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The Role and Approach of the European Court of Human Rights in the Protection of Core Human Rights and in Deferring to the Judgment of States under the European Convention on Human Rights.

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1. Situational Analysis and Introductory Remarks

In order to understand the complexity and peculiarity of human rights, it is important to provide a proper definition of human rights, based on the Irish concept.

Human Rights is defined [...] as: the rights, liberties and freedoms conferred on, or guaranteed to persons: (a) by the Constitution, and (b) by any agreement, treaty or convention to which the State is a party [...] the definition of human rights is restricted as regards any agreement, treaty or convention to which the State is a party by including only those (or a provision thereof) which has been given the force of law in the State. This restriction is required because of the dualistic principle relating to the effect in Irish law of international agreements; such agreements to which the State is a party may not necessarily be part of the law of the State and consequently may not be relied on in cases before the Irish Courts.¹

Based on the above definition, it is significant to stress that the European Court of Human Rights (ECtHR) makes decisions and sentences, but certainly does not examine and determine the national/Irish law. The main function of this institution is to supervise and command the obligations under the European Convention on Human Rights (ECHR).² Therefore, the Court does not have the appeal function, as it has no power to cancel or abolish decision made by the local Courts of the particular States.

The main purpose of this essay is to analyse and determine the approach the ECtHR takes to core human rights issues and to assess its role in deferring to the judgment of States under the ECHR. The author takes into account the Irish justice system and some other European Union jurisdictions. The essay comprises a brief situational analysis, introductory remarks, and an interpretation of results with conclusion. A list of sources consulted for this essay can be found at the end.

In Section 2 (The Role and Approach of the European Court of Human Rights in the Protection of Core Human Rights), the author identifies the particular and crucial role of the Court in judicial functions of the Court. In addition, this section examines different approaches taken by the ECtHR in order to protect basic human rights.

¹ H. Murdoch, *Murdoch's Dictionary of Irish Law*, Dublin 2004, p. 534-535; *Human Rights Commission Act, 2000*, [online:] [<http://www.irishstatutebook.ie/eli/2000/act/9/enacted/en/html>], accessed on the 5.01.2017.

² *European Convention on Human Rights*, [online:] [http://www.echr.coe.int/Documents/Convention_ENG.pdf], accessed on the 06.01.2017.

Section 3 concerns the European Court's jurisdiction and action in deferring to the judgment of States under the ECHR. The author presents examples of situations where the Court failed to accomplish the relevant standards that are obligatory under the ECHR.

In the interpretation of results and conclusion section, the author presents findings from the topic and takes the opportunity to assess the future role of the ECtHR in improving the protection of human rights.

2. The Role and Approach of the European Court of Human Rights in the Protection of Core Human Rights

The ECtHR plays a significant role in the protection of human rights in Europe.³ This judicial body has been functioning in Strasbourg since 1959. The Council of Europe's Court has 47 judges, corresponding with the 47 Council of Europe member states, with 800 million members of the public. It is worth mentioning that since 01 November 1998, this particular body has had permanent jurisdiction and has been fully regulated by the ECHR (established under Article 18).⁴

The Convention shall be treated as the universal concurrence to *securing the universal and effective recognition and observance of the Rights therein declared*.⁵ Literally, this extraordinary, global document guarantees protection of core human rights and *fundamental freedoms* in Europe. As already mentioned, the predominant role of the ECtHR is to *hear cases involving basic rights under the Convention* and which violate the document.⁶ The ECHR, by definition, largely (but not exclusively) prevents:⁷

- torture and inhuman or degrading behaviour or punishment
- slavery and forced labour
- the death penalty
- arbitrary and unlawful detention
- discrimination in the enjoyment of rights and freedoms
- aspects listed in the Convention.

Articles 33, 34 and 47 provide three types of cases which can be processed by the ECtHR. These are:⁸

³ *European Court of Human Rights*, [online:] [http://www.echr.coe.int/Documents/Court_in_brief_POL.pdf], accessed on the 06.01.2017.

⁴ *European Convention on Human Rights*, op. cit.

⁵ *Ibidem*.

⁶ H. Murdoch, op. cit.

⁷ *European Convention on Human Rights*, op. cit.

⁸ *Ibidem*.

- High contracting party applications (Article 33) – from a particular country that another country has violated according to the European Convention. A good example is *Ireland v United Kingdom*, regarding inhuman treatment and dignity.⁹
- Individual applications (Article 34) – from any individual. For example, the *Doran v Ireland* case, where the Republic of Ireland violated the two articles of the ECHR.¹⁰ This case concerned the Irish court’s delays, in a matter of acquisition, in relation to a member of the public from County Wicklow. Similar examples can be found in the recent case of prison law – *Radzhab Magomedov v Russia* – regarding conditions in detention.¹¹
- Advisory opinion requests (Article 47) – where the particular member state can ask for advisory opinions from opinions from the Council of Europe *on legal questions concerning the interpretation of the Convention and the Protocols thereto*.

All applications are restricted by admissibility criteria which have to be met in order to cases to proceed. Article 35 of the Convention (Protocol 14 in 2010) provides nine criteria in four sections, and these are crucial for bringing case before the Court.¹² Literally, the ECtHR accepts individual complaints from all victims of a Convention violation. The EU Framework Decision on the Standing of Victims in Criminal Proceedings (2001) provides a proper definition of the victim, as follows:¹³

A ‘victim’ means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.

The above aspect provides meaningful examples that can be observed in the different approaches taken by the ECtHR in order to protect basic human rights. In the case *Burden v United Kingdom*, the Court refused to hear facts or hypothetical questions from parties who were not directly affected.¹⁴ In this tax relief discrimination situation, the ECtHR held that the

⁹ *Ireland v United Kingdom* [1978] 5310/71 [online:] [<http://www.bailii.org/eu/cases/ECHR/1978/1.html>], accessed on the 06.01.2017.

¹⁰ *Doran v. Ireland* [2003] 50389/99 [online:] [[http://hudoc.echr.coe.int/eng#{"appno": "50389/99"}, {"itemid": "001-61277"}\]](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

¹¹ *Radzhab Magomedov v Russia* [2016] 20933/08 [online:] [[http://hudoc.echr.coe.int/eng#{"languageisocode": "ENG"}, {"documentcollectionid2": "JUDGMENTS"}, {"itemid": "001-169652"}\]](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

¹² *European Convention on Human Rights*, op. cit.

¹³ *The Victims of Crime Office*, Department of Justice and Equality, [online:] [<http://www.victimsofcrimeoffice.ie/en/vco/Pages/WP10000006>], acc. 04.01.2016.

¹⁴ *Burden v United Kingdom* [2008] 13378/05 [online:] [<http://ceere.eu/wp-content/uploads/2016/03/CASE-OF-BURDEN-v.-THE-UNITED-KINGDOM.pdf>], accessed on the 06.01.2017.

plaintiff's sisters were not in a civil partnership. Therefore, they were not victims within the meaning of the Convention. A similar judgment can be found in the *Eckle v Germany* case, which shows that the victim's status can be lost during the course of a case.¹⁵ In contrast is the prime Irish case *Norris v Ireland*, where a gay person was able to bring his case before the Court, as he was at real individual risk (Article 8 of the Convention).¹⁶ As can be seen from the above examples, the ECtHR adopts different approaches in order to protect basic human rights.

During the analyses of the ECtHR role and its different approaches to human rights, it is worth clarifying that the judicial body of the Council of Europe is the last resort judgment solution. Again, the *Burden v United Kingdom* case demonstrated a symbolic lack of Domestic Remedies, so the ECtHR had a function of the last legal jurisdiction.¹⁷ However, in the case of *Foka v Turkey*, the Court held that in Eleni Foka's situation, there were no violations of articles 3 and 5, but only of article 10.¹⁸ The Court made the following judgements:

121. In the present case the Court has found that the confiscation of the applicants' books and cassettes violated Article 10 of the Convention. On the other hand, it has not found any violations of the Convention on account of the imposition of a fine. As the value of the confiscated material cannot be determined with absolute precision, the Court decides to award EUR 300 in respect of pecuniary damage.

122. With regard to the non-pecuniary damage sustained by the applicant, the Court considers that the finding of a breach of Article 10 of the Convention constitutes sufficient just satisfaction.

*The application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each case. This means, amongst other things, that the Court must take realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant (see *Menteş and Others v. Turkey*, judgment of 28 November 1997, Reports 1997-VIII, p. 2707, § 58).*

¹⁵ *Eckle v Germany* [1982] 8130/78 [online:] [<http://www.bailii.org/eu/cases/ECHR/1982/4.html>], accessed on the 06.01.2017.

¹⁶ *Norris v Ireland* [1988] 10581/83 [online:] [[http://hudoc.echr.coe.int/eng#{"itemid":\["001-57547"\]}](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

¹⁷ *Burden v United Kingdom* [2008] op. cit.

¹⁸ *Foka v Turkey* [2008] 28940/95 [online:] [[http://hudoc.echr.coe.int/eng#{"itemid":\["001-57547"\]}](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

As can be seen from the above judgments, no rules are absolute.

3. The Jurisdiction and Actions of the European Court of Human Rights in Deferring to the Judgment of States under the European Convention on Human Rights

Article 5 of the ECHR is relevant to many cases raised by the European prisoners. The article says:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law[...] Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him [...] Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial [...] Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful [...] Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

In the case of *Kalashnikov v Russia*, the plaintiff, a Russian citizen, alleged under article 3 of the Convention – *Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*¹⁹ The Court made a very genuine and controversial decision in this situation. The Judges upheld the violation of Articles: 5,1,6,3, but they did not find any violation, or inhuman or degrading treatment (Kalashnikov was detained in an overcrowded and tiny cell for the almost five years). While overcrowding can surely lead to further, serious health matters, the ECtHR failed to provide the relevant standards which are obligatory under the ECHR – for example proper financial contribution for the prisoner.

Analogical judgment can be presented in the *Price v UK* case.²⁰ Here, the British prisoner with a disability was detained in prison without facilities such as a shower or a proper toilet. The judgment was similar to the above case: lack of humiliation, which corresponds

¹⁹ *Kalashnikov v Russia* [2003] 47095/99 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60606>], accessed on the 06.01.2017.

²⁰ *Price v UK* [2001] 33394/96 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59565>], accessed on the 6.01.2017.

which the State's court verdict. Another example can be found in the *Peers v Greece* case,²¹ where the ECtHR was unable to discover humiliation.

The three above cases show a common paradigm, where the ECtHR failed to find the *intention to humiliate or debase the prisoner*. These are accurate instances where the Court failed to accomplish the relevant standards which are obligatory under the ECHR, and deferred the proper judgement.

Prison law is a relevant area, which can provide solid examples of the ECtHR deferring excessively to the judgment of States, and failing to enforce the minimum rights standards which should apply under the Convention. The Scottish case, *Napier v Scottish Ministers*, can be treated as another precedent.²² In this situation, the European Court agreed with the Scottish national court that the 'slopping-out' measures do not violate Article 3 of the Convention (largely as a result of absence of proper facilities).

Another legal area which requires attention is Freedom of Thought, Conscience and Religion. One controversial case is *Leyla Sahin v Turkey*.²³ This is a momentous example of a situation where the European Court deferred to the judgment of the States and avoided enforcing the relevant solution. Ms. Sahin was a fifth-year medical Student in Istanbul University which banned the wearing of long beards and Muslim headscarves. As a result, she was denied entrance to the university's classes. She brought a case before the Court and claimed under Articles 9 and 14, under the ECHR – Freedom of Thought, Conscience and Religion (Article 9) and Prohibition of Discrimination (Article 14).²⁴ The ECtHR upheld the Turkish national law and the decision made by Istanbul University in the vote (16 judges voted for upheld, one voted for violation). In the Court's view, there was no violation of freedom, as

²¹ *Peers v Greece* [2001] 28524/95 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59413>], accessed on the 06.01.2017.

²² *Napier v Scottish Ministers* [2005] 2005CSIH16 [online:] [<http://www.scotcourts.gov.uk/opinions/CSIH16.html>], accessed on the 06.01.2017.

²³ *Leyla Sahin v Turkey* [2005] 44774/98 [online:] [[http://hudoc.echr.coe.int/eng#{"fulltext":\["sahin"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-70956"\]](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

²⁴ *European Convention on Human Rights*, op. cit.

Turkey is a secular country and the ban was to *comply with the laws and regulations in force*. Similar judgements were delivered in the *Ebrahimian v France*²⁵ and in *SAS v France* cases:²⁶

A general policy or measure that had disproportionately prejudicial effects on a particular group might be considered discriminatory even where it was not specifically aimed at that group and there was no discriminatory intent. This was only the case, however, if such policy or measure had no “objective and reasonable” justification, that is, if it did not pursue a “legitimate aim” or if there was not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised. In the present case, while it might be considered that the ban imposed by the Law of 11 October 2010 had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, this measure had an objective and reasonable justification.

With regard to the above decision, it could be tempting to say that France has a significant amount of discretion from the European Court, especially in the Religion and Right to Manifest belief. On the other hand, complementary experience can be found in UK’s favour. The relevant example is *Pichon v France*²⁷ and in the case against United Kingdom: *Eweida v United Kingdom*.²⁸ In the latter case, the UK did not violate Article 9 of the Convention for dismissing employees for religious reasons. Based on the Court’s decision, British law appropriately protected the rights of employees to manifest their religious beliefs.

In order to conclude regarding jurisdiction and actions of the ECtHR in deferring to the judgment of States under the ECHR, it is beneficial to raise another French case: *Lambert and Others v France*.²⁹ By a vote of twelve to five, the Grand Chamber accepted that the State can

²⁵ *Ebrahimian v France* [2015] 64846/11 [online:] [<https://www.strasbourgconsortium.org/content/blurb/files/Judgment%20Ebrahimian%20v.%20France%20-%20nonrenewal%20of%20contract%20of%20a%20social%20assistant%20refusing%20to%20remove%20her%20veil%20.pdf>], accessed on the 06.01.2017.

²⁶ *SAS v France* [2014] 43835/11 [online:] [https://www.law.umich.edu/.../7.1_CASE%20OF%20S.A.S.%20v.%20FRANCE.pdf], accessed on the 06.01.2017.

²⁷ *Pichon v France* [2001] 49853 [online:] [<https://www.strasbourgconsortium.org/common/document.view.php?DocumentID=4942>], accessed on the 06.01.2017.

²⁸ *Eweida v United Kingdom* [2013] 48420/10 [online:] [<http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115881&filename=001-115881.pdf>], accessed on the 06.01.2017.

²⁹ *Lambert and Others v France* [2015] 46043/14 [online:] [<https://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj7vrXSpq3RAhUEJ8AKHaNZAM0QFggBMAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-5099865-6285870%26filename%3D003-5099865-6285870.pdf&usg=AFQjCNGVv7K-K5fXUWIG1zrwaB1TfKnlw&sig2=oTUDXo450nrxQUCyGBY5aA&bvm=bv.142059868,d.ZGg>], accessed on the 06.01.2017.

cause the death of a patient with a minimal state of consciousness. Based on that decision, Mr. Lambert was disconnected from food and water. Literally, the ECtHR approved the right to die.

4. Interpretation of Results and Conclusion

With regard to the cases analysed, and the approaches of the European Court, it is important to stress that there is no perfect legal and prison system in the world. The judgment in the *Lambert and Others v France* case³⁰ may provide considerable doubt (and indeed hit has). Should the ECtHR decide about human life and death or focus only on basic human rights protection? It is extremely hard to answer to this question, especially in relation to case-law on euthanasia.

In order to answer this, it is significant to review the major factors of the pragmatic and relevant political and socio-cultural system of the Council of Europe member states. In this instance, in the case of *Novruk and Others v Russia*, the ECtHR refused permission for people who are HIV positive to stay in the Russian Federation.³¹ The Court held:

a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights read together with Article 8 (right to private life and family) [...] no violation of Article 34 (right of individual petition) of the European Convention. [...] The court also found that the defective legislation which gave rise to the proceedings in the applicants' case amounted to a structural problem which could generate further repetitive applications. Noting, however, that legislative reform was currently under way in Russia, the court decided at this stage not to formulate any general measures about the proper implementation of its present judgment.

Based on the above judgement, the Russian Federation needed to pay each plaintiff 15,000 EUR for non-pecuniary damage, as well 9,270 EUR for expenses and judgment costs.

The Court justified its judgment on the European and international consensus aimed at the abolition of restrictions on access, stay and residence for people diagnosed as HIV-positive. According to the ECtHR, these people constitute a particularly vulnerable group, and the Russian government has not indicated any objective justification for different treatment on the grounds of health reasons.

³⁰ *Lambert and Others v France* [2015], op. cit.

³¹ *Novruk and Others v Russia* [2016] 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14 [online:] [[http://hudoc.echr.coe.int/eng#{"itemid":\["001-161379"\]}](http://hudoc.echr.coe.int/eng#{)], accessed on the 06.01.2017.

In case, the Court observed a number of potentials for the pilot judgments. Indeed, the problem described above is very broad in nature. However, the European Court has not yet released yet the “full” pilot judgement, as the Russian parliament has been working on legislative action in this area.

As was already mentioned at the beginning of this section, there is no perfect legal system. However, the role of the European Court is crucial and necessary in order to protect core human rights.

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