European Convention on Human Rights (ECHR)

I. Introduction

[1] Contrary to a common misconception, the creation of the European system of human rights protection has not been an easy journey. At the end of World War II, states were keen to protect their → sovereignty and gradually became engulfed in the Cold War, during which the solidarity among the former Allies fell apart. It was the beginning of a new era, where opposite values defended by USSR and United States were part of a global confrontation (Madsen [2005]). Against this background, in particular the ideological as well as the territorial conquest led by Joseph Stalin, ten Western European states – Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom – created the → Council of Europe (CoE) in London on 5 May 1949. The CoE was an ideological tool, with the purpose to defend liberal democracy, the → rule of law and human rights (Art 3 CoE Statute). The Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights; ECHR) was adopted one year later, on 4 November 1950, in the Barberini Palace in Rome.

[2] The preparatory works show that the negotiations were difficult and that some states (led by the United Kingdom) wanted to preserve their sovereignty at all costs (Bates [2010]). These states were successful in inserting two clauses (former Arts 25 and 46 ECHR) concerning the optional (rather than compulsory) jurisdiction of the 'quasi-judicial' body (the European Commission of Human Rights, EComHR) as well as the judicial

body (the → European Court of Human Rights, ECtHR). In the same vein, they granted an exceptional power to the Committee of Ministers, which was able to rule on a case when the jurisdiction of the Court was not recognized by the respondent state. They also developed a very specific limitation of the territorial scope of the Convention to avoid its application in colonial territories still under Western subjugation (→ Colonialism). These concessions were the only way to reach an agreement and, subsequently, a quick entry into force of the ECHR on 3 September 1953.

[3] Most of the initial signatories to the Convention were relatively quick in ratifying the Convention (United Kingdom (1951), Germany (1952), Norway (1952), Sweden (1952), Ireland (1953), Luxemburg (1953), Netherlands (1954), Turkey (1954), Belgium (1955) and Italy (1955)). This was also due to the concern at the time that the lack of sufficient speedy ratifications would jeopardize the very existence of the mechanism. In contrast, France – an old liberal democracy, whose delegates had strongly defended the idea of the Court during the drafting process – was not keen on accepting the consequences of this new international review mechanism. Hence, France ratified the Convention only in 1974 (with several important → reservations), accepting the jurisdiction of the Court, but not of the Commission. It was only in 1981 – under the socialist Presidency of François Mitterrand – when the individual complaint mechanism of Article 34 was fully accepted, with the first ruling against France being delivered in 1986 (ECtHR, *Bozano v France* [1986]).

[4] The system initially set up by the European Convention was based on three organs: the Commission, the Court and the Committee of Ministers. The Commission received applications, examined them and, once they were declared admissible, drew up 'reports' (called '31 reports') on whether or not there had been a violation of the Convention. The Court, in turn, was seized only through the Commission and, on the basis of its report, gave a final judgment on the violation alleged by the applicants. The Committee of Ministers of the Council of Europe, on the other hand, could be transformed into a 'judgment body' if the Commission decided not to refer the matter to the Court within three months of the publication of its report or if the respondent state had not accepted the jurisdiction of the Court. As an intergovernmental body composed of representatives of the states parties (with the rank of ambassadors), the Committee of Ministers had exceptional jurisdictional powers (in total contradiction with the current 'spirit' of a fair trial according to which one cannot be 'judge and party'). This architecture was the result of the concessions granted in 1950 to the states, still anxious to preserve their sacrosanct sovereignty.

[5] This architecture has been completely changed. Indeed, the transformation of the ECHR over time has been bold, from two perspectives: the substantive one, and the procedural one. The following will provide an overview of both dimensions.

II. Substantive aspects

[6] The ECHR initially contained a list of 13 substantive rights, all civil and political, namely the → right to life (Art 2), the → prohibition of torture (Art 3), the → prohibition of slavery and forced labour (Art 4), the right to → liberty and → security of person (Art 5), the right to a fair trial (Art 6; see → Civil Proceedings, → Criminal Proceedings, → Administrative Proceedings), the principle of → no punishment without law (Art 7), the → right to respect for private and family life (Art 8), the → freedom of thought, conscience and religion (Art 9), the → freedom of opinion and expression (Art 10), the freedom of → assembly and → association (Art 11), the → right to marry (Art 12), the → right to an effective remedy (Art 13), as well as the → prohibition of discrimination (Art 14). The exclusion of economic, social and cultural rights was the consequence of the overall member state parties' traditional view and affirmed their differences to communist ideology (→ Generations of Human Rights).

[7] That catalogue of rights was significantly expanded through the adoption of six optional protocols – Protocols No 1 (1952), No 4 (1963), No 6 (1983), No 7 (1984), No 12 (2000) and No 13 (2002). However, this remained limited to deepening the protection of civil and political rights – with the potential exception of the right to peaceful enjoyment of one's possessions (Art 1 Protocol No 1; → Right to Property), which is considered by some as a 'mixed' right and the → right to education (Art 2 Protocol No 1). The other substantive rights included in the Protocol are: the right to free elections (Art 3 Protocol No 1), the prohibition for imprisonment for debt (Art 1 Protocol No 4), → freedom of movement (Art 2 Protocol No 4), the prohibition of → expulsion of nationals (Art 3 Protocol No 4), the prohibition of collective expulsion of aliens (Art 4 Protocol No 4), the prohibition of the → death penalty in principle (Art 1 Protocol No 6), procedural safeguards relating to the expulsion of aliens (Art 1 Protocol No 7), the right of appeal in criminal matters (Art 2 Protocol

No 7), compensation for wrongful conviction (Art 3 Protocol No 7), the → right not to be tried or punished twice (*ne bis in idem*) (Art 4 Protocol No 7), equality between spouses (Art 5 Protocol No 7), the general prohibition of discrimination (Art 1 Protocol No 12) and, last but not least, the prohibition of death penalty 'in all circumstances', in others words, even during war (Art 1 Protocol No 13). State parties have not systematically ratified these optional protocols. For example, Monaco and Switzerland have not ratified Protocol No 1; Greece, UK, Switzerland and Turkey have not ratified Protocol No 4; the same applies for Russia concerning Protocol No 6 and for Armenia and Azerbaijan with Protocol No 13. It is notable that Germany, the Netherlands and the UK (all Western liberal democracies) have shied away from signing or ratifying Protocol No 7. The least successful protocol in terms of ratification is Protocol No 12 – which contains the very important general prohibition all kinds of discrimination – with only 20 ratifications and a number of states not even having signed it, including Denmark, France, Sweden, Switzerland and the UK.

[8] In many instances, there has been an impressive transformation of certain guaranteed rights, thanks to the virtues of several technics of → treaty interpretation. One of them is considering notions enshrined in the ECHR as 'autonomous concepts', partly leading to extending its scope. The case in point would be Article 6(1), which limits the application of the right to a fair trial to disputes concerning 'civil rights and obligations' or 'any criminal charge'. Although the drafters of the Convention considered the former to be essentially limited to private disputes – thus disputes between private individuals or between a private individual and the state when it acts as a private person – the Court decided to include it in most disputes in which elements of public law were involved. This was in response to the necessity to take note of the 'blurring' of the boundaries between private and public law in European societies strongly marked by the intervention of public authorities in many areas. The Court was able to do so by considering the expression 'civil' to be an autonomous concept – which enabled it not to be constrained by the classifications of domestic law (ECtHR, *Ringeisen v Austria* [1971]) – and by confirming the applicability of Article 6 even where a public person was party to the dispute (ECtHR, *König v Germany* [1978]).

[9] This process of 'autonomizing' the concepts has enabled the Court to proceed in the criminal field in the same way as in the civil field. It has thus succeeded in extending the scope of Article 6(1) to penalties that are not, *per se*, classified as 'criminal' by the legal systems of the states' parties. The seminal judgment here is *Engel and others v the Netherlands* (1976) concerning disciplinary sanctions imposed on Dutch soldiers performing their military service. The ECtHR took the opportunity to identify three criteria for defining the contours of a 'criminal charge': the classification provided by domestic criminal law, the nature of the offence and the degree of severity of the sanction – with the last two being fundamental in the situation where domestic law does not classify the offence as criminal (paras 82–3). This has been applied to military disciplinary sanctions (as in *Engel*) and those pronounced against prisoners (ECtHR, *Campbell and Fell v UK* [1984]), as well as administrative sanctions (ECtHR, *Oztürk v Germany* [1984]) and tax penalties (ECtHR, *Bendenoun v France* [1994]).

[10] More generally, the ECtHR has adopted a very dynamic way of interpreting rights which has enlarged the scope and content of rights – from applying the 'living instrument' doctrine, to using the words of the Preamble ('the maintenance and further realisation of Human Rights and Fundamental Freedoms' as an aim of the Council of Europe in the achievement of greater unity between its members) or more generally the object and purpose of the Convention. The *Golder* case is exemplary in that respect, adding a new dimension to the right to a fair trial: the right to access to court (ECtHR, *Golder v UK* [1975] para 34). In *Hornsby v Greece* (1997), the Court held that Article 6 ECHR also included the right to the execution of a judgment. More recently, in *Guðmundur Andri Ástráðsson v Iceland* (2020), the Court ruled that the nomination process of judges is part of the notion of 'Tribunal established by law'.

[11] Overall, the ECtHR has developed a very cosmopolitan way of interpreting the Convention as well as the Protocols, which is frequently debated in literature. For some, the way the Court relies on external sources allows it to develop a current and accurate interpretation of the ECHR which is quite in harmony with universal standards (Burgorgue-Larsen [2018]) and supports, in the long run, the unity of international law. While this open way of interpreting the Convention has been used for quite some time (see ECtHR, *Marckx v Belgium* [1979]), the *Demir and Baykara v Turkey* (2008) and *Magyar Helsinki Bizottság v Hungary* (2016) cases epitomize this phenomenon. The *Demir and Baykara* judgment rewrites Article 11 of the Convention on the right of association by

including the right of civil servants to associate through trade unions and to conclude collective agreements. As for the *Magyar* judgment, it includes the right to seek information of public interest in the right to freedom of expression guaranteed by Article 10 ECHR.

[12] Other authors consider that this process has disregarded the traditional rules of the Vienna Convention of Law of Treaties (Arts 31–3) (Bossuyt [2014]), thereby weakening states' confidence in the Court. Also, the way the Court uses the concept of 'European consensus' in order to determine the scope of the → margin of appreciation afforded to states when applying the ECHR has been met with opposition (ibid.). This discussion remains crucial if one bears in mind that the Court has entered into a new age: 'the age of subsidiarity' (Spano [2014]), where states have the primary responsibility to secure human rights and the ECtHR have only a supervisory function in last resort.

[13] Indeed, after several bold developments over the past decades, most current judges of the Court (when reading some of their separate opinions) agree that the time has now come to enter in a period of judicial self-restraint, taking into account the will of states as expressed in Protocol No 15. That Protocol amends the Convention's preamble to now expressly make reference to the principle of subsidiarity and the margin of appreciation doctrine. Hence, the new era is expected to be characterized by the increase of the application of the margin of appreciation doctrine, the enhancement of the subsidiarity principle and the launch of a very challenging process-based review (ECtHR, *Animal Defenders International v UK* [2013]). These developments have been seen critically by several scholars (García Roca [2019]; Krenc [2020]), but have been strongly defended by the current President of the Court (Spano [2018]).

III. Procedural aspects

[14] The modalities for bringing cases before the Court have remained the same over time – the Court may be seized, after the → exhaustion of domestic remedies, by individuals who must allege to be the victims of a human rights violation (Art 34; → individual and collective communication or complaint procedures) or by states which, for their part, may seize the Court without having to demonstrate an interest in the case (Art 33). Thus, the → inter-state complaint procedure constitutes an *actio popularis*. Indeed, the procedural system has undergone impressive transformations over time.

[15] After the adoption of several protocols – Protocols No 2 (1963), No 5 (1966), No 8 (1985), No 9 (1990) and No 10 (1992) – aiming to improve the mechanism gradually, Protocol No 11 (1994) entered into force in 1998, radically redesigning the European system on human rights. The two-tier mechanism existing until that point (Commission and Court) disappeared and was replaced with a single Court, permanently located in Strasbourg. Moreover, the role of the Committee of Ministers is now restricted to reviewing the implementation of Court decisions, thus losing its jurisdiction to decide cases on the merits. Such a complete transformation was necessary in light of the increase of CoE member states including, particularly, several new Eastern European states and the success of the individual application procedure (Art 34). During the drafting process of Protocol No 11, a division between state parties emerged on the question whether to include a review or appeal procedure. This ultimately resulted in the existence of two possibilities for obtaining a judgment from a chamber made up of seven judges and/or a Grand Chamber judgment composed by 17 judges: the so-called relinquishment (Art 30) and referral procedure (Art 43).

[16] Even though the procedural transformation brought upon with Protocol No 11 was bold, it quickly became clear it was not sufficient. At the same time, the defiance by some important state parties to the European Convention increased, including the UK (an old liberal democracy) and Russia (an authoritative state) (Touzé [2016]). *Strasbourg bashing* became a common behaviour among several member states (Oomen [2016]). This has resulted in a continuing reform process since 2010. Several diplomatic conferences (Interlaken, 2010; Izmir, 2011; Brighton, 2012; Brussels, 2015; Copenhagen, 2018) have taken place to, among others, address the main procedural challenge of the Court – its backlog. Several governments have tried to appropriate reformist rhetoric to weaken the system, a not uncommon tactic in the realm of regional human rights systems (Burgorgue-Larsen [2020]).

[17] The reform process has advanced with mixed reviews. On the one hand, some texts have aimed at rationalizing and speeding up the procedure (Protocol No 14 and some new management principles), as well as triggering a more fruitful and genuine cooperation between the ECtHR and domestic judges, in particular with the 'highest courts and tribunals' (Protocol No 16, the so-called 'Dialogue Protocol'). However, other developments demonstrate the work of contradictory

forces – such as Protocol No 15 (which highlights the importance of judicial self-restraint modifying the Preamble with the mention of the margin of Appreciation doctrine as well as the subsidiarity principle) and restricting the timeframe in which the Court may be seized after the final national decision (four months instead of six before), the establishment of new principles (enshrined in the Copenhagen Declaration [2018]) and the presence of judges keen on defending new procedural approaches (Spano) or very conservative values contrary to traditional liberal interpretation of rights (Dedov, Yüksel, Eloseguí).

[18] As for the positive aspects of the procedural evolution, the institution of a 'single judge' established by Protocol No 14 to accelerate the admissibility procedure is an important achievement (although the use of 'boilerplate' decisions was strongly criticized, leading to some adjustment within the Court that now requires at least a brief reasoning). The priority treatment of applications (based on the nature of violations) has permitted the Court to quickly concentrate on gross or/and systemic violations. Moreover, the development of a case management approach, with the increasing use of → artificial intelligence (AI), has quite successfully dealt with the issue of backlog (Dourneau-Josette [2020]). The entry into force of Protocol No 16 (in 2018) is encouraging for the future. It foresees a prejudicial procedure which allows (but does not oblige) the highest domestic courts and tribunals – when a case is pending before them (Art 1(2) Protocol No 16) – to ask the Court for an Advisory Opinion 'on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto' (Art 1(1) Protocol No 16). As of August 2021, there have been six requests for Advisory Opinions and the Court has delivered two opinions: the first opinion concerned a question in relation to surrogacy (the surrogate mother, ECtHR, *Advisory Opinion No 1* [2019]); the second opinion related primarily to the scope of criminal law and its application through time, ECtHR, *Advisory Opinion No 2* [2020]). While such a new mechanism will certainly foster a new kind of judicial cooperation (Sicilianos [2014]), it is also true that it could quickly appear to be too complex to manage with the concurrent preliminary ruling procedure existing in EU law (Art 267(3) TFEU) (Lemmens [2019]). Above all, it is not sure whether this new mechanism will successfully deal with the backlog (Dzehtsiarou and O'Meara [2014]), with the Advisory Opinions eventually entailing a greater number of similar cases.

[19] As for the more complicated, not to say negative, aspects of procedural evolution, the Court has notably adopted a new policy for several years. Already before the entering into force of Protocol No 15 in August 2021, the increased use of the margin of appreciation and the valorisation of the subsidiarity principle was striking. The reasons, therefore, are arguably threefold: Firstly, it is a way to tackle and resolve the backlog; secondly, it is also a way to remind domestic judges that they must take their responsibility in taking account of the ECHR seriously; thirdly, it is a way to avoid more defiance from states. However, this new procedural approach of 'shared responsibility' came at a difficult historical time with the upsurge of populism and illiberalism. In such a setting, it can be very problematic to afford more leeway to states which are not in tune with liberal values. Despite the fact that the Court will certainly stay vigilant – as some recent cases have shown (ECtHR, *Baka v Hungary* [2016]; ECtHR, *Mehmet Hasan Altan v Turkey* [2018]; ECtHR, *Şahin Alpay v Turkey* [2018]) – the dangers of the new approach are real, including concerning liberal democracies which can have dubious politics as *Garib v the Netherlands* (2017) demonstrates: it brought to light the gentrification policy promoted by a far-right municipality to the detriment of the most vulnerable.

[20] All this brings to light an additional layer of complexity when having in mind the way judges are selected (by states) and elected (by the Parliamentary Assembly). The democratic backsliding will have an obvious effect on both processes. Already now certain judges within the Court are elaborating very conservative political and religious points of view (for example see the dissident opinions of the Russian judge Dedov under the *Bayev* case; the Spaniard Judge Elosegui under the *Mariya Alekhina* case and the Turkish judge Yüksel under the *Kavala* case). Some dissenting voices gain in force when states request a Grand Chamber judgment. For instance, in *Z.A. v Russia* (2019) by the Grand Chamber, the opinion of the Russian Judge Dedov under the Chamber Judgment (2017) were taken into account by the Court – and as a result the right of states to protect their borders took precedence over the right of migrants. This has been furthered by certain principles of the Copenhagen Declaration (2018), which call for a 'dialogue' with governments and 'other stakeholders' (para 34). This third-party intervention procedure is explicitly intended to allow states to present their legal and political position – which has been particularly intrusive in *Z.A. v Russia* (in

the same vein, see the *Ilias and Ahmed v Hungary* [2019]).

[21] All these factors show that important changes are coming: an important battle is at stake to preserve the main *acquis* of the conventional protections that have been built since the mid-1970s. The migration tragedy is the scene of a 'backsliding case law' in construction (ECtHR, *N.D. and D.T. v Spain* [2020]). It remains to be seen what other protections will face deconstruction in the coming years.

IV. Impact and challenges

[22] Over time, the *impact* of ECHR case law has been exceptional. At times, significant elements of domestic law have been completely changed by new standards developed by the ECtHR. In one line of cases, the Court applied the non-discrimination principle, which permitted it to eradicate a lot of types of injustice in day-to-day life. This included ending discriminatory treatment between legitimate and illegitimate children (ECtHR, *Marckx v Belgium* [1979]); between heterosexual and homosexuals (ECtHR, *Dudgeon v UK* [1981]; ECtHR, *Norris v Ireland* [1988]; ECtHR, *Modinos v Cyprus* [1993]; ECtHR, *Salgueiro da Silva Mouta v Portugal* [1999]); between men and women (ECtHR, *Konstantin Markin v Russia* [2012]; ECtHR, *Carvalho Pinto de Sousa Morais* [2017]; between nationals and foreigners (ECtHR, *Gaygusuz v Austria case* [1996]) or persons in good health and those with health problems (ECtHR, *I.B. v Greece* [2013]). This bold jurisprudence has completely re-shaped domestic legal orders.

[23] The Court also managed to (indirectly) protect other human rights not enshrined in the ECHR through its jurisprudence. For instance, it took account of the protection of the environment through Article 8 (right to privacy ECtHR, *López Ostra v Spain* [1994]; ECtHR, *Cordella and others v Italy* [2019]) but also Article 2 (right to life ECtHR, *Taşkın v Turkey* [2004]). The Court's case law might likewise serve to protect economic and social rights through certain civil and political rights, such as the right to property (ECtHR, *Gaygusuz v Austria* [1996]) or the right to a private life (ECtHR, *Saidoun v Greece* [2010]) combined with the principle of non-discrimination.

[24] That being said, one of the main long-standing problems faced by the system, as a whole, is its difficulty to deeply transform the overall legal structures of member states – although sought for by a number of activists. Firstly, the considerable variety of diplomatic culture explains why the situation in Germany or Sweden (long well-established democracies) will differ from that in Turkey or Russia (both authoritarian states). Secondly, the variety of domestic judicial structures explains the notable differences in relationships to the ECtHR's case law. It is striking to observe that where an individual constitutional complaint exists (as for instance in Germany or Spain), the number of applications tends to be lower in comparison to countries where such a mechanism doesn't exist (like France). Thirdly, there is still a trend among states to defy judgments by the Court. Apart from hostile contestation (occurring regardless of particular proceedings), we can observe that all three domestic branches of power (executive, legislative and judicial) might be involved in challenging certain trends in jurisprudence in sensitive issues. For instance, the then UK Prime Minister David Cameron contested the Court's findings in the context of prisoners' right to vote (*Hirst v UK* [2005]), as did both Italian and Russian Constitutional Courts on other issues.

[25] Having an overall view about the question of implementation as a structural question, it is significant to see the involvement of the Committee of Ministers. Thanks to a transparent policy since the publication of Annual Reports on that matter and the installation in the database Hudoc of a special issue related to execution (HUDOC EXC), everybody is able to check the level of execution of each ruling, with regard to each state party. Even though the ECtHR is increasingly involved in this process by indicating more precisely to the member states what kind of legislative changes are necessary when systemic problems are at stake (so-called 'pilot judgments'), it is clear that the Committee of Ministers remains the 'master' of the execution process. This was notably shown in *Burmych v Ukraine* (2017). At issue, in this case, was the failure to comply with a pilot judgment in *Ivanov v Ukraine* (2009). The Court struck the case out of its list of cases, considering that the issues raised in *Burmych v Ukraine* (as well as in the 12,143 applications of the same type) were inseparable from the pilot judgment proceedings. In doing so, it referred the case back to the Committee of Ministers 'as the body with responsibility in the Convention system for ensuring that all persons affected by the systemic problem identified in a pilot judgment obtain justice and redress' (para 198). It therefore raised the examination of several thousand applications (which it refused to examine) to the level of a political body. This led to the dissenting judges' observations criticism that it

marked a return to the 1950 system which gave state representatives a judicial function (para 15 of the joint dissenting opinion of Judges Yudkivska, Sajò, Bianku, Karakas, De Gaetano, Laffranque and Motoc).

[26] It is therefore easy to see that the task of the ECtHR is nowadays quite difficult when discovering the deep state of chaos existing in some states (Ukraine) and the very aggressive policy against dissidents in a growing number of states: Navalny in Russia (ECtHR, *Navalnyy v Russia* [2018]), Kavala in Turkey (ECtHR, *Kavala v Turkey* [2019]), Merabishvili in Georgia (ECtHR, *Merabishvili Georgia* [2017]).

V. Conclusion

[27] Seventy years after the signature in Rome of the European Convention, the development of the rights' scope has been impressive. The conventional *acquis* is outstanding and deserves to be preserved and protected. Its preservation is yet under debate concerning several topics (migration) and with certain new kind of relationships with domestic law (margin of appreciation, subsidiarity, process based review).

[28] It will be hard to preserve to status quo, in light of a growing anti-rights discourse among more and more influential globalized intellectuals, but also, more importantly, among states. The human rights project, at the global stage, is under assault through very aggressive foreign policy of influential and illiberal states, some of which are members of the Council of Europe. Their ongoing attack against specific liberal trends of human rights jurisprudence (concerning homosexuals, religious beliefs, the beginning of life and so on), is sustained by a new generation of very conservative NGOs. What will be the future? This is difficult to predict, but one thing is certain: everybody (whether judge, professor, activist or citizen) needs to be aware of the challenges in order to fight strongly against all kind of backslidings.

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