorate of Religious Denominations ("Дирекция по вероизповеданията"), a governmental agency attached to the Council of Ministers, stated that, around 11 a.m. on 20 August 1994, they were informed by the Deputy Chief Mufti that the Ataka demonstration was going to be held in proximity to the mosque and that they immediately contacted the Ministry of Internal Affairs, after which the specialist police officers were dispatched to the mosque. They also contacted the municipality, which confirmed that permission had been given for the assembly to take place in the park between the mosque and the Sofia Central Mineral Baths.

[200] Case summary of Svinarenko and Slyadnev v. Russia, available at www.legalaidreform.org

## 2. Investigations into the events

Two separate investigations were held as abovementioned regarding the events at the mosque on 20 August 1994: one by the police and the other by the National Investigation Service.

The police had opened two investigations as the letter dated 15 April 1995 from the Ministry of Internal Affairs states regarding injuries sustained by two police officers and a cameraman, and criminal damage to the mosque and a police car; and the violence directed towards the worshippers. The first investigation has been suspended and no one was charged.

It was also stated at the letter that during the second investigation, twenty individuals had been interviewed as witnessed and video recordings within other related evidence had been obtained. Again, throughout the investigation, seven people had been charged with aggravated hooliganism contrary to Article 325 § 2 of the Criminal Code. Regarding the people who were charged, no information has been provided whether they were prosecuted and if so, if convictions were obtained.

## 3. The National Investigation Service investigation

### *a. The applicants attempts to participate in the investigation*

Sofia City Prosecutor's Office opened an investigation on 26 August 1994 focusing if there had been any offences committed under Article 164 § 1 of the Criminal Code.

The applicant's request on 2 January 1996 to be allowed to that investigation as a victim within the meaning of Article 74 § 1 of the Code of Criminal Procedure 2005 was refused on 15 January 1996 by the Sofia City Prosecutor's Office stating that the offence under Article 164 § 1 of the Criminal Code 1968 was a "conduct" one and could therefore not have a victim.

Appealing against the decision on 17 March 1996 to the Sofia Appellate Prosecutor's Office, the applicant's case was referred back to the Sofia City Prosecutor's Office on 3 April 1997, ordering it to rule on the request by means of a formal decision. On 7 April 1997, the Sofia City Prosecutor's Office did so, repeating the reasons that it had given on 15 January 1996.

On 20 April 1997 the applicant appealed against that decision. On 30 May 1997 the Sofia Appellate Prosecutor's Office found that the question whether an offence was a "conduct" or a "result" one was irrelevant as to whether a person could be a victim of that offence. However, there was no evidence that the applicant had been present when the alleged offence had been committed or that the offence had directly affected him. It was therefore necessary to interview the applicant.

Accordingly, on 7 July 1997 the applicant was interviewed by the investigator in charge of the case. He stated that he had arrived at the mosque at 12 am and had sat in the park between the mosque and the Central Mineral Baths until prayers began. He described the demonstrations' behaviour in the course of their demonstration, including the insults he had heard. He said that the police had done their job well in keeping the groups apart. According to the applicant, in the course of the interview the investigator was hostile to him and his religion, asking him whether he knew whether he was entitled to pray in front of the mosque and whether he had obtained permission to do so by an appropriate authority.

On 14 August 1997 the applicant requested that the supervising prosecutor assign the case to another investigator on the basis that the original investigator was ethnically and religiously biased. He also requested access to the case file.

On 7 September 1997 the applicant once again asked to be allowed to take part in the investigation as a victim of the alleged offence.

On 20 November 1997 the Sofia City Prosecutor's Office refused the applicant's request, again finding that the offence under Article 164 § 1 of the Criminal Code 1968 was indeed a "conduct" offence and could therefore not have a victim. It went on to reject the applicant's request to have the case reassigned to another investigator, reasoning that, not being party to the proceedings, the applicant had no standing to make such a request. For the same reason, the applicant had no right to inspect the case file.

On 1 December 1997, after unsuccessful appeals by the applicant to Sofia Appellate Prosecutor's Office and the Supreme Cassation Prosecutor's Office, the deputy Chief Prosecutor decided that "conduct" offences could in principle have a victim. It was therefore necessary to check whether the applicant had himself been prevented from carrying out his religious observances, and if so, in what way. That point had not been fully elucidated in his first interview, which made it necessary to interview him again, before deciding whether he could be allowed to take part in the proceedings in his capacity as a victim.

*b. The progress of the investigation*

It appears that the National Investigation Service's investigation is still ongoing. Although a number of witnesses have been interviewed and expert reports obtained, no charges have been brought against any person in the framework of that investigation. From the investigation file as submitted to the Court, various efforts were made to summon the Ataka party leaders who were at the demonstration in order to interview them, but those efforts have failed.

## D. CLAIMS

### I. Claims of the Applicant

The applicant submitted that the incidents should be evaluated within its context. Ataka is a political party represented at the parliament of Bulgaria and also well-known for its opinion regarding Islam and Bulgaria's Turkish minority, is able to gather with more than one hundreds of demonstrators, including leading persons of the party during an highly sensitive moment of the prayer and mobbing worshippers regardless of police officers' number of equipment.

Irrespectively of the efforts of the police, they were unable to fulfil the standards provided at the Convention and failed to prevent the activists of Ataka from verbally abusing and threatening the worshippers, burning their prayer rugs, destroying a fez, mounting loudspeakers inside the mosque grounds and then attacking certain of the worshippers, meaning the police did not intervened on time, did not act until violence broke out.

Notwithstanding the Respondent's submissions which will be mentioned below, the Friday prayers were not to be notified, however, the demonstration was. The other submission is that, the failure of municipality, since much before the police had intervened; they were able to avert the demonstration to another place or time via using their power. It is also under the discretion of the municipality to not to allow it completely. Both of failures coming from the police and local authorities indicate a failure to meet their positive obligations under Article 9 of the Convention.

The investigations were also flawed since prosecutors needed more than a year to interview the applicant. Likewise, during the interview of the applicant, he was asked about the legality of praying outside the mosque and noise level of the call to prayer rather than the actions of the demonstrators, as though this would justify demonstrators' actions.

There were famous members amongst the demonstrators and also various video recording of the incidents, but, the investigation continued into "unknown" perpetrators. Mr. L, who cut up the fez, was known by the police. Last but not least, the MP and MEPs who were also at the demonstration had not been questioned. The investigation was not handled well and it failed to hold a deterrent effect for future crimes of this nature.

## II. Claims of the Respondent

The Government accepted the existence of positive obligations deriving from both the substantive and procedural aspects of Article 9. However, they denied that there had been a breach of those positive obligations.

The Government submitted that the case concerned on the one hand, the right of a political group to freedom of expression and assembly (rights guaranteed by Articles 10 and 11 of the Convention) and, on the other, the rights of a religious group freely to practise their religion (guaranteed by Article 9). As much as the rhetoric of Ataka's supporters might go beyond good manners and the standards of good conduct, it was based entirely on their political views. The specific reason for the clash that day was not intolerance of the worshippers' religion but the refusal of the mosque to comply with directions from the municipality as to noise level of the loudspeakers. Advance notice of their demonstration had been given to the municipality; there was no legitimate reason to prevent it. Furthermore, the mosque had failed to notify the municipality of the intention of worshippers to pray on the boulevard outside the mosque. Given this lack of notification, there was no possibility for the Ministry of Internal Affairs to deploy additional police units around the mosque, particularly when that might have led the worshippers to complain of an unduly strong police presence around the mosque.

The Government further relied on the information provided by the municipality and the police. Even before the demonstration started, ordinary and specialist police officers had deployed around the mosque and formed a cordon to separate demonstrators from worshippers. Sufficient numbers of police officers had been at the scene. They had handled the scuffle on the roof of the single storey extension in a matter of seconds and ensured the gradual dispersal of the demonstrators: once two demonstrators had been arrested, the demonstrators left the scene. No worshippers were arrested and the police remained until Friday prayers had been concluded; those prayers finished without any other incidents. The applicant himself had praised the police for the job they had done and other worshippers had applauded the police for their actions in arresting certain demonstrators; it was Ataka who had criticised the police for only arresting its supporters. In all, the police response had been objective, balanced and reasonable.

Finally, the Government reiterated their submission, first made with respect to Article 3 above, that this demonstration had been a one-off event and that, subsequent to it, the domestic authorities took all necessary steps to prevent further such incidents, to sanction those responsible and not to allow any other provocative acts.

In the police investigation, seven demonstrators had been charged under Article 325 § 2 of the Criminal Code. Almost twenty people had been interviewed during the investigation and other investigative steps taken, including photographing and identifying participants in the incident. Complaints from those affected by the incident, including one made by the applicant, had been properly and expeditiously handled.

In the National Investigation Service investigation, the prosecutor's office had been justified in not treating the applicant as a 'direct' victim for the purposes of the relevant provisions of the Criminal Code. There had been no bias on the part of the investigation or anyone conducting it; all questions put to the applicant in his interview had been aimed at clarifying what had happened during the incident. The investigation had been carried out expeditiously: the main obstacle to its comprehensive completion was the parliamentary immunity of the party members who were at the demonstration. This made it difficult to interview them, even as witnesses, because it was rare for requests to lift immunity to be made.

## E. CONCLUSION

As above mentioned, protecting the rights of minorities, especially religious minorities, has always been a crucial issue, in regard to more than one aspect. The duty of the Contracting States to protect the rights and freedoms provided by the Convention, especially the starting point of this duty has also kept being an issue at many cases which were brought to the Court.

On Sultanovac v. Bulgaria case, the applicant claims that their right to freedom of religion (as Muslims praying at the mosque) were violated by the acts of the demonstrators including a political partys' members and the police (who did not intervene on time to protect them). Another claim by the applicant party is that investigations regarding the events of the demonstration were not fast and efficient. The request of the applicant Mr. Sultanovac to be involved in the investigations, were also contradictive.

As the respondent party, the Bulgarian Government argues that they were informed about the demonstration and since it is a right to assemble peacefully, also a right provided at the Convention, there were no legitimate reasons to prevent it. It is also argued by the Government that they were not informed about praying outside of the mosque so there was no need to bring additional police officers to the area, adding that the police officers who were

already there had done their jobs thoroughly to handle the events well, therefore the Government took necessary steps to prevent these kind of incidents.

## Bibliography


Council of Europe, "Winston Churchill, speech delivered at the University of Zurich, 19 September 1946", accessed November 3, 2015, http://www.coe.int/t/dgal/dit/ilcd/Archives/Selection/Churchill/ZurichSpeech_en.asp#TopOfPage

*The Treaty of London*, London, 5 May 1949, *the Statue of the Council of Europe*, available from http://www.ehu.eus/ceinik/tratados/1TRATADOSSOBREORGANIZACIONESINTERNACIONALES/16TratadosdeOrganizacionesInternacionalesRegionales/OI163ING.pdf

Hart, James W., The European Human Rights System, *Law Library Journal Vol.102:4* (2010-31), at p.537

Van Dijk, Pieter and van Hoof, Godefridus J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd Ed., the Hague, Kluwer Law International, (1998), at p.1

The European Court of Human Rights, *Spotlight on the European Convention on Human Rights*, at p.1

The Open University, *The development of the European Convention on Human Rights*, accessed November 3. 2015, http://www.open.edu/openlearn/society/the-law/human-rights-and-law/content-section-3.4

European Convention on Human Rights, "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*", Rome, 4 November 1950, Art. 46, available from <http://www.echr.coe.int/Documents/Convention_ENG.pdf>

Ovey, Clare and White, Robin C.A., *European Convention on Human Rights*, 3rd Ed., New York, Oxford University Press, (2002), at p.6

Council of Europe, *The ECHR in 50 Questions*, at p.4

Council of Europe, *Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force*, Conference of High Contracting Parties of Protocol No.14, Madrid, 12 May 2009

Council of Europe, Protocol No. 194, 13 May 2004, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

Council of Europe, Protocol No. 14, Article 8

House of Lords & House of Commons, Joint Committee on Human Rights, Protocol No. 14 to the European Convention on Human Rights First Report of Session 2004–05, at p. 9

Hart, James W. "The European Human Rights System." *Law Library Journal* 102, no. 4, 548.

Council of Europe. *The European Convention on Human Rights*. Article 30.

Hart, James W. "The European Human Rights System." *Law Library Journal* 102, no. 4, 548.

Council of Europe, *The ECHR in 50 Questions*, at p.9

Council of Europe. *The European Convention on Human Rights*. Article 39

Council of Europe, *The ECHR in 50 Questions*, at p.10

*Religious Liberty The Legal Framework in Selected OSCE Countries*. Rep. Law Library US Library of Congress.

Little, David. "Christianity and Religious Freedom in the Medieval Period (476 – 1453 CE)." Religious Freedom Project. Berkley Center for Religion, Peace & World Affairs.

http://berkleycenter.georgetown.edu/essays/christianity-and-religious-freedom-in-the-medieval-period-476-1453-ce.

*Res publica Christiana means the Christian republic in English, latin-dictionary.net*

*International Encyclopedia of the Social Sciences*: Encyclopedia.org, "Infidels"

*Britannica Academic*, s. v. "John Wycliffe," accessed, http://academic.eb.com/EBchecked/topic/650168/John-Wycliffe

Encyclopaedia Judaica: Vienna, vol.16, col.129, death penalty by hanging and fire for Jewish criminals in 1642: Engraving showing the torture and execution in Vienna of Jewish thieves, including a relapsed convert, 1642.

EDC Foundation, *Notes On Entering Deen Completely: Islam as its followers know it*, 2015.

Randell, Keith, and Russel Tarr. *Access to History: Luther and the German Reformation 1517-55*. 3rd ed. Hodder Education, 2008.

Miller, Jessica Elam. "Religious Reform in Switzerland: Calvin & Zwingli's Teachings in the Reformation." Lecture. Available from http://study.com/academy/lesson/religious-reform-in-switzerland-calvin-zwinglis-teachings-in-the-reformation.html

"Henry VIII." BBC History. Available from: http://www.bbc.co.uk/history/people/henry_viii/

"Timeline Switzerland." *Timelines of History*. Available from: http://www.timelines.ws/countries/SWITZERLAND.HTML

"King James I (1603 - 1625)." Royal Family History. http://www.britroyals.com/kings.asp?id=james1.

"The Wars of Religion." Huguenot Memorial Museum. Available from:

http://www.museum.co.za/wars.html.

Brown, Christopher Boyd. *Singing the Gospel: Lutheran Hymns and the Success of the Reformation (Harvard Historical Studies)*. Harvard University Press, 2005.

"Documents - Part III: Section E – Imperial Reformation." Available from: http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=4386.

Cuius religio - EU ius regio?: komparative Betrachtung europäischer staatskirchenrechtlicher Systeme, status quo und Perspektiven eines europäischen Religionsverfassungsrechts, Lasia Bloss,Mohr Siebeck, 2008

Minorities, Minority Rights and Internal Self-Determination, Ulrike Barten

Konnert, Mark W. *Local Politics in the French Wars of Religion: The Towns of Champagne, the Duc De Guise, and the Catholic League, 1560–95*. Canada: University of Calgary.

The Oxford Handbook of the French Revolution, David Andress, OUP Oxford

The Causes of the Thirty Years War 1618–48, Professor Peter H. Wilson, Department of History,University of Hull

The War Chronicles: From Chariots to Flintlocks

Treaty of Osnabrück

Catholic Encyclopedia (1913), Volume 3, Bulgaria, *by Joseph Lins*

Bulgarian History - A Concise Account by Martin Miller-Yiann

State-nationalisms in the Ottoman Empire, Greece and Turkey: Orthodox and Muslims, 1830-1945, edited by, Benjamin C. Fortna, Stefanos Katsikas, Dimitris Kamouzis, Paraskevas Konortas

Catholic Encyclopedia (1913), Volume 3, Bulgaria, *by Joseph Lins*

Sunday Times, judgment, op. cit., paragraph 47. However, this is not by any means confined to common law jurisdictions. See the extensive discussion about French case-law in Kruslin, judgment, op. cit., paras 28-29 and about German case-law in Barthold v. the Federal Republic of Germany, judgment of 25 March 1985, A 90, paragraph 46 and in Markt Intern Verlag GmbH and Klaus Beerman v. Germany, judgment of 20 November 1989, A 165, paragraphs 28-30

See Groppera Radio AG v. Switzerland, judgment of 28 March 1990, A 173, paragraphs 65-68 and especially the dissenting judgment of Judge Bernhardt

See De Wilde, Ooms and Versyp (the "Vagrancy cases"), judgment of 18 June 1971, A 12, paragraph 93; Appl. No. 101761, X v. the Netherlands, Coll 8 (1962) 1, 4; Appl. No. 1983/63, Wallace v. the Netherlands, Yearbook VIII (1965) 228, 246 and 264; Appl. No. 7736/76, X v. Switzerland, D R 9 (1970) 206, 207; Appl. No. 7308/75, X v. the United Kingdom, D R 16 (1979) 32, 34-35

X v. the Federal Republic of Germany, No 254/57, (1957)

Kruslin, judgment, op. cit., paragraph 29; Barthold, judgment, para 48. In Campbell v. the United Kingdom, the Court held that "it is not, in principle, for the Court to examine the validity of secondary legislation. This is primarily a matter which falls within the competence of national courts.." (judgment of 25 March 1992, A 233, paragraph 37). However, where the Court decides that the law itself violates the Convention, it will not hesitate to include relevant court decisions in its review of the necessity and proportionality of an impugned measure (Kokkinakis v. Greece, judgment of 25 May 1993, A 260-A, paragraph 47).

Herczegfalvy v. Austria, judgment of 24 September 1992, A 242, paragraph 68; Sunday Times, judgment, paragraph 49. In Herczegfalvy the Court held that such specifications were particularly important where, as in this case, a psychiatric patient under detention alleged improper interference with correspondence, since such persons were "frequently at the mercy of the medical authorities so that their correspondence is their only contact with the outside world." (paragraphs 89-91).

Groppera Radio AG v. Switzerland, judgment of 28 March 1990

Herczegfalvy, judgment, op. cit., paragraph 89; Observer/Guardian, judgment of 26 November 1991, A 217, paragraph 65 and in Sunday Times, judgment of 26 November 1991, A 217, paragraph 63; Kruslin, judgment, op. cit., paragraph 33; Malone, judgment, op. cit., paragraphs 67 and 68

Leander, judgment, op. cit., paragraph 51; Malone, judgment, op. cit.; Kruslin, judgment, op. cit.; Leander, judgment, op. cit.; Klass, judgment, op. cit.; Kopp v. Switzerland, judgment of 25 March

1998, Reports of Judgments and Decisions, 1998-II, 524; Halford v. the United Kingdom, judgment of 25 June 1997, Reports of Judgments and Decisions, 1997-III, 1004

Greer, op. cit., pp. 22-23

ECtHR, 23 June 1993, Hoffmann v. Austria, op. cit., § 29.

ECtHR, 20 April 1993, Sibson v. the United Kingdom, Series A, No. 258-A, § 27.

V. Coussirat-Coustère, "Article 8 § 2", op. cit., p. 331 and references.

ECtHR, 21 February 1975, Golder v. the United Kingdom, Series A, No. 18, § 43.

Freedom of thought, conscience and religion, Jean-François Renucci, Professeur, University of Nice Sophia-Antipolis (France), Director, Centre d'études européennes sur les Droits de l'Homme

(CEDORE-IDPD), op. cit.

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