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| Chapter 6 |

Protection of Human Rights—The Role of the ECHR

Péter PACZOLAY

ABSTRACT

In present-day Europe a multilevel protection of human rights has developed. Freedoms in Europe are protected at the national level, the Council of Europe level, and the European Union level. National courts, especially constitutional courts, defend rights based primarily on the ground of the national constitutions, but also by the international legal instruments. The Court of Justice of the European Union protects the rights embodied in the Charter. The European Court of Human Rights protects the freedoms and rights enshrined in the European Convention of Human Rights.

The chapter analyses only the developments of jurisprudence of the Strasbourg Court, and focuses on three distinct subjects: the protection of ethnic minorities, the right to education, and the human rights challenges of the digital era.

The Court considers the Convention a "living instrument," and by the way of its "innovative interpretation" can protect human rights even outside the area that the Convention's text strictly covers. Through this flexible approach, the Court is able accommodate human rights protection to changing political and social environments. Nevertheless, as the first subject indicates, the efforts are not always successful. In the area of the protection of ethnic and national minorities the result cannot be called a success story, and the case-law is unfortunately contingent. Contrariwise, the subject of education rights provides an example of how the Court could enlarge the applicability of a right previously interpreted very narrowly and elevate the standard of assessment higher than its previous case-law.

The Court could also give adequate answers to the challenges of the digital era, extending human rights jurisprudence to the online world. The approach of the Court is illustrated in connection with two fundamental rights protected by the Convention: first, the Internet and freedom of expression; second, data-protection and retention issues relevant for the Internet in the context of the right to privacy.

KEYWORDS

European Court of Human Rights, minority rights, right to education, internet

1. Introduction: The protection of human rights in the era of transitional justice

This article first reviews for the reader the difficulties of the transition from the Communist regime to a democratic political system based on rule of law. The aim of the transition was not only to introduce human rights into the constitutions but also to provide effective enforcement mechanisms for the protection of those rights.

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After shortly addressing these enforcement and guarantee mechanisms, I present the developments in the jurisprudence of the European Court of Human Rights in three specific fields, namely the protection of ethnic minorities, the right to education, and the challenges of the digital era.

After World War Two, in 1948 the United Nation Universal Declaration of Human Rights opened a new era in the history of protection of human rights. The Declaration codified the universal character of human rights and called for their protection. These objectives were realized by the UN Covenants on civil and political rights, and on economic, social, and cultural rights, respectively.

International treaties protecting freedoms and human rights were adopted also at regional levels, in Europe by means of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 (hereinafter "the Convention").

The protection of human rights has a special historical importance in Central and Eastern Europe. Without digging deeper into the history of this area, it is enough to recall to the dramatic decades in the second half of the 20th century spent under Communist rule. Therefore, the present state of the art of human rights in these countries (I am referring, as in this volume in general, to Croatia, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia) has to be evaluated and understood in light of the difficulties of transitional justice.

First of all, former Communist countries had to provide constitutional guarantees for human rights and introduce the judicial enforcement of those rights after decades when no protection of basic rights existed. Rights in the communist-era constitutions tended to be unenforceable pledges.[1] Although at the beginning the expectations were that these countries would simply adopt international human rights standards and apply them quite automatically to their legal system, the reality has become much more complex. Even with the accession of these States to the Council of Europe and to the European Union, the concept of sovereignty has remained strong, and in some countries the idea of "constitutional identity" has gained popularity. This controversial process cannot be depicted simply as "democratic backsliding" or an "illiberal turn"; one should see the difficult search for balance between sovereign and European values.

In present-day Europe a multilevel protection of human rights has developed. Freedoms in Europe are protected at the national level, the Council of Europe level, and the European Union level. National courts, especially constitutional courts, defend rights based primarily on the ground of the national constitutions, but also by international legal instruments. The Court of Justice of the European Union protects the rights embodied in the Charter. The European Court of Human Rights (hereinafter the Court) protects the freedoms and rights enshrined in the Convention. Although formally the multilevel protection multiplies the guarantees for remedy violations of human rights, this complexity might also create difficulties.

The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political

1 See Osiatynski, 1994, p. 112.

rights set out in the Convention. Since 1998 it is a full-time court and individuals can apply to it directly. The Court's judgments are binding on the member States. The Court is based in Strasbourg.

2. The concept of identity in the case law of the European Court of Human Rights

Identity as a self-identity is a common concept in the social sciences. Although much less common in law and jurisprudence, a specific use has recently emerged, and in the meantime the concept of constitutional identity has become popular, with the most significant area of application and interpretation being European Union law.

Unlike EU law and the Treaty, the European Convention on Human Rights does not contain the concept of identity, nor can the concept of constitutional identity arise in the context of the legal interpretation of the Convention. However, the limited application of the concept of identity can be found in the case law of the European Court of Human Rights, but this differs significantly from the dialogue on constitutional identity within EU law. The essence of the fundamental difference is that the debate over constitutional identity appears in the context of individual states and supranational integration, while in matters related to the interpretation of the Convention, it arises from the question of the identity of collectives within States.

The first-level concept of identity that emerges in the interpretation of the Convention refers to individual self-identity and the physical and psychological integrity related to privacy, and is outside our scope today.

The second level of interpretation and application is collective identity, which can refer to national, ethnic, linguistic, religious, or cultural group identity, or a combination of these.

2.1. National and ethnic identity

In the case law of the Court, collective identity is linked to minority rights. Unlike the International Covenant on Civil and Political Rights, the European Convention provides for the protection of the rights of minorities. The notion of "belonging to a national minority" appears in Article 14, which prohibits discrimination (and in Article 1 of Additional Protocol No. 12, which states the general prohibition of discrimination), as part of the usual indicative list, but the Court linked minority rights to Article 8 (private and family life), Article 10 (freedom of expression), and Article 11 (freedom of association) as well. Even if the Court's jurisprudence is not extensive regarding the issue of identity, in several cases the Court addressed the problem of different aspects of identity.

It is important to mention that among the legal documents adopted by the Council of Europe, the Framework Convention for the Protection of National Minorities (Framework Convention) is Europe's most comprehensive treaty protecting the rights of persons belonging to national minorities. It is the first legally binding multilateral

instrument devoted to the protection of national minorities worldwide, and its implementation is monitored by the only international committee dedicated exclusively to minority rights: the Advisory Committee. It was adopted on November 10, 1994, by the Committee of Ministers, and it entered into force on February 1, 1998. It is now in force in 39 states.

The European Charter for Regional or Minority Languages is the European convention for the protection and promotion of languages used by traditional minorities. Regional or minority languages are part of Europe's cultural heritage and their protection and promotion contribute to the building of a Europe based on democracy and cultural diversity. The Charter, drawn upon the basis of a text put forward by the Standing Conference of Local and Regional Authorities of Europe, was adopted as a convention on June 25, 1992, by the Committee of Ministers of the Council of Europe, and was opened for signature in Strasbourg on November 5, 1992. It entered into force on March 1, 1998.

As regards national-political identity, in the case of the *United Communist Party v. Turkey* the Court faced the problem of how to recognize and protect the identity of minorities in the context of the national identity of the respondent State. The United Communist Party of Turkey ("the *TBKP*"), the first applicant, was a political party that was dissolved by the Constitutional Court. According to the Constitutional Court the *TBKP* sought to promote separatism and the division of the Turkish nation by drawing a distinction in its constitution and programme between the Kurdish and Turkish nations. The identity of the Kurdish minority has been at odds with the Turkish national identity at the state level, and such a political challenge to national identity is defended by the Court. However, the Court avoided addressing the identity problem, stating that "The Court notes that although the *TBKP* refers in its programme to the Kurdish 'people' and 'nation' and Kurdish 'citizens,' it neither describes them as a 'minority' nor makes any claim—other than for recognition of their existence—for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population."[2] With regard to the right to self-determination, the *TBKP* does no more in its program than deplore the fact that because of the use of violence, it was not "exercised jointly, but separately and unilaterally," adding that "the remedy for this problem is political" and that if the oppression of the Kurdish people and discrimination against them are to end, Turks and Kurds must unite. The Court found a violation of Article 11 of the Convention.

In *Sidiropoulos and Others v. Greece*, the recognition of Macedonian minority culture was at stake,[3] in *Gorzelik v. Poland* the recognition of the Silesian national minority.[4] In other cases, the use of the adjectives "Turkish," "Kurdish," and "Macedonian" has become a source of controversy.

2 *United Communist Party of Turkey and Others v. Turkey*, January 30, 1998, § 56, Reports of Judgments and Decisions 1998-I.
3 *Sidiropoulos and Others v. Greece*, July 10, 1998, Reports of Judgments and Decisions 1998-IV.
4 *Gorzelik and Others v. Poland* [GC], no. 44158/98, ECHR 2004-I.

The protection of the ethnic identity of the Roma minority was adjudicated by the Court in the case of *Chapman v. The United Kingdom*.[5] In this and other four similar cases applications were brought by applicants from five British gypsy families, as the judgment identifies them. Sally Chapman bought land in 1985 on which to station her caravan without obtaining prior planning permission. She was refused planning permission for her caravan, as well as permission to build a bungalow. It was acknowledged in the planning proceedings that there was no official site for gypsies in the area and the time for compliance with the enforcement order was for that reason extended. She was fined for failure to comply and left her land for eight months, returning due to an alleged lack of other alternatives and having spent the time being moved on from one illegal encampment to another. In all five cases, the Court considered that the applicants' occupation of their caravans was an integral part of their ethnic identity as gypsies and that the enforcement measures and planning decisions in each case interfered with the applicants' rights to respect for their private and family life. However, the Court found that the measures were "in accordance with the law" and pursued the legitimate aim of protecting the "rights of others" through preservation of the environment. As regards the necessity of the measures taken in pursuit of that legitimate aim, the Court considered that a wide margin of appreciation had to be accorded to the domestic authorities, who were far better placed to reach decisions concerning the planning considerations attaching to a particular site. In these cases, the Court found that the planning inspectors had identified strong environmental objections to the applicants' use of their land that outweighed the applicants' individual interests.

The Grand Chamber generally noted that there was a growing consensus among Member States to recognize the special needs of minorities and to take responsibility for the protection of their security, identity, and way of life (in particular the Framework Convention for the Protection of National Minorities), and not only to protect the interests of minorities but also to value cultural diversity for the community as a whole.[6] Thus, the Court imposed a positive obligation on the States to facilitate the preservation of the traditional Roma way of life. However, in the concrete case the Court did not find a violation.

The ethnic identity of the individual and its self-determination is an essential feature of his private life. In the case *Ciubotaru v. Moldova* the applicant claimed that there had been a violation of Article 8 of the Convention on account of the fact that when collecting and recording information concerning his identity the authorities had refused to register his Romanian ethnic identity and forced on him an ethnic identity (Moldavian) with which he did not identify. The applicant considered that the Moldovan ethnic identity had been created artificially by the Soviets and perpetuated by the new Moldovan authorities for political reasons. He felt humiliated as a result of being forced to assume an ethnic identity that was contrary to his philosophy and

5 *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I.
6 Ibid., § 93.

his inner belief about his true identity. The Court observed that Mr Ciubotaru's claim was based on more than his subjective perception of his own ethnicity. It is clear that he was able to provide objectively verifiable links with the Romanian ethnic group such as language, name, and empathy.[7] For the Court, the State's failure consisted in the inability for the applicant to have his claim to belong to a certain ethnic group examined in the light of the objectively verifiable evidence adduced in support of that claim. The Court therefore concluded that the authorities failed to comply with their positive obligation to secure to the applicant effective respect for his private life. There was accordingly a breach of Article 8 of the Convention.

Among the language rights in the broadest sense, minority language use may also be linked to the use of language in court proceedings (Article 6.3), and the arrested person must be informed in a language he or she understands (Article 5.2) and afforded the services of a free interpreter in criminal proceedings (Article 6.3.e). These rights are also connected to the protection of freedom of expression or to the educational rights (to be discussed below).

2.2. Religious identity under Article 9

Another important aspect of the subject matter is religious identity as formulated in Article 9 of the Convention.

In *Kokkinakis v. Greece* the Court pointed out the role of the Orthodox Church in the preservation of Greek culture and language (*mutatis mutandis* identity) and Hellenism:

> "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[8]

In the case of *Leyla Sahin v. Turkey*, the Court proceeded from the premise that freedom of religion is one of the most important elements in the identity and conception of life of believers.

> "This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion,"

7 *Ciubotaru v. Moldova*, no. 27138/04, § 58, April 27, 2010.
8 *Kokkinakis v. Greece*, 25 May 1993, §§ 14, 31, Series A no. 260-A1.

but no reference was made to identity in deciding and arguing the case.[9] The headscarf is part of their identity for believers and a political symbol for outsiders.[10]

The verdict in the famous and controversial *Lautsi v. Italy* case was widely criticized, saying the Court did not stand up for minorities or for the weak. The Government explained the presence of crucifixes in State-school classrooms as the result of Italy's historical development, a fact that gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition that they considered it important to perpetuate. The Court took the view

> "that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development."[11]

The cross was considered essentially a passive symbol that does not violate the neutrality of the state, while the headscarf is a powerful external symbol whose prohibition protects the neutrality of the state.

According to the evaluation of the literature, the Court has avoided defining the concept of identity, but has emphasized in its judgments that opinions, views, and statements on collective identity cannot be excluded from the democratic debate, nor can the formation of associations be prevented. Attempts by States to do so have been declared unconstitutional by the Court in its judgments, but it has followed this philosophy where, for some reason (for example, due to a failure to exhaust domestic remedies), it has not found a violation of the Convention, unlike the *Gorzelik* case, where the Polish authorities and courts rejected the claim for the registration of an association of Silesians. Accepting the argument of the Supreme Court, the Strasbourg Court stated that Silesians are an ethnic group not entitled to have the rights of a national minority. The Court acknowledged with nice words that associations formed for different purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity, or asserting a minority consciousness, are also important to the proper functioning of democracy. "For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts."[12] Nevertheless, even in this case the Court concluded that there was no violation, as the Grand Chamber found it hard to perceive any practical purpose for this paragraph in relation to the association's proposed activities other than to

9 *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 104, 114, ECHR 2005-XI.
10 Ibid., § 35.
11 *Lautsi and Others v. Italy* [GC], no. 30814/06, § 68, ECHR 2011 (extracts).
12 *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, ECHR 2004-I.

prepare the ground for enabling the association and its members to benefit from the electoral privileges accorded to "registered organisations of national minorities."

It can be noted that the Court could further refine and clarify its conception of identity, but given that it develops its case law on a case-by-case basis (vulgarly: it works from imported material), this development of law is contingent.

3. Education rights

3.1. The right to education in the ECHR—structure, meaning, scope, and interpretation

Article 2 of Protocol No. 1 of the European Convention on Human Rights (more precisely, the Convention for the Protection of Human Rights and Fundamental Freedoms—hereinafter ECHR) defines the right to education as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The inclusion of a right to education among the Convention rights in 1952 was accepted among controversies although the originally proposed formula ("Every person has a right to education") was rejected to avoid imposing positive obligations on the State. Even today, there is an unusually high number of reservations and declarations regarding this Article.[13]

The first sentence of the Article guarantees the right of individuals to education. The second sentence refers to the right of parents to have their children educated in conformity with their religious convictions. The second sentence is considered by the Court as an adjunct of the fundamental right to education.

> "The education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers is particular to the transmission of knowledge and to intellectual development."[14]

The Convention does not require the establishment of any special educational system, but merely guarantees in principle access to the means of education existing at a given time. In spite of its importance, the right to education is not an absolute right, but may

13 Jacobs, White and Ovey, 2014, p. 520.
14 *Campbell and Cosans v. UK*, 1982, February 25, 1982, § 33, Series A no. 48.

be subject to limitations. These are permitted by implication since the right of access "by its very nature calls for regulation by the State."[15]

The objective of the second sentence is the safeguarding of pluralism in education, an essential element in the preservation of the democratic society. It does not guarantee an absolute right to have children educated in accordance with their parents' religious or philosophical convictions.[16]

3.2. Principles

First, the Court underlines the necessity of an effective right of access to educational institutions. Although that Article cannot be interpreted as imposing a duty on the Contracting States to set up or subsidize particular educational establishments or institutions of higher education, any State doing so will be under an obligation to afford an effective right of access to them.[17] Put differently, access to educational institutions is an inherent part of the right to education.[18] The right of access obviously pertains only to existing educational institutions. It includes also the right to obtain official recognition of the studies completed. The beneficiary of education should be able to draw profit from the education received. Education in the majority of cases is not an end in itself.[19]

Second, the Convention does not impose a positive obligation on the States but demands the duty of regulation. The first sentence has a negative formulation not obliging the States to establish or subsidize education of any particular type.[20] However, the second sentence implies some positive obligations on the part of the State.

Third, the right to education is enjoyed at all school levels. The case law mainly refers to primary or elementary schooling, but the Court has extended the rights to secondary[21] and higher education as well,[22] stating that it would be hard to imagine that institutions of higher education do not come within the scope of the first sentence of Article 2 of Protocol No 1.

In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned. Thus, at the university level, which remains optional for many people, higher fees for aliens seem to be commonplace and can be considered fully justified, as clarified by the Court. The opposite holds for primary schooling, which provides basic literacy and numeracy—as well as integration into society—and is compulsory in most countries.[23]

15 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* [=*Belgian linguistic case* (No. 2)] (merits), 23 July 1968, § 2, Series A no. 6, 154; *Leyla Şahin v. Turkey,* no. 44774/98, § 5, 29 June 2004.
16 *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* December 7, 1976, § 50, Series A no. 23.
17 *Belgian linguistic case,* § 3-4; *Leyla Şahin v. Turkey,* no. 44774/98, § 137, June 29, 2004.
18 *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* December 7, 1976, § 50, Series A no. 23.; *Ponomaryovi v. Bulgaria,* no. 5335/05, § 49, ECHR 2011.
19 *Belgian linguistic case,* § 4.
20 *Valsamis v. Greece,* no. 21787/93, December 18, 1996.
21 *Cyprus v. Turkey* [GC], no. 25781/94, § 278, ECHR 2001-IV.
22 *Leyla Şahin v. Turkey,* no. 44774/98, § 137, June 29, 2004.
23 *Ponomaryovi v. Bulgaria,* no. 5335/05, § 49, ECHR 2011.

The fourth principle guarantees education in the national language. Since the Belgian linguistic case the right to be educated in the national language forms part of the general right to education. "The right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be."[24]

3.3. Restrictions

The text of the Convention does not contain expressed list of restrictions or exhaustive list of legitimate aims.

States enjoy a certain margin of appreciation in this sphere, but the Court must satisfy itself that the restrictions are foreseeable for those concerned and pursue a legitimate aim. Furthermore, a limitation will only be compatible with Article 2 of Protocol No. 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[25]

Admission and selection criteria are compatible with the Convention and may be imposed, but the criteria must be foreseeable for those concerned.

School fees may have legitimate reasons, but not unreservedly so, and must not create a discriminatory system. In the *Ponomaryovi* case the applicants of Russian origin had enrolled in and attended secondary schools run by the Bulgarian State. They were later required, by reason of their nationality and of their immigration status, to pay school fees in order to pursue their secondary education. The applicants were thus clearly treated less favorably than others in a relevantly similar situation on account of their personal characteristics.[26]

3.4. Discrimination

The eventual different treatment in the implementation of Article 2 of Protocol 1 should not lead to the violation of the prohibition of discrimination enshrined in Article 14. The applied test is again legitimate aim plus proportionality. The case law of the Court has mainly focused in this respect on three main areas: first, on the discrimination based on nationality, as in the above-mentioned *Ponomaryovi v. Bulgaria* case requiring free access to education as "effective access."

Second, the Court faced the problem of the educational discrimination based on ethnic origin. In particular, there have been numerous cases related to discrimination against the Roma community.[27]

In the case *Horváth and Kiss v Hungary* the applicants, Roma children with mild mental disabilities, were placed in schools for children with mental disabilities where

24 *Belgian linguistic case,* § 3. In the cases *Cyprus v. Turkey* [GC] and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts) the Court reiterated the right to receive education in the national language.

25 *Leyla Şahin v. Turkey,* no. 44774/98, § 154, June 29, 2004.

26 *Ponomaryovi v. Bulgaria*, no. 5335/05, § 49–50, ECHR 2011.

27 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV; *Oršuš and Others v. Croatia* [GC], no. 15766/03, ECHR 2010.

a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a consequence, they received an education that did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education in the view of the Court should help them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Thus, the State is obliged to implement positive measures against segregation.[28]

Third, recently the specific concern of the Court has regarded discrimination against persons with disabilities. The development of the Court's case-law in this regard is worth for a closer look.

3.5. Substantive equality of pupils with disabilities

The former European Commission of Human Rights (the Commission, which functioned until 1998) interpreted the scope of the States' obligation to provide specific arrangements and solutions for disabled persons quite narrowly. A wide measure of discretion had to be left to the appropriate authorities regarding how to make the best possible use of the resources available to them in the interests of disabled children.

In the restrictive practice of the Commission, the second sentence of Article 2 of Protocol No. 1 did not require that a child suffering from a severe mental handicap should be admitted to an ordinary private school rather than placed in a special school for disabled children.[29] Similarly, it did not require the placing of a child with serious hearing impairment in a regular school.[30] The Court followed a similar interpretation. The use of public funds and resources also led to the conclusion that the failure to install an elevator at a primary school for the benefit of a pupil suffering from muscular dystrophy did not entail a violation.[31] In the same vein, the refusal of a single school to admit a disabled child could not be regarded as a breach of the Convention.[32] In the case of *Şanlısoy v. Turkey*,[33] the applicant had complained of a discriminatory breach of his right to education on account of his autism. After examining the facts of the case and the minor's situation, the Court found that there had not been a systemic denial of the applicant's right to education on account of his autism or a failure by the State to fulfill its obligations under Article 2 of Protocol No. 1 taken together with Article 14 of the Convention. It thus dismissed the application. Applications have been aimed at the accommodation in special schools as well. In *Simpson v. UK* the local education authority considered adequate the education of a child in a local large comprehensive school, while the parent wished the dyslexic child to attend a special

28 *Horváth and Kiss v. Hungary*, no. 11146/11, § 127, January 29, 2013.
29 *Graeme v. the United Kingdom* (Commission decision), no. 13887/88, February 5, 1990.
30 *Klerks v. the Netherlands* (Commission decision), no. 25212/94, July 14, 1995.
31 *McIntyre v. the United Kingdom* (Commission decision), no. 29046/95, October 21, 1998.
32 *Kalkanli v. Turkey* (dec.), no. 2600/04, January 13, 2009.
33 *Şanlısoy v. Turkey* (dec.), no. 77023/12, § 60, November 8, 2016.

school. The Commission concluded that it was not its task to assess the standard of the special facilities provided.[34]

However, the Court has gradually developed an approach more in favor of the vulnerable groups through the adoption of two related concepts: inclusive education and reasonable accommodation. Inclusive education brings all children together in the same classrooms, in the same schools. It opens real learning opportunities for groups who have traditionally been excluded, like children with disabilities or speakers of minority languages. A reasonable accommodation is an adjustment made to accommodate or make the system for individuals of a proven need fair. The term was introduced by the Convention on the Rights of Persons with Disabilities (CRPD—adopted by the United Nations on December 13, 2006, and entered into force on May 3, 2008) The refusal to make accommodation results in discrimination. The CRPD defines a "reasonable accommodation" as

> "... necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

In the case of *Çam v. Turkey*, the National Music Academy refused to enroll a blind person even though she had passed the examination. The Academy had not even considered special accommodations to meet her special needs. The Court considered that discrimination on grounds of disability also covers refusal to make *reasonable accommodation*. The Court underlined that it must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. The Court noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasized that those international instruments have recognized *inclusive education* as the most appropriate means of guaranteeing the fundamental principles.[35]

The Court observed that the refusal to enroll the applicant in the National Music Academy was based solely on the fact that she was blind and that the domestic authorities had at no stage considered the possibility that reasonable accommodation might have enabled her to be educated in that establishment. The Court considered that the applicant was denied, without any objective and reasonable justification, an opportunity to study in the National Music Academy solely on account of her visual disability. It therefore concluded that there had been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. The Court was aware that every child has his or her specific educational needs, and this applies particularly

34 *Simpson v. the United Kingdom* (Commission decision), no. 14688/89, December 4, 1989.
35 *Çam v. Turkey*, no. 51500/08, February 23, 2016 (§ 64).

to children with disabilities. In the educational sphere, the Court acknowledges that reasonable accommodation may take a variety of forms, whether physical or non-physical, educational or organizational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation, or appropriate facilities. Finally, the Court emphasized that it is not its task to define the resources to be implemented in order to meet the educational needs of children with disabilities. The national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this respect.

In the case of *Enver Şahin v. Turkey* while the applicant was a first-year mechanics student in a technical faculty of a University, he was seriously injured in an accident that left the lower limbs of his legs paralyzed. He asked the faculty to adapt the university premises in order to enable him to resume his studies. The judgment reiterated that education is geared to promoting equal opportunities for all, including persons with disabilities. Inclusive education indubitably forms part of the States' international responsibility in this sphere.[36]

The judgment also addressed the other concept, that of the respect for the "reasonable accommodation—necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case"—which persons with disabilities are entitled to expect in order to secure their "enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 CRPD). The Court concluded that the national authorities, including in particular the academic and judicial authorities, had not reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake, and that this resulted in the violation of the Convention.[37]

After these developments in the related jurisprudence of the Court, its practice still leaves open certain questions for the standards of reasonable accommodations. Two cases on inclusive education decided by decisions at the Committee level after cautious balancing rejected the applicants' claims for violation.

Thus, there had not been a systemic denial of the applicant's right to education in *Bettina Dupin v. France*[38] when an autistic child who had been denied admission to a mainstream school was directed to a specialized institution. In my view the Court did not turn away from its previous case-law, having taken into due consideration the situation of the child (the applicant's son) and the assessment of the domestic authorities, courts, and experts, who found it more appropriate in this autistic child's case to enroll him in a special medico-educational institute.

36 *Enver Şahin v. Turkey,* no. 23065/12, § 55, January 30, 2018.
37 *Enver Şahin v. Turkey,* no. 23065/12, § 68, January 30, 2018.
38 *Dupin v. France,* decision, no. 2282/17, December 18, 2018.

In the case of *Stoian v. Romania*[39] the Court took into consideration that the applicant was never completely deprived of education, and she continued her studies despite the lack of personal assistance, and that she advanced through the school curriculum. When evaluating whether the state authorities complied with their duty to provide reasonable accommodation, the Court took into consideration that the authorities made efforts to find and retain a suitable personal assistant for him. The authorities—in compliance with the international standards in the field, which recommend inclusive education for children with disabilities—recommended that the child attend mainstream schools throughout his education. When the parents alerted them to the lack of accessibility and of reasonable accommodation in school, the domestic courts ordered the local authorities to take concrete measures in the first applicant's favor. The courts also gave interim orders compelling the authorities to make immediate accommodation for the first applicant in school. Thus, the Court rightly observed that the domestic courts reacted quickly and adequately to changes in the first applicant's situation and renewed their instructions to the administrative authorities whenever they found that the measures taken by those authorities were insufficient. The Court took note of the difficulties encountered by the State in finding a suitable personal assistant for the first applicant and could not ignore the fact that some of these difficulties were created by the parents themselves. In the understanding of the Court, the authorities did not turn a blind eye to the first applicant's needs, but allocated resources to the schools attended by him in order to help accommodate his special requirements. Therefore, the Court, in accordance with its case law, concluded that the domestic authorities complied with their obligation to provide reasonable accommodation "not imposing a disproportionate or undue burden" and, within their margin of appreciation, to allocate resources in order to meet the educational needs of children with disabilities, and there was no violation of Article 8 of the Convention or of Article 2 of Protocol No. 1 to the Convention taken alone or together with 14 of the Convention.

Recently, in the *G.L. v. Italy* Chamber judgment, the Court concluded that the inability of an autistic child to receive the specialized learning support to which she was entitled by law during her first two years of primary school, had entailed a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1.[40] The national authorities had not determined the child's real needs or the possible solutions to allow her to attend primary school in conditions that were equivalent as far as possible to those enjoyed by other pupils, without imposing a disproportionate or undue burden on the administration. However, in this case based on very similar facts that in *Stoian*, the Court raised the threshold. The case concerned a girl with non-verbal autism who had a special assistant during kindergarten, but this was discontinued when she started elementary school. As the girl according to Italian law had a right to special assistance, the parents initiated court proceedings. Their claim was

39 *Stoian v. Romania,* no. 289/14, June 25, 2019.
40 *G.L. v. Italy,* no. 59751/15, September 10, 2020.

rejected by the domestic administrative courts, mainly based on the argument that the local authorities had taken the necessary steps but that there had been a reduction of resources allocated to the region. The justification of the lack of resources caused by budgetary restrictions was not accepted by the Strasbourg Court. The Court went even further: it underlined that limitations caused by budgetary restrictions should impact the educational offer for both non-disabled and disabled pupils in an equivalent way. The concurring opinion of Judge Wojtyczek rightly pointed out that the Court is not consistent in its interpretation of the duty of reasonable accommodation. In any case, *G.L. v. Italy* elevated the standard of assessment higher than in its previous case law.

4. Fundamental Rights in the Age of Digitalization

4.1 Digitalization and human rights: Advantages and risks

Without doubt, the most important challenge of the 21st century is cyberspace and the growing role of digital technologies. Politicians, experts, lawyers, human rights advocates, and civil society organizations soon grasped the impact of the digital era on human rights. Without entering into the details of the respective debate, let me give only some examples of the possible advantages and negative consequences.

On the positive side, one can mention the facilitation of transparency mechanisms (among others against corruption), the digitalization of communication tools that opens up new perspectives for freedom of speech and opportunities for active and interactive communication and to share information with incomparably wider audiences than ever before, extended political participation, wider access to knowledge in education—these all are benefits attributable above all to the Internet.

On the other hand, digital technology exposes human rights to unprecedented risks such as filtering content or blocking access to new technologies and their use for censorship and surveillance. The existence of new technologies in itself creates new inequalities like the "digital divide" (the gap between people with effective access to digital technologies, and those with limited or no access—"IT analphabetism") and might lead to extreme concentrations of power.

The main problem, in my view, that the digital era creates for human rights stems from the following factors. It is without question that the speed of technological progress is by far faster than the legislative response to it. Historically, the first international document reflecting the potential impact of new technologies on fundamental rights was the UN General Assembly Resolution 2450 (XXIII) "Human rights and scientific and technological developments," adopted on December 19, 1968, which initiated interdisciplinary studies to define respective new standards of protection of human rights. The resolution laid down the fundamental features of the approach to the ambivalent relation of technological progress and human rights.

The second problem is that technology, digitalization, and cyberspace go hand in hand with globalization. Technologies cannot be limited to space, to the territory of a State, or to the control of a government, as they go beyond the jurisdictions of

these spaces. Regulatory regimes have shifted from States and treaties between States to new global and transnational institutions and unclear forms and types of soft governance.

The third factor is the continuously growing variety of the fields, disciplines, and topics affected by the dynamic rise of new technologies. If we look just at the case law of the European Court of Human Rights related to new technologies, we see decisions on the following: electronic data, e-mail, Global Positioning System, Internet, mobile telephone applications, musical copyright, radio communications, satellite dish, telecommunications, the use of hidden cameras, video surveillance, the "right to be forgotten," etc. In any case, all legal fields are concerned with solving the legal problems raised by new technologies in criminal law, private law, intellectual property law, and administrative law.

Within this general, wide-ranging context I limit myself to the presentation of the case-law of the ECHR in two fields:

1. The Internet and freedom of expression (Article 10),
2. Data protection and the Internet (Article 8).

4.2 Internet and freedom of expression

Freedom of expression is guaranteed by Article 10 of the Convention.[41] Internet publications fall within the scope of Article 10 and its general principles, but the particular form of that medium has led the Strasbourg Court to rule on certain particular restrictions that have been imposed on freedom of expression on the Internet. Freedom of expression, as protected by Article 10 § 1, constitutes for the Court an essential basis of a democratic society. Limitations on that freedom foreseen in Article 10 § 2 are interpreted strictly. Interference by States in the exercise of that freedom is possible, provided it is "*prescribed by law*" and "*necessary in a democratic society*,"; that is to say, according to the Court's case law, it must correspond to a "*pressing social need*," be *proportionate to the legitimate aim* pursued within the meaning of the second paragraph of Article 10, and justified by judicial decisions that give relevant and sufficient reasoning.

In the judgment *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*,[42] the Court for the first time acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet. In that case the applicants had been ordered to pay damages for republishing an anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology—even though the latter was not provided for by law. The national authorities

41 For a comprehensive analysis of the Court's related jurisprudence, see European Court of Human Rights, 2015. See also European Court of Human Rights, 2021, pp. 99–106.
42 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, May 5, 2011.

must thus be careful to respect the duty of journalists to disseminate information on questions of general interest, even if they have recourse to a degree of exaggeration or provocation. However, the protection of journalists is subject to the proviso that they act in good faith and provide reliable and precise information in accordance with *responsible journalism*.[43]

The Court has applied these general principles to cases concerning *online publication*: "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally."[44] It is for the domestic courts—which are better placed than the Court to appreciate all the facts and evaluate the impact of the statements made—to weigh all the interests in issue. A proper balance must be struck between the competing interests and there must be no arbitrariness in the decisions of the domestic courts. That was the Court's view in a case brought by an association whose aim was to fight corruption in public administration. The Court set out the following principle, applicable in all circumstances: "The distortion of the truth, in bad faith, may sometimes overstep the limits of acceptable criticism: a true statement may be accompanied by additional remarks, value judgments, suppositions, even insinuations that could give the public the wrong picture."[45] In this case the militant association had published a press release on its website relating to light heating oils and a case of massive tax evasion that had received widespread media attention. The press release took the form of a summons addressed to an MP and Vice-President of the Chamber of Deputies, who subsequently became Interior Minister and who was invited to clarify his relationship with certain people. The association complained about the damages it had been ordered to pay. The courts had punished it for having published information about the MP that was inaccurate and distorted, and therefore misleading. The Court found no violation of Article 10.

Delfi AS v. Estonia was the first case in which the Court had been called upon to examine a complaint concerning the liability of a company running an Internet news portal because of comments posted on the portal by its users. The portal provided a platform, run on commercial lines, for user-generated comments on previously published content. In such cases some users—whether identified or anonymous—can post clearly unlawful comments that infringe the personality rights of others. The Court held that the commercial operator of an Internet news portal may be held accountable for offensive comments posted on the portal by users. It is important to underline that the posted comments violated the personality rights of others and constituted hate speech.

The Grand Chamber then laid down four criteria for determining whether or not the finding that Delfi AS was liable for comments posted by third parties had violated its freedom of expression. It took into account:

1. the context and contents of the comments,

43 *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V.
44 *Delfi AS v. Estonia* [GC] § 133.
45 *Růžový panter, o.s. v. the Czech Republic*, no. 20240/08, § 32, February 2, 2012.

2. the liability of the authors of the comments,
3. the measures taken by the applicants and the conduct of the aggrieved party,
4. the consequences for the aggrieved party and for the applicants.

After the examination of these criteria, in the end the Court found no violation of Article 10.

Clearly the publication of false information on the Internet is not protected by the Convention. However, the "duties and responsibilities" of journalists do not go so far as to require the removal from the public electronic archives of the press of all traces of past publications deemed defamatory in final court decisions. In the *Węgrzynowski and Smolczewski v. Poland* case, the Court found no violation of Article 8 in respect of a press article considered defamatory that had been kept in a newspaper's Internet archives. Indeed, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention. Furthermore, it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications that have in the past been found defamatory by final judicial decisions.[46]

In the case of *Magyar Tartalomszolgáltatók Egyesülete and* Index.hu *Zrt v. Hungary*, the Court reiterated that although not publishers of comments in the traditional sense, Internet news portals had to assume duties and responsibilities. However, the Court considered that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate websites' right to respect for its commercial reputation.[47]

The case of *Magyar Jeti Zrt v. Hungary* concerned a finding of the applicant company as liable for posting a hyperlink to an interview on YouTube that was later found to contain defamatory content. The applicant company complained that by finding it liable for posting the hyperlink on its website the domestic courts had unduly restricted its rights. The Court held that there had been a violation of Article 10 of the Convention. It underscored in particular the importance of hyperlinking for the smooth operation of the Internet and distinguished the use of hyperlinks from traditional publishing—hyperlinks directed people to available material rather than provided content. Updating its case law on these issues, the Court set down elements that need to be considered under Article 10 when looking at whether posting a hyperlink could lead to liability and said that an individual assessment was necessary in each case. Objective liability for using a hyperlink could undermine the flow of information on the Internet, dissuading article authors and publishers from using

46 *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, July 16, 2013.
47 *Magyar Tartalomszolgáltatók Egyesülete and* Index.hu *Zrt v. Hungary*, no. 22947/13, February 2, 2016.

such links if they could not control the information that they led to. That could have a chilling effect on freedom of expression on the Internet.[48]

It is clear from the wording of Article 10 of the Convention that its scope includes the right to receive and impart information. In addition to the substance of information, Article 10 also applies to the various forms and means by which it is transmitted and received, since any restriction imposed on the means necessarily interferes with the right to receive and impart. The Court broadened the scope of its interpretation and acknowledged that the "*freedom to receive information*" includes the right of access to information. Although the public has a right to receive information of general interest, Article 10 does not guarantee an absolute right of access to all official documents. However, once a national court has granted access to documents, the authorities cannot obstruct the execution of the court order. In the context of historical research, the Court has found that access to original documentary sources in State archives is an essential element of the exercise of Article 10 rights.[49]

Associations of civil society whose function is similar to the role of the press benefit equally from the strong protection of Article 10. The authorities cannot create obstacles and barriers to the gathering of information in matters of public importance, especially if they hold a monopoly of the information.[50]

4.3. Data protection and retention issues relevant for the Internet

The protection and retention of personal data clearly falls within the scope of private life as protected by Article 8 of the Convention. Article 8 encompasses a wide range of interests—namely private and family life, home and correspondence. Article 8 protects personal information that individuals can legitimately expect should not be published without their consent, such as their home address. Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, e-mail, and other forms of communication; and informational privacy, including online information.

The Internet differs as an information tool from the printed press, and the risk it poses to the rights protected by Article 8 of the Convention is certainly higher.[51]

Among other challenges (data portability, the right to be forgotten), questions of surveillance are all the more relevant in the context of the Internet, as the evolution of Internet technology has included the rapid development of equipment and techniques to monitor online communications. In the case of *Big Brother Watch and Others v. the United Kingdom*,[52] the applicants complained about the interception of communications by intelligence services. The Grand Chamber found that when viewed as a whole, the regime, despite its safeguards, had not contained sufficient "end-to-end"

48 *Magyar Jeti Zrt v. Hungary,* no. 11257/16, December 4, 2018.
49 *Kenedi v. Hungary,* no. 31475/05, May 26, 2009.
50 *Társaság a Szabadságjogokért v. Hungary,* no. 37374/05, April 14, 2009.
51 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine,* no. 33014/05, § 63, May 5, 2011.
52 *Big Brother Watch and Others v. the United Kingdom,* nos. 58170/13 and 2 others, September 13, 2018.

safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. In particular, the following fundamental deficiencies in the regime had been identified: the absence of independent authorization, the failure to include the categories of selectors in the application for a warrant, and the failure to subject selectors linked to an individual to prior internal authorization. Those weaknesses concerned not only the interception of the contents of communications but also the interception of related communications data. Therefore the Court concluded in violation of Article 8 (right to privacy).

As regards the complaint under freedom of expression, the Court observed that under the bulk interception regime, confidential journalist material could have been accessed by the intelligence services intentionally through the deliberate use of selectors or search terms connected to a journalist or news organization. As that situation would very likely result in the acquisition of significant amounts of confidential journalistic material, it could undermine the protection of sources to an even greater extent than an order to disclose a source; the interference would be commensurate with that occasioned by the search of a journalist's home or workplace. Therefore, before the intelligence services used selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms had to be authorized by a judge or other independent and impartial decision-making body vested with the power to determine whether they had been "justified by an overriding requirement in the public interest." The regime, which had interfered with their right to freedom of expression, did not comply with the above requirements, and there was a violation of Article 10.

The Court would not exclude that the monitoring of an employee's telephone, e-mail or Internet usage at the place of work may be considered "necessary in a democratic society" in certain situations in pursuit of a legitimate aim. However, the member States have an obligation to provide sufficiently clear and accessible rules governing the use of the Internet in the workplace. Monitoring of employees' computer use was the subject of the case *Bărbulescu v. Romania*.[53] This case concerned the decision of a private company to dismiss an employee—the applicant—after monitoring his electronic communications and accessing their contents. The applicant complained that his employer's decision was based on a breach of his privacy and that the domestic courts had failed to protect his right to respect for his private life and correspondence. The Grand Chamber held that there had been a violation of Article 8 of the Convention, finding that the Romanian authorities had not adequately protected the applicant's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake. In particular, the national courts had failed to determine whether the applicant had received prior notice from his employer of the possibility that his communications might be monitored; nor had they had regard either to the fact that he had not been

53 *Bărbulescu v. Romania* [GC], no. 61496/08, September 5, 2017.

informed of the nature or the extent of the monitoring, or the degree of intrusion into his private life and correspondence. In addition, the national courts had failed to determine, first, the specific reasons justifying the introduction of the monitoring measures; second, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and third, whether the communications might have been accessed without his knowledge.

The Internet can also relay personal information that is not meant initially to be posted online. A simple press release, for example, issued in an individual case with no intention of its being posted on the Internet may well be picked up by third parties and discussed on the Web to the detriment of the individual's right to protection of private life.[54]

The case *Szabó and Vissy v. Hungary*[55] concerned Hungarian legislation on secret anti-terrorist surveillance introduced in 2011. The applicants complained in particular that they could potentially be subjected to unjustified and disproportionately intrusive measures within the Hungarian legal framework on secret surveillance for national security purposes. They notably alleged that this legal framework was prone to abuse, notably for want of judicial control.

In this case the Court held that there had been a violation of Article 8 of the Convention. It accepted that it was a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies, including massive monitoring of communications, in pre-empting impending incidents. However, the Court was not convinced that the legislation in question provided sufficient safeguards to avoid abuse. Notably, the scope of the measures could include virtually anyone in Hungary, with new technologies enabling the Government to intercept masses of data easily concerning even persons outside the original range of operation. Furthermore, the ordering of such measures was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary and without any effective remedial measures, let alone judicial ones, being in place.

As a conclusion we can say that the Court's jurisprudence is based on the principle expressed very clearly by the following motto: *"The same rights that people have offline must also be protected online."*[56]

5. Conclusion

The examination of three specific fields and how the protection of human rights is exercised by a special international human rights court affords us interesting lessons.

54 *P. and S. v. Poland*, (no. 57375/08, 30 October 2012). §§ 130–134.
55 *Szabó and Vissy v. Hungary*, no. 37138/14, January 12, 2016.
56 UN Human Rights Council, *Promotion and protection of all human rights…*, A/HRC/21/L.6 (September 21, 2012).

The first observation regards the method with which the Strasbourg Court tries to address problems and phenomena that are not regulated by the text of the Convention. The Court considers the Convention a "living instrument," and by the way of its "innovative interpretation" can protect human rights even outside the area that the Convention text's strictly covers. This seems successful in the case of the challenges developed by the digital era. The same cannot be said if we look at the highly important and sensitive issue of the protection of ethnic minorities, an area that seems to be a failure of the Convention system. This affects Central Europe, not exclusively but seriously, as an area where minority rights are a burning issue, while the subject of education rights provides an example of how the Court could enlarge the applicability of a right previously interpreted very narrowly.

Further, as I have already underlined, these are only three specific segments of the jurisprudence of a Court that does not stand alone in protecting human rights. The Court always emphasizes its "subsidiary" role. The subsidiarity principle requires the member States to be primarily responsible for providing effective remedies for human rights violations (Articles 1 and 13). The Strasbourg Court is secondary to the national courts in adjudicating violations of Convention rights. All possible domestic remedies have to be previously exhausted, and the Strasbourg Court is not a court of appeal from national courts. Moreover, the Court strongly emphasizes the "margin of appreciation" of the States when applying the Convention. Human rights have a universal character, but they are applied in the context of national legal systems.[57]

57 The principle of the "margin of appreciation" elaborated by the Court was inserted into the preamble of the Convention by Protocol 15, adopted in 2013 and entered into force in 2021: "... the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

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