CHARLES UNIVERSITY IN PRAGUE

FACULTY OF SOCIAL SCIENCES

Institute of Political Studies

Department of International Relations

Master Thesis

2020 **Oleksandra Konoplia**

CHARLES UNIVERSITY IN PRAGUE

FACULTY OF SOCIAL SCIENCES

Institute of Political Studies

Department of International Relations

Protection against Discrimination under the European Convention on Human Rights

Master's Thesis

Author: Oleksandra Konoplia

Supervisor: JUDR. Milan Lipovsky, Ph.D.

Study programme: International Relations

Year of the defence: 2020

Declaration

1. I hereby declare that I have compiled this thesis using the listed literature and resources only.

2. I hereby declare that my thesis has not been used to gain any other academic title.

3. I fully agree to my work being used for study and scientific purposes.

In Prague Oleksandra Konoplia

Reference

KONOPLIA, Oleksandra. *Protection against Discrimination under the European Convention on Human Rights*. Praha, 2020. 74 pages. Master's thesis (Mgr.). Charles University, Faculty of Social Sciences, Institute of Political Studies, Department of International Relations. Supervisor JUDr. Milan Lipovsky, Ph.D.

Length of the thesis: 20 402 characters (with spaces)

Abstract

The thesis is focused on the examination of the scope of Article 14 of the European Convention of Human Rights, theoretical framework, and legal basis of the concept of discrimination. The paper presents an analysis of the caselaw of the European Court on Human Rights, how the latter operationalises the issue of inequality, and which inaccuracies of interpretation it leaves. The primary aim is to challenge the system of protection against discrimination under the Article 14 as well as the role of the national actors in its development. The thesis examines the level of compliance among signatories of the Convention with its anti-discriminatory provisions and focuses on the individual capacities of the states to satisfy judgements of the European Court on Human Rights. The usage of the comparative approach also helps to analyse the role of local non-governmental organisations in the process of compliance with human rights obligations under the Convention among signatories. The thesis aims to show why the level of protection against discrimination differs from the one country to another and which obstacles they face on the path towards the respect for human rights.

Abstrakt

Práce je zaměřena na zkoumání rozsahu článku 14 Evropské úmluvy o lidských právech, teoretický rámec a právní základ pojmu diskriminace. Příspěvek představuje analýzu judikatury Evropského soudu pro lidská práva, jak tento soud operuje otázku nerovnosti a jaké nepřesnosti výkladu ponechává. Primárním cílem je zpochybnit systém ochrany před diskriminací podle článku 14 a úlohu vnitrostátních aktérů v jeho rozvoji. Diplomová práce zkoumá míru souladu mezi signatáři úmluvy s jejími antidiskriminačními ustanoveními, zaměřuje se na jednotlivé schopnosti států plnit rozsudky Evropského soudu pro lidská práva. Použití komparativního přístupu také pomáhá analyzovat roli místních nevládních organizací v procesu dodržování závazků v oblasti lidských práv podle úmluvy mezi signatáři. Práce si klade za cíl ukázat, proč se úroveň ochrany před diskriminací v jednotlivých zemích liší, a jakým překážkám čelí na cestě k dodržování lidských práv.

Key words

Discrimination, human rights, violation, European Convention on Human Rights, Article 14, European Court of Human Rights, compliance, Council of Europe, non-governmental organisations.

Klíčová slova

Diskriminace, lidská práva, porušování, Evropská úmluva o lidských právech, článek 14, Evropský soud pro lidská práva, dodržování předpisů, Rada Evropy, nevládní organizace.

Název práce: Ochrana před diskriminací podle Evropské úmluvy o lidských právech.

Table of Contents

Introduction

Adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights or ECHR) in 1950, brought an important contribution to the protection of fundamental human rights by the introduction of the core principles of protection and establishment the international judicial authority - European Court of Human Rights (here and after ECtHR). Ratified by 47 countries, the Convention became a part of the national laws and enforced countries to move their behaviour towards the respect for human rights. One of the provisions to which an international community brought the most attention is Article 14 which prohibits discrimination on any basis and aims to secure individuals from unjustified, unequal treatment.

However, despite the states' agreement to obey the rules of provisions of the Convention, discrimination at all levels remains the scourge of modern society. The thesis do not seeks to answer the question of why in the 21st century many people of different ages still face societal aggression on the grounds of race, religion, gender identity, national or social origin, or other status, but rather to estimate the amount of protection on the national level as well as potential limitations of the successful functioning of this system. An effective protection of fundamental rights cannot be reached without proper supervision of the international community. As a leading human rights organisation in Europe, the Council of Europe (CoE) promotes cooperation between its members, above all, in the fields of the protection of human rights and respect towards the rule of law. Despite the efforts the CoE put into enhancing states' compliance with obligations under the Convention, it may seem that protection against discrimination remains a salient issue and hence, requires some detailed research.

This master's thesis presents the analysis of the caselaw of the European Court of Human Rights, how it interprets Article 14, and the scope of its provisions. On the basis of the ECtHR judgements we seek to identify the level of compliance with Article 14 of the ECHR by the 10 members of the Council of Europe that have received the highest number of convictions in violation of the Article at issue. The thesis questions an existing behaviour of 10 members of the Council of Europe on the actual level of protection against discrimination on different grounds. We seek to examine the effectiveness of existing protection against discrimination on all grounds among certain CoE members, as well as efforts they put towards reducing discrimination in this field.

The thesis starts with elaboration on chosen theoretical background, which focuses on the concept of discrimination and, how it is explained in different theoretical approaches. This part also analyses the scope of the concept from the legal perspective, how it functions in official legal

documents, and why it has been criticised among scholars. In further chapters we analyse how the European Court on Human Rights operates components of the concept of discrimination in the meaning of Article 14 of the Convention and which limitations of before mentioned phenomena caselaw establishes. The last chapter of the thesis reveals potential obstacles that prevent countries from complying with their obligations under Article 14, as well as the factors that may potentially increase an adherence to anti-discriminatory provisions among states. One of the factors we are concerned about is local non-governmental organisations, their status in the particular states, and the role in the enhancement of compliance with provisions of Article 14 among them.

1. The concept of discrimination

In literature the concept of discrimination is a subject of debates because of the wide range of disciplines which seek to explain the phenomena. We can examine how different those definitions while comparing them, for example, with the one existing in the legal sphere, which defines discrimination as *«any differential treatment of a person or group of persons based on a prohibited ground, which has no objective and reasonable justification»*.[1] In every other official document, whether it is European Convention on Human Rights or International Covenant on Civil and Political Rights reveals the principle of prohibition against discrimination without explaining the concept as such. However, in the interpretation of mentioned Conventions particular roles play the European Court on Human Rights and UN Human Rights Committee, that give the concept of discrimination wide meaning. Both bodies examine whether a treatment was discriminatory or not by investigating if the grounds of unequal treatment were reasonable or not (Burden v. The United Kingdom, Application no. 13378/05, para. 60), whether the differentiation was *«compatible with the provisions of the Covenant»*.[2] European Court explains discrimination as *«treating differently, without an objective and reasonable justification, persons in similar situations»*[3], paying a particular attention to identification of analogy of situations where discriminatory treatment occurred. In this chapter we seek answers for questions about:

1. What is discrimination?

2. What are the differences between direct and indirect discrimination?

3. Which approach to discrimination use official legislative documents and whether the meaning of the concept changes from the source to source?

4. Which definition could be considered as full and suitable in legal terms?

1.1. Theoretical approaches

What is discrimination?

This section will concentrate on those approaches to discrimination that are closely related to

---

[1] Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation N. 7 on National legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, 13 December 2002, CRI (2003)8.

[2] *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic,* Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992 (1995), para. 11.5.

[3] *Maktouf et Damjanović v. Bosnia and Herzegovina*, Applications no. 2312/08 and 34179/08, Council of Europe: European Court of Human Rights, 18 July 2013, para. 81.

the legal one mentioned above, but also aim to supplement and widen the official notion of the concept. Those are varieties of sociological and intersectional "contextualized" approaches.

Social constructivist theory rejects the idea of the legal one and can be distinguished among others that explain the given concept through a "macro-lens", putting on the foreground a social processes which leaded to the emergence of discrimination, but not the individual characteristics of a human such as gender, race, religion, birth origin, etc.[4] Scholars argue, that the common practice among individuals is to separate one particular social category through which people distinguish themselves from each other (e.g., race, sex, or gender) as a trait that *"can be manipulated as a treatment"* instead of social phenomena, accurate analysis of which can help us to understand motives of particular behaviour.[5]

Social constructivist theory, on the contrary, do not see race, or other grounds of discrimination, as one that arises from biological differences, but as a consequence of historical social processes (e.g., colonization, immigration, or slavery). Even though such claims try to explain the phenomena of discriminatory treatment, it does not help to clearly identify discrimination based on a particular ground by itself. While detecting discrimination, it is important to take into account the system of social meanings and practices inside every category (ground), cultural preconditions, and how exactly they have caused discriminatory treatment in particular society, and to rely on moral theory which helps to explain why we morally disavow one or another social category.[6]

Regarding this, I. Kohler-Hausmann proposes a definition of discrimination that takes into consideration afore mentioned features of the concept, as follows: *"Discrimination is an action or practice that acts on or reproduces an aspect of the category in a way that is morally objectionable"*.[7] This way of defining discrimination also allows for elements that are inserted into a concept of disparate impact (indirect discrimination) which we will talk about later in this chapter. Nevertheless, in a "morally objectionable way" it is an abstract and inaccurate category, as what is

---

[4] Kohler-Hausmann, I. (2014). *Discrimination*. Available at: https://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0013.xml.

[5] Kohler-Hausmann, I. (2019). *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination,* p. 1181. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050650.

[6] *Ibid.,* p. 1169.

[7] *Ibid.,* p. 1171.

objectionable for one, is unobjectionable for others. In this case it is hard to define whether certain a action or practice is discriminatory or not.

Other sociologists define discrimination as *"unjustifiable negative behaviour towards a group or its members, where behaviour is adjudged to include both actions towards, and judgements/ decisions about, group member,"*[8] emphasising also a question of "deservingness of the target" to be discriminated against. Deservingness is understood as a criterion through which the perpetrator affects the target because of their affiliation to another category (e.g., race, sex or others).[9] While detecting discrimination, it is necessary to understand preconditions of such behaviour and, as we already saw, researchers pay particular attention to historical and social processes underlying discriminatory action. Key feature of most definitions are concentrated on behaviour and most of the scholars put an accent on the distinction of discrimination from racial prejudices, stereotypes (beliefs), and racism.[10] This is because all of them refer to negative attitudes towards members of different groups and are often based on limited, incorrect information and rarely change.[11]

Discrimination is a name given to an outcome of prejudices or stereotypes, but it does not mean that those prejudices necessarily lead to an act that we describe as discriminatory. While prejudices are mostly beliefs about different social groups that are often blamed to be the cause of some problems, discrimination is described as an action towards those groups, that puts their members into unfavourable position.[12] Moreover, prejudice itself includes two aspects: one of which consists of aforementioned false assumption about "target" and the other simply rejects genuine knowledge about the group or person that is discriminated against.[13] It also absolutely

---

[8] Al Ramiah, A., Hewstone, M., Dovidio, J.F., Penner, L.A. (2010). *The social psychology of discrimination: theory, measurement and consequences.* In: Making Equality Count: Irish and International Research Measuring Equality and Discrimination, p. 85.

[9] *Ibid.*

[10] Pager, D., Shepherd, H. (2008). *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets.* In: Annual review of sociology, *34*, 181–209, p. 182. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2915460/.

[11] Al Ramiah et. al. (2010), p. 84-85.

[12] Giddens, A., Griffiths, S. (2008). *Sociology*. In: Cambridge, Malden: Polity, 2008. Available at: https://polity books.com/giddens7/studentresource/summaries/Student_Summary_16.asp.

[13] Laki, I. (2014). *The concept of discrimination nowadays.* In: Struktúrafordulók. Studies in Political Science - Politikatudományi Tanulmányok (2014). MTA TK Politikatudományi Intézet, Budapest, pp. 252-259, p. 190. Available at: http://real.mtak.hu/25124/.

accepts the wrong knowledge, leading us to conclude that non-rational line of thoughts and actions are crucial elements of discrimination.[14]

From this perspective, L. Halldenius proposes a "Standard View" on discrimination as *"decision-making representing (or resulting in) a disadvantage for someone (P) on grounds that are irrelevant in the decision-making context (C)."*[15] Regarding this concept of discrimination, taking the ground X as a personal characteristic, it is necessary for X to be irrelevant or irrational in C.[16] Halldenius explains, that it happens in cases when an employer hires an able-bodied applicant instead of a disabled even though this particular disability does not keep a person from effective fulfilment of his working obligations or when promotion depends on sexual orientation of the individual etc. When personal characteristic starts to influence our moral principles (becomes morally relevant), then we can conclude that the particular decision is made on morally relevant grounds even though as a matter of principle personal characteristic should be morally irrelevant by itself.[17] What really matters is "context" as, for example, in some cases gender may play a role (hiring a woman as a psychologist for a male group where its members can be vulnerable to such decision and the therapy will have no effect) and in others do not (when hiring a woman as tram/ train/bus driver) (p. 458). In this sense we should view discrimination as a particular form of unfairness and even though we may experience some disadvantages every day, realizing that every person is different, it does not mean that a decision which we think is discriminatory, is made on irrelevant grounds and could result in negative consequences to person's life (e.g., mental stress, financial losses, etc), so cannot be identified as discrimination.[18]

Nevertheless, even if the effect of a discriminatory act may seem for one person as positive (for example in a case when employer refuses to hire a person because of his personal characteristic, knowing that other colleagues obtain certain amount of prejudices regarding this characteristic), the afore mentioned action constitutes discrimination as it puts a person or group of

---

[14] *Ibid.*

[15] Halldenius, L. (2005). *Dissecting "Discrimination"*. In: Cambridge Quaterly of Health Care Ethics 14, 455-463, p. 457. Available at: https://www.cambridge.org/core/journals/cambridge-quarterly-of-healthcare-ethics/article/dissecting-discrimination/4D25DDE0D0AA1CF4750271421EA40E9A.

[16] *Ibid.*

[17] *Ibid.*, p. 456.

[18] *Ibid.*, p. 458.

people at a disadvantage because of a certain trait.[19] That is, above all, irrelevant, and character of consequences in this case does not play any role as regarding the classic definition of discrimination actions like that show unequal treatment towards individuals.

From previously mentioned definitions, two central components of discrimination can be highlighted: *"similarity of cases"* and *"relevance to the given circumstances",* so that differentiation between two people can be justified only if *"they share all traits relevant to the given situation"*.[20] The concept of relevance may cause several questions regarding when and how we can tell that certain a trait is relevant in the decision-making and when it is not. Often normative premises identify what is relevant in a particular situation, if there is a morally-valid reason to treat people differently (e.g. when in libertarian system employer has a primary right to decide what is relevant, in socialist system agreement of the society on particular principles creates limits of the individual authority[21]). Definitions of discrimination that include the concept of "relevance" reflect real circumstances of social lives.

While previously mentioned approaches to discrimination mostly focus on differences between individuals, there is also one which claims that discrimination is tightly linked, first of all, to the concept of domination. That is the "intersectional" or "contextualized" approach, which shifts the centre of attention from "difference and similarity" to "power and powerlessness".[22] Scholars see intersectionality going beyond the general theory of identity as it seeks to examine power relationships and the role of a class and socio-economic status in discriminatory framework.[23]

A previously mentioned approach takes into consideration different aspects while dealing with discrimination, for example, some historical obstacles which discriminated groups

---

[19] Heinrichs, B. (2012). *What Is Discrimination and When Is It Morally Wrong?* In: Jahrbuch für Wissenschaft und Ethik. 12. 97-114, p. 100. Available at: https://www.researchgate.net/publication/236633286.

[20] *Ibid*., p. 106.

[21] *Ibid*., p. 108.

[22] Smith, B. (2016). *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*. The Equal Rights Review, Vol. Sixteen (2016), p. 79.

[23] Antoine, R.M. B. (2018). *An Intersectional Approach to Addressing Gender and Other Forms of Discrimination in Labour in the Commonwealth Caribbean.* University of Oxford Human Rights Hub Journal, Vol. 1 (2018), p. 89. Available at: https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/09/4-Intersectional-Approach-to-Labour-Discrimination.pdf.

experienced. In that sense, it is not individual features that matter, but the reaction of the society.[24] Nevertheless, it is hard to avoid an analysis of individual features, for example race, as that socio-economic status in the particular area, is a result of societal development, that emerged out of racial or gender and other forms of stratification and relationships of domination (e.g., slavery).[25]

The intersectional approach explains the multilateral nature of discrimination, which is frequently about the combination of grounds (e.g., discrimination on the grounds of gender, race and class, gender and religion etc), or even based on the conditions people are living in. For example, the main reasons why previously women were not viewed as candidates for some jobs were gender and ethnic stereotypes (socio-economic class) that saw them as restricted to family obligations of caring for children, and completely unskilled to perform other tasks.[26] Scholars agree on the distinction of intersectional discrimination from "additive" ("compound"), where the latter, even though dealing with inequality based on more than one ground, differentiate roles of particular grounds, while intersectionality does not.[27]

The idea of "additive intersectionality" has been highly criticised as not able to explain the connection between different grounds. For example, due to the theory of intersectionality, race and gender interact as much as they change each other's qualities and taken together, show absolutely different effect than taken alone.[28] We find this criticism reasonable as from the definition of additive intersectionality – *"both the subject formations based on gender, race, ethnicity, sexuality, etc., and the orders of power that create them, are analysed as separated structures and limited units which do inter-act, but not intra-act,"*[29] it is not clear how those formations exist in isolation from each other, in which case we can tell that they "interact" but not "intra-act". Nevertheless, the

---

[24] Ontario Human Rights Commission, (2001). *An intersectional approach to discrimination. Addressing Multiple Grounds in Human Rights Claims,* p. 5. Available at: http://www.ohrc.on.ca/sites/default/files attachmentsAn_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf)

[25] Antoine, R.M.B. (2018), p. 90.

[26] Antoine, R.M.B. (2018), p. 91.

[27] Burri, S., Schiek, D. (2009). *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination,* p. 3. Available at: https://eige.europa.eu/library/resource/aleph_eige000008236.

[28] Christoffersen, A. (2017). *Intersectional approaches to equality research and data,* p. 9. Available at: http://www.ecu.ac.uk/wp-content/uploads/2017/04/Research_and_data_briefing_2_Intersectional_approaches_to_equality_research_and_data.pdf.

[29] Knudsen, S.V. (2006). *Intersectionality - A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks,* p. 63 in Éric Bruillard et. al (eds.): *Caught in the Web or Lost in the Textbook?* Caen: IARTEM, stef, Iufm,2006 (pp. 61-76).

additive approach is dominant in the legal sphere; even though it recognises the possibility of intersection of multiple grounds, counts only a few cases where the consequences of interaction between them is taken into account.[30]

The overall, intersectional approach complements the one that exists in the legal sphere but seeks to answer the question why most of anti-discriminatory campaigns usually fail. The answer is that by focusing on a single characteristic of a human, policymakers usually represent a "single-axis" model of discrimination law. Intersectional approach let us to dive deeply in the concept of discrimination and realise how it emerged and how to overcome the phenomena.[31] We will talk about intersectionality in the legal sphere in more details in the following chapters.

1.2. Legal perspective

Article 14 of the European Convention on Human Rights does not explain or define the nature of discrimination as such, but establishes the principle of the prohibition of discrimination through promotion of equal treatment in the enjoyment of any right as it reads: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"[32]

Within legal parameters discrimination is described by one of the independent human rights monitoring bodies, European Commission Against Racism and Intolerance (ECRI) as *"any differential treatment of a person or group of persons based on a prohibited ground, which has no objective and reasonable justification,"*[33] In accordance with this, discrimination is also used in Article 14 of the ECHR and Article 1 of the Protocol No. 12 to the ECHR, even though the latter establishes a general principle of prohibition of discrimination as follows: *"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a*

---

[30] La Barbera, M., Cruells López, M. (2019). *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain.* Law & Society Rev, 53: 1167-1201, p. 1172.

[31] Smith, B. The Equal Rights Review, Vol. Sixteen (2016). *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective,* p. 74.

[32] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[33] Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No. 7 on National legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, 13 December 2002, CRI (2003)8.

national minority, property, birth or other status."[34] Similarity of the interpretation of discrimination in both Articles were approved by the caselaw of the European Court of Human Rights (*Maktouf et Damjanović c. Bosnie- Herzégovine*, no. 2312/08 and 34179/08, 18 July 2013, para. 81; *Sejdić and Finci v. Bosnia and Herzegovina*, no. 27996/06 and 34836/06, para. 55). In its activity, the Council of Europe refers to various international treaties regarding the protection of human rights, so does the European Court of Human Rights. They emphasise the inability of interpretation of the European Convention *"in a vacuum but..in harmony with the general principles of international law"* (*Harroudj v. France*, No. 43631/09, 4 October 2012, para. 42).[35]

For a comparison, Article 1 of the Convention for the Elimination of all Forms of Racial Discrimination (to which ECRI refers too), focuses on the purposes or effects of discriminatory actions and reads the direct racial discrimination in the similar meaning as ECRI, which is *"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."*[36] In that sense the meaning of discrimination presented in ECRI`s Recommendation No. 7 reflects one of sociological approach as it seeks for the purposes of the emergence of described phenomena, as its base and aim of discriminatory treatment. Absence of objectionable and reasonable justification is one that *"does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.*"[37]

When we look at the Article 1 of Protocol 12 that establishes a general principle of the prohibition of discrimination that goes beyond the rights and freedoms set in the Convention and its Protocols, it may be confusing that the latter do not specify any limitations to this principle. However, the preamble states that *"the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is*

---

34 Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177.

35 European Union Agency for Fundamental Rights, Council of Europe, (2018). *Handbook of European anti-discrimination law.* Available at: https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf.

36 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

37 Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No.7 on National legislation to combat racism and racial discrimination.

an objective and reasonable justification for those measures,"[38] technically identifying situations when unequal treatment can be justified.

In its Recommendation No.2 ECRI also deals with such concepts as structural discrimination, which *"refers to rules, norms, routines, patterns of attitudes and behaviour* ***in institutions and other societal structures*** *that, consciously or unconsciously, present obstacles to groups or individuals in accessing the same rights and opportunities as others and that contribute to less favourable outcomes for them than for the majority of the population"* [highlighting added].[39] All presented definitions contain analogous elements of the concept, that are:

1. Discrimination is always a certain behaviour that is expressed in a particular form.
2. At the same time presence/absence of intention does not play a decisive role ("consciously or unconsciously; any differential treatment…with no objective and reasonable justification", "any distinction, exclusion, restriction or preference…which has the purpose or **effect**"*)*.
3. Consequences of discriminatory treatment are noticeable ("..present obstacles to groups or individuals..", "..less favourable outcomes..").

Legal perspectives of discrimination have been highly criticized for their single-ground approach, where all the grounds are taken and analysed separately from each other.[40] This can be explained through narrow perception of the groups interests ("minority inside minority"), where interaction between various traits was usually denied (e.g., gender and disability, ethnic origin). It was not only denied by a majority, but also inside oppressed groups (e.g., anti-racist and feminist movements), when *"single-issue movements have kept considerable distance from each other, as both groups have still been striving for recognition and empowerment.*"[41]

Lack of appropriate legislation concerning multiple (intersectional) discrimination may be an obstacle when dealing with cases where more than one right of a particular ground is violated.

---

[38] Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177.

[39] Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level, Adopted by ECRI on 7 December 2017, 7 December 2017, CRI (2018)06.

[40] European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2007). *Tackling Multiple Discrimination: Practices, policies and laws.* Available at:https://eige.europa.eu/library/resource/EUCALE000447448.

[41] Makkonen, T. (2002). *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore,* p. 19. Available at: https://www.abo.fi/wp-content/uploads/2018/03/2002-Makkonen-Multiple-compound-and-intersectional-discrimination.pdf.

However, even though it may be difficult to address this concept in legislation, a clear terminology or interpretation from the Court would eliminate this issue. From establishing whether intersectional discrimination took place in a particular case or not may depend on the amount of compensation or any other effective remedy that might be different than if only the ground that ensures the highest level of protection was examined.[42] Regarding ECRI Recommendation No.2 to the government of member states, the latter should establish equality in bodies that aim to cover issues of multiple and intersectional discrimination on any ground including those mentioned in Article 14 of the ECHR. Recommendation refers to multiple discrimination as the one being *"experienced on two or more grounds"* while intersectional occurs in a situation *"where several grounds of discrimination interact with each other at the same time in such a way that they become inseparable and their combination creates a new ground."*[43] In the next chapter we will examine in more detail caselaw of the European Court of Human Rights and its attitude towards the intersection of grounds.

What are the differences between direct and indirect discrimination?

One more question that constitute the importance to the discrimination framework is a notion of direct and indirect discrimination. European Convention on Human Rights in Article 14 created a basis for a further interpretation of indirect discrimination as it prohibits discrimination on any grounds which allows us to judge that the notion of indirect unequal treatment included. The Council of The European Union in the Directive 2000/43/EC established a definition as follows: *"Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"*[44] (Article 2, para. 2b). Part of the definition of discrimination mentioned in ECRI Recommendation No.7 ("..which has the purpose..") represents a concept of direct discrimination, while the meaning of indirect discrimination received widened interpretation and is understood as *"cases where* ***an apparently neutral factor*** *such as a provision, criterion or practice cannot be as easily complied with by, or*

---

[42] La Barbera, M., Cruells López, M. (2019), p. 1173-1174.

[43] Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level, Adopted by ECRI on 7 December 2017, 7 December 2017, CRI (2018)06.

[44] Council of the European Union, *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June 2000, Official Journal L 180, 19/07/2000 P. 0022 - 0026, Article 2, para. 2b.

disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized" (highlighting added; p. 5, para. I(1c)).[45] From both definitions we can tell that either way, consequences of discriminatory treatment are noticeable and project a wrongful character if they do not pursue an objective and reasonable justification.

However, a distinctive feature of indirect discrimination is that the discriminatory factor should seem "neutral," which creates complexity in identification. Regarding the definition of indirect discrimination, the behaviour seems apparently neutral only *"if it put persons at a particular disadvantage compared with other persons."*[46] Even though we cannot find an official legal explanation of a scope of "disadvantage," researchers see the main idea behind identification of indirect discrimination in the strength of the effect that was caused by it and not its transparency or intensity of expression.[47]

Scholars notice that intentions in this case do not play any role, as some cases of direct discrimination may not include putting a person at a disadvantage. For example, Altman claims that it can occur in a situation in which an employer uses obvious disadvantage criterions when hiring women without any intention of doing so, out of convenience and unwillingness to change them.[48] In this and other cases, groundlessness opinions about the abilities of some group of people to perform certain tasks may be considered as direct discrimination.[49] Others argue, that it would be incorrect to base an identification of the concept of indirect discrimination simply on effects, as even though this type of unequal treatment can be interpreted broadly, it still has limits - regulatory

---

[45] Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No. 7 on National legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, 13 December 2002, CRI (2003)8, p. 5, para. I(1c).

[46] Council of the European Union, *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,* Article 2, para. 2b.

[47] Tobler, C. (2008). *Limits and potential of the concept of indirect discrimination,* Office for Official Publications of the European Communities, 2008, p. 29. Available at: https://op.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

[48] Altman, A. (2020). *Discrimination*, The Stanford Encyclopedia of Philosophy, Summer 2020 Edition, Available at: https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination.

[49] *Ibid.*

distinction.[50] In a case when regulatory distinction treats a group of people unfavorably, we can further investigate whether it was indirect discrimination or any other form of inequality.

Nevertheless, identification of indirect discrimination depends on context of application. For example, while dealing with the prohibition of discrimination on grounds of religion, a requirement of impermissibility to wear any headgear may constitute an indirect discrimination in one case (national Dutch restaurant case 2004/112, where the customers were prohibited to wear headgears).[51] However, it is not applicable in another (*S.A.S. v. France*, Application no. 43835/11), where the French government banned concealing a face in public places that negatively affected Muslim women, but was necessary for the reasons of security concerning states wide margin of appreciation in this case). Cases when both direct and indirect discrimination can be justified will be discussed in the next chapter.

---

[50] De Burca, G., Scott, J. (2001). *The EU and the WTO. Legal and Constitutional Issues*. Oxford, Portland, Oregon: Hart Publishing, p. 234. Available at: https://academic.oup.com/bybil/article-abstract/73/1/362/310701?redirectedFrom=fulltext.

[51] Tobler, C. (2008), p. 58.

2. Discrimination in the legal framework

2.1. Article 14 of the European Convention on Human Rights in the interpretation of the European Court of Human Rights

To determine the jurisdiction of the European Court of Human Rights (here and after - ECtHR) it is necessary to refer to Article 32 of the European Convention on Human Rights (here and after - ECHR) which states that *"the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47*."[52] One of the Court's tasks is to examine individual or state applications alleging violations of human rights set out in the Convention, which are discrimination. Provisions of the Article 14 of the European Convention on Human Rights say: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*."[53] As we can see, the Convention does not define the concept of discrimination, that it why it is particularly important to analyse how, on the basis of Article 14, the ECtHR interprets the notion of discrimination, which criteria are used to identify and distinguish indirect discrimination from direct, and how the Court deals with the intersection of grounds.

Elements of discrimination

With a reference to the multiple cases of ECtHR discrimination mean *"treating differently, without an objective and reasonable justification, persons in similar situations*"[54] (see also *Kiyutin v. Russia*, Application no. 2700/10, para. 59). From this interpretation we can identify such elements of discrimination as:

1. Differential treatment,
2. Absence of objective and reasonable justification,
3. Differential treatment should occur to individuals in analogous situations.

---

[52] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[53] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms.

[54] *Maktouf et Damjanović v. Bosnia and Herzegovina*, Applications no. 2312/08 and 34179/08, Council of Europe: European Court of Human Rights, 18 July 2013, para. 81.

Differential treatment

Referring to the first element, ECtHR states that *"Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or other "status", by which persons or groups of persons are distinguishable from one another"*.[55] The wording "other status" lets us judge the broad and non-exhaustive context of the latter. Nevertheless, ECtHR provides a limitation by relating to characteristics that are innate or inherent and not just "personal" that is more broad than the characteristics mentioned above. Depending on the circumstances of a particular case, as prohibited grounds of discrimination can be considered the inclusion of property (*James and others v. The United Kingdom*, Application no. 8793/79; *Chassagnou and others v. France*, Applications nos. 25088/94, 28331/95 and 28443/95), sexual orientation (*Salguieiro da Silva Mouta v. Portugal*, Application no. 33290/96; *E. B. v. France*, Application no. 43546/02), place of residence as an aspect of personal status (*Carson and others v. The United Kingdom*, Application no. 42184/05), distinction based on military rank (as the *"word 'status' is wide enough to include rank"*[56]*, Engel and others v. The Netherlands*, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72*,* para. 72).

Being a prisoner can fit in the notion of "other status" in the meaning of Article 14 of the Convention as well. In the Court's opinion, prisoners are not deprived from fundamental rights and freedoms guaranteed under Convention (in this case *"regards the provision of health care"*) as well as other members of the community, even though the scope of enjoyment of those rights can be regulated regarding the context (*Shelley v. United Kingdom*, Application no. 23800/06, the Court's assessment).[57]

As we can see, such an approach to interpretation of differential treatment empowers the Court with the ability to examine every case with regards to individual circumstances and thus, make an informed decision.

Objective and reasonable justification

All elements of discrimination mentioned above are connected with each other. That is why, differential treatment will only be considered as discrimination if, above all, it has no objective and

---

[55] *Clift v. The United Kingdom*, Application no. 7205/07, Council of Europe: European Court of Human Rights, 13 July 2010, para. 55.

[56] *Engel and others v. The Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Council of Europe: European Court of Human Rights, 8 June 1976, para. 72.

[57] *Shelley v. United Kingdom*, Application no. 23800/06, Council of Europe: European Court of Human Rights, 4 January 2008, the Court's assessment.

reasonable justification. The European Court of Human Rights views the difference in treatment discriminatory *"if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a relationship of proportionality between the means employed and the aim sought to be realized*"[58] (see also *James and others v. The United Kingdom*, Application no. 8793/79, para. 75). In case of *Dahlab v. Switzerland* (Application no. 42393/98) the Court found no violation of Article 14 of the Convention as a requirement of an employer not to wear an Islamic headscarf aimed on providing neutrality of the state's education system - so was legitimate.[59]

In the case of *Burden v. The United Kingdom,* Judge Zupančič expressed a dissenting opinion on the notions of proportionality and legitimate aim. Regarding this, such grounds of discrimination as race or national origin require more intense examination of circumstances of the case - *"strict scrutiny test"*, and the underlying act or norm that claims to be discriminatory will be justified only if it pursues a particular state's interest. While dealing with the question of proportionality, the main goal is to analyze whether the rules/norms or legislation examined support legitimate and rational reasons of state in social and economic issues ("the mildest reasonableness test").[60]

Principle of proportionality may be also explained through weighting of public-private interests, where the situation cannot be claimed as disproportionate if the scope of "violation" of an individual's interests is not excessive in comparison with achievement of public goals.[61] Such weighting is also called by the Court as "fair balance", that is breached when an individual, who *"has been deprived of his possessions"* faces in the result a *"disproportionate burden."*[62]

In questions of proportionality and legitimacy of aim, the Court uses the "margin of appreciation" doctrine that provides State Parties with a certain level of discretion within the scope

---

[58] *Burden v. The United Kingdom*, Application no. 13378/05, Council of Europe: European Court of Human Rights, 29 April 2008, para. 60.

[59] *Dahlab v. Switzerland*, Application no. 42393/98, Council of Europe, European Court of Human Rights, 15 February 2001, decision on admissibility.

[60] *Burden v. The United Kingdom*, Application no. 13378/05, Council of Europe: European Court of Human Rights, 29 April 2008, dissenting opinion of Judge Zupančič.

[61] Oddný, M. A. (2003). *Equality and non-discrimination under the European Convention on Human Rights.* The Hague: Martinus Nijhoff Publishers, p. 48.

[62] *Lithgow and others v. The United Kingdom*, Application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, Council of Europe: European Court of Human Rights, 8 July 1986, para. 120.

of the Convention.[63] Such practice is common as the Court considers governments to owe more precise knowledge about their own society, its demands, interests, and *"generally respects the legislature's judgment as to what is in the'"public' or 'general' interest unless that judgment is 'manifestly without reasonable foundation."*[64] (see also *Carson and others v. The United Kingdom*, Application no 42184/05, para. 61). For example, states are given a wide margin of appreciation in questions of general measure of economic or social strategies, and may vary *"according to the circumstances, the subject matter and its background"*[65], that also signifies whether common grounds exist in states laws.

The Court also agrees on margin of appreciation when the issue is concerned with a sensitive area of social, political, or religious controversy with a low, or even zero chance of consensus. For example, in those situations where it comes to the recognition of same-sex unions (*Orlandi and others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, paras. 203-205), in questions of protection of children's interests, where *"the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care*"[66] (*Strand Lobben and others v. Norway*, Application no. 37283/13, para. 211), or, talking about economic and social strategies, margin of appreciation is considered to be wide, in questions of taxation while following the principle of "fair balance"[67] (*Euromak Metal DOO v. The Former Yugoslav Republic of Macedonia*, Application no. 68039/14, para. 42; *Burden v. The United Kingdom*, Application no. 23800/06, para. 60), welfare and pension schemes, that should be implemented *"in a non-discriminatory manner and comply with the requirements of proportionality"*[68] as in the case of *Fabian v. Hungary* (Application no. 78117/13) and others.

---

[63] The Open Society Justice Initiative (2012). *ECHR reform: Margin of Appreciation*. Available at: https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf

[64] *Garib v. The Netherlands*, Application no. 43494/09, Council of Europe: European Court of Human Rights, 6 November 2017, para. 137.

[65] *Khamtokhu and Aksenchik v. Russia*, Applications nos. 60367/08 and 961/11, Council of Europe: European Court of Human Rights, 24 January 2017, para. 77.

[66] *Strand Lobben and others v. Norway*, Application no. 37283/13, Council of Europe: European Court of Human Rights, 10 September 2019, para. 211.

[67] *Euromak Metal DOO v. The Former Yugoslav Republic of Macedonia*, Application no. 68039/14, Council of Europe: European Court of Human Rights, 14 June 2018, para. 42.

[68] *Fabian v. Hungary*, Application no. 78117/13, Council of Europe: European Court of Human Rights, 5 September 2017, para. 115.

Previously mentioned cases of the ECtHR demonstrate that when state's discretionary authority pursues a legitimate aim, it does not lead to violation of Article 14 of the Convention. However, in some cases, the Court demands *"very weighty reasons"* in order to justify discrimination on the grounds of ethnic and national origin[69], disability and gender[70], sexual orientation,[71] and other "suspect" grounds such as race, alienage, ant others that require the "strict scrutiny test" and limits a state's margin of appreciation.[72] The concept of "suspect" grounds came from the US caselaw and refers to sensitive issues that require more cautious attention from the Court.[73]

Differential treatment in analogous situations

Whether differential treatment constitutes discrimination also depends on the context where it was applied. In this case, while making a decision whether there was a breach of Article 14 of the Convention *"there must be a difference in the treatment of persons in analogous or relevantly similar situations"*[74]. For example, in the case of *Molla Sali v. Greece,* the applicant faced discrimination on the ground of religion as in an analogous situation - being a married female beneficiary of her Muslim husband's will versus being a married beneficiary of a non-Muslim husband's will, authorities applied rules of Sharia law contrary to the husband's will and deprived the applicant of three-quarters of the inheritance after his death.[75] In the well-known case of *E.B. v. France* (Application no. 43546/02) the applicant faced discrimination on the ground of sexual orientation as she was denied the right to adopt a child because of her homosexuality (authorities

---

[69] *Biao v. Denmark,* Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016, para. 138.

[70] *J.D. and A. v. The United Kingdom,* Applications nos. 32949/17 and 34614/17, Council of Europe: European Court of Human Rights, 24 February 2020, para. 97.

[71] *Zhdanov and others v. Russia,* Applications nos. 12200/08, 35949/11 and 58282/12, Council of Europe: European Court of Human Rights, 16 October 2019, para. 179.

[72] *Chassagnou and others v. France,* Applications nos. 25088/94, 28331/95 and 28443/95, Council of Europe: European Court of Human Rights, 29 April 1999, Partly concurring and partly dissenting opinion of Judge Zupančič, III.

[73] Gerards, J. (2013). *The Discrimination Grounds of Article 14 of the European Convention on Human Rights.* Oxford University Press: Human Rights Law Review, 99-124, p. 114.

[74] *Molla Sali v. Greece*, Application no. 20452/14, Council of Europe: European Court of Human Rights, 19 December 2018, para. 133.

[75] *Ibid*., para. 161.

named it *"lifestyle of the applicant: unmarried and cohabiting with a female partner",* para. 10) even though French law generally allowed an adoption by a single person.[76]

Rules of analogous situations apply not only to the grounds enumerated in Article 14, but also to the notion of "other status". For example, "other status" also covers mental illness and a person claimed to be discriminated on this ground, above all, if in an analogous situation he/she is treated differently from those who does not have this kind of disease. In the case of *Cînța v. Romania* (Application no. 3891/19), applicant was limited in contact with his daughter on the base of mental illness even though the Court found no evidence that father's disease *"impaired his ability to take care of his child"* (para.79)*,* so he was treated differently analogously to parents who do not have health problems.[77]

Not only differential treatment in analogous situations can be defined as discrimination, but also treatment of different situations as similar. In this case what is called an "equal treatment" will result in a fundamentally contrast effect. In ECtHR's opinion, prohibition of discrimination mentioned in Article 14 of the Convention *"give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different"*[78]. In the case of J.D. and A. v. The United Kingdom (Applications nos. 32949/17 and 34614/17), the second applicant faced discrimination on the ground of gender as she, being a victim of domestic violence, was incentivised to move from the apartment with an "extra" bedroom to a smaller one, despite the fact that due to her post-traumatic stress disorder the Supreme Court of The United Kingdom earlier allowed her to stay in her adapted accommodation for a non-limited period of time (within protection under national law). The ECtHR stated, that treating the second applicant as any other Housing Benefit recipient is discriminatory as it did not pursue a legitimate aim and found no justification for deprivation of the victim of domestic violence from her special treatment.[79]

In the case of *Thlimmenos v. Greece* the applicant was discriminated on the ground of "other status" as a convicted person in the result of his past refusal to wear the military uniform at a time

---

[76] *E.B. v. France,* Application no. 43536/02, Council of Europe: European Court of Human Rights, 22 January 2008, para. 94.

[77] *Cînța v. Romania,* Application no. 3891/19, Council of Europe: European Court of Human Rights, 18 February 2020, para. 70.

[78] *J.D. and A. v. The United Kingdom,* Applications nos. 32949/17 and 34614/17, Council of Europe: European Court of Human Rights, 24 February 2020, para. 84.

[79] *Ibid.*, para. 103-105.

of general mobilisation. His appointment as a chartered accountant was refused on the basis of past accusations and was not treated differently from other persons who committed serious crimes, thus violating Article 14 of the Convention taken in conjunction with Article 9 (*Thlimennos v. Greece*, Application no. 34369/97, para. 47).[80]

Similar treatment of persons whose situations are significantly different may be considered as indirect discrimination such as in mentioned above cases of *Thlimennos v. Greece*, *J.D. and A. v. The United Kingdom*. The Court notes, that *"indirect discrimination prohibited under Article 14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, which is only the case if such policy or measure has no "objective and reasonable" justification."*[81] At the same time, an intention to discriminate in the case of indirect discrimination does not play a significant role and it *"may arise by failing to take due and positive* ***account of all relevant differences*** *or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are* ***genuinely accessible by and to all****"*[82] [highlighting added].

The main difference between direct and indirect discrimination is that the latter is not explicitly directed at a particular group. To prove or refute a disproportionate effect of discriminatory acts, parties often use relevant statistical evidence.[83] At the same time, where the issue of discrimination is concerned, the Court applies the rule of "burden of proof", that regarding the preambles of Council Directives 2000/43/EC of 29 June 2000 and 2000/78/EC of 27 November 2000: *"must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought".*[84] However, the ECtHR adheres to the position of the distribution of burden, which depends on the *"specificity of the facts, the nature of the allegation made and the Convention right at stake..and where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on*

---

[80] *Thlimennos v. Greece,* Applications no. 34369/97, Council of Europe: European Court of Human Rights, 06 April 2000, para. 47.

[81] *J.D. and A. v. The United Kingdom,* Applications nos. 32949/17 and 34614/17, Council of Europe: European Court of Human Rights, 24 February 2020, para. 85.

[82] *Garib v. The Netherlands*, Application no. 43494/09, Council of Europe: European Court of Human Rights, 6 November 2017, para. 32.

[83] *D.H. and others v. The Czech Republic*, Application no. 57325/00, Council of Europe: European Court of Human Rights, 13 November 2007, para. 136.

[84] *D.H. and others v. The Czech Republic,* para. 83.

the authorities to provide a satisfactory and convincing explanation on how the events in question occurred"[85]. Burden of proof is one that shifts from the applicant to the state when the individual provides evidence in support of his complaint and to the applicant from the state when the latter satisfies the burden of proof from its side.[86]

Intersection of grounds

In most of the cases, European Court of Human Rights required evidence regarding every alleged ground of discrimination separately (as in the case of *N.B. v. Slovakia*, Application no. 29528/10, para. 121). Even though Article 14 of the ECHR allows wide interpretation of discrimination and forms that it can take, vagueness in the European legal system creates obstacles on the way to effective protection in cases where intersectional discrimination occurs. However, there are examples when the Court steps back on its regular practice regarding examination of "additive" discrimination and deals with the notions of the intersection of grounds. In the case of *Garib v. The Netherlands,* the Court explicitly explained significance of the concept as follows:

> *"The intersection of the various factors of discrimination is flagrant here and the effects of their synergy can thus be clearly understood. It is precisely this consideration of the additional harmful effects produced by the combination of factors of discrimination which has proved indispensible in addressing complex situations of discrimination. It is not always sufficient to add together the multiple factors of discrimination, especially where the intersection between them exacerbates their consequences. Such synergy does not necessarily result in an accumulation of forms of unitary discrimination, but in a new form of multidimensional discrimination. In view of the significance of the phenomenon, its consequences in terms of the effectiveness of the guaranteed rights, and the international consensus obtaining at the present time, the Court must today include this aspect in its scrutiny under Article 14 of the Convention"*[87].

---

[85] *Makuchyan and Minasyan v. Azerbaijan and Hungary*, Application no 17247/13, Council of Europe: European Court of Human Rights, 26 May 2020, paras. 211, 212.

[86] *N.D. and N.T. v. Spain,* Applications nos. 8675/15 and 8697/15, Council of Europe: European Court of Human Rights, 13 February 2020, para. 85.

[87] *Garib v. The Netherlands,* Application no. 43494/09, Council of Europe: European Court of Human Rights, 06 November 2017, Dissenting opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, paras. 38-39.

Dissenting opinion expressed an agreement regarding the intersectionality of the applicant's situation that was exacerbated both by the applicant's status as a woman (single mother) and poverty, so her treatment as any other citizen goes in contrast with the rule of proportionality.[88] Before that, in some of the cases such wording as "multiple discrimination" was used or the Court just recognised interdependence of grounds without giving it a particular name. Thus, in the case of *B.S. v. Spain* (Application no. 47159/08) the European Social Research Unit and the AIRE Centre, as the third-party interveners, invited the ECtHR to examine factors of discrimination as being interconnected. After that the Court decided that *"domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute"* (para. 62), practically applying a multiple-ground approach without reference to any wording.[89] Nevertheless, even though being a revolutionary case in the sense of acknowledging an intersection of grounds, the Court did not refer to structural problems of peculiarity of being a black migrant woman in Spain or possible ways to overcome racial profiling in future.[90] In the present case, the ECtHR emphasized that its judgements are essentially declaratory in nature and it did not consider this case as one that needs just satisfaction[91] (para. 67 of the judgement).

In the case of Konstantin *Markin v. Russia,* the applicant was refused in three year's parental leave as a military serviceman, thus being treated differently from military servicewoman. Again, a third-party draws the Court's attention to the intersection of such grounds as sex and "other status" (military in this case), that resulted in discrimination. They claimed that a separate analysis of discrimination on the basis of sex without taking into account military status (and vice versa) keeps from drawing a parallel between military servicemen and servicewoman, which is particularly important considering that "other (military) status" gives gender with specific characteristics that cannot be ignored in this case (para. 122). However, recognising the fact that *"the exclusion of servicemen from the entitlement to parental leave cannot be considered as reasonably or objectively justified"*, the Court concluded that *"this difference in treatment*

---

[88] *Ibid.*, para. 39.

[89] *B.S. v. Spain,* Application no. 47159/08, Council of Europe: European Court of Human Rights, 24 October 2012, paras. 56-57, 62.

[90] La Barbera, M. and Cruells López, M. (2019), *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain*. Law & Society Rev, 53: 1167-1201, p. 1192. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/lasr.12435.

[91] *Ibid.,* p. 1193.

amounted to discrimination on grounds of sex" (para. 151), and not in combination of his "other status" as a military serviceman.[92]

Nevertheless, particular attention was drawn to Russian legislation, where the decision on parental leave depends only on the sex of military personnel. In the Court's opinion, *"that imposes such a general and automatic restriction applied to a group of people on the basis of their sex, which must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 14"*[93]. Such expression can be understood as unobtrusive "recommendation/condemnation" for government to revise existent regulations in this sphere.

Another example of interaction between grounds is the case of *Carvalho Pinto de Sousa Morais v. Portugal* (Application no. 17484/15) where the applicant (50-year old woman) on the basis of age and gender stereotypes, was reduced in the amount of compensation for failed surgery, which resulted in damaging her health (among other things, inability to have sexual relationship) and well-being.[94] While reducing the amount of compensation, the domestic court noted that *"at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age*"[95], while in its previous judgements of 2008 and 2014 in similar situations with male plaintiffs, the Supreme Court of Justice of Portugal awarded much higher amounts of compensation without paying attention to applicants age (para. 55). At the same time, the European Court of Human Rights admitted, that *"the question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people"*[96], thereby viewing discrimination on the grounds of sex and age as a whole in this case.

---

[92] *Konstantin Markin v. Russia,* Application no. 30078/06, Council of Europe: European Court of Human Rights, 22 March 2012, paras. 122, 151.

[93] *Ibid*., para. 148.

[94] Peroni, L. (2017). *Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v. Portugal.* Strasbourg Observers, Available at: https://strasbourgobservers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/#more-3897.

[95] *Carvalho Pinto de Sousa Morais v. Portugal,* Application no. 17484/15, Council of Europe: European Court of Human Rights, 25 October 2017, para. 16.

[96] *Ibid.*, para. 52.

Introducing the concept of intersectional discrimination into legal praxis may help to change the assumption about discrimination as such, thus viewing each category as a complex dynamic phenomena with "contrasting characteristics", excepting their homogeneity.[97] Moreover, it would be inaccurate to put any hierarchy among categories (e.g., recognising that in particular case gender is predominant over race or any other grounds) and a multiple-ground approach intends to eliminate this disparity.[98] Existence of explicit and clear terminology (whether it is "intersectional" or "multiple-ground" discrimination) even only within caselaw of the ECtHR, will help to determine a clear line of arguments and reasoning needed for effective protection against discrimination as well as structural issues underlying the concept.[99]

2.2. Limitation of the principle of prohibition of discrimination in the caselaw of the ECtHR in comparison with the International Covenant on Civil and Political Rights

In the previous chapter we were examining the way the European Court of Human Rights interprets different aspects regarding the concept of discrimination used in Article 14 of the European Convention on Human Rights. The goal of this chapter is to analyse the ECtHR's assessment of Article 14 content from the following aspects:

1) accessory character of its provisions,

2) scope of autonomy of Article 14,

3) correlation between provisions of Article 14 of the Convention and Article 1 of the Protocol no.12 to the Convention,

4) differences from the notion of prohibition of discrimination presented in Article 26 of the International Covenant on Civil and Political Rights.

Accessory character of Article 14 vs. autonomy of the right

Article 14 of the ECHR requires the connection between the rights and freedoms mentioned in the Convention and *"has effect solely in relation to the "rights and freedoms" safeguarded by*

---

[97] Sosa, L. (2017). *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* Cambridge: Cambridge University Press, p. 18. Available at: https://www.cambridge.org/core/books/intersectionality-in-the-human-rights-legal-framework-on-violence-against-women/3437DD6E6E381E020188871CE778DDCF.

[98] *Ibid.,* p. 19.

[99] La Barbera, M. and Cruells López, M. (2019), *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain*. Law & Society Rev, 53: 1167-1201, p. 1192. Available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/lasr.12435.

substantive provisions of the Convention and its Protocols"[100], which means that to be related to Article 14 and be accepted by the European Court of Human Rights, complaint concerning discrimination should also be connected with one of the rights and freedoms protected by the Convention, so it cannot exist independently. In this sense Article 14 has an accessory character.

At the same time, *"application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous*" but *"there can be no room for its application unless the facts at issue **fall within the amb**it of one or more of them"*[101] [highlighting added]. This interpretation of Article 14 may be confusing, but it plays a significant role in practice. One of the cases that illustrates an autonomous character of Article 14 is of *Sommerfeld v. Germany* (Application no. 31871/96). An applicant was refused in right to see his daughter, who was born out of wedlock, on the basis of the child's own will. He claimed that dismissal of the request to see his daughter constituted a breach of his right to respect for family life (Article 8) and that he was a victim of discriminatory treatment in this respect (Article 14).[102] The ECtHR found no violation of Article 8 as child's interest play a decisive role in such cases (paras. 64, 72-75), nevertheless acknowledging violation of Article 14 as underlying German legislation *"put fathers of children born out of wedlock in a different, less favourable position than divorced fathers"* and *"that unlike the latter, natural fathers had no right of access to their children and the mother's refusal of access could only be overridden by a court when access was 'in the interest of the child"*[103]. From the example of this case we can see that, even though other provisions of the Convention were not breached, facts of the case fall within the ambit of Article 8 and an autonomous character of Article 14 favoured in its application. In the case of *Ēcis v. Latvia* (Application no. 12879/09) the Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention without separate examination of Article 8 again, because circumstances of the case fall within the ambit of Article 8 (applicant was refused in the request to attend his father's funeral *"on the basis of the prison regime to which he was subjected owing to his sex"*)[104].

---

[100] *Molla Sali v. Greece*, Application no. 20452/14, Council of Europe: European Court of Human Rights, 19 December 2018, para. 123.

[101] *Cînța v. Romania*, Application no. 3891/19, Council of Europe: European Court of Human Rights, 18 February 2020, para. 60.

[102] *Sommerfeld v. Germany*, Application no. 31871/96, Council of Europe: European Court of Human Rights, 08 July 2003, para. 3.

[103] *Ibid.,* para. 77.

[104] *Ēcis v. Latvia*, Application no. 12879/09, Council of Europe: European Court of Human Rights, 10 January 2019, para. 94.

In case of *Molla Sali v. Greece* (Application no 20452/14) the Court decided to examine the case solely under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. noting, above all, that *"Article 14 applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide"*[105]. In the above mentioned case, the Court concluded that *"applicant's proprietary interest falls within the ambit of Article 1 of Protocol No. 1 and of the right to respect for property guaranteed therein, which is sufficient to render Article 14 of the Convention applicable"*.[106] On the contrary, in the case of *Ioviţoni and others v. Romania* (Applications nos. 57583/10, 1245/11 and 4189/11), the Court concluded that Article 1 of Protocol No. 1 of the Convention was not applicable and so did not examine a complaint under Article 14 as it did not fall within the scope of the respective article of Protocol 1.

At the same time, accessory character of Article 14 has been criticised for limiting the general principle of equality and non-discrimination and depriving them of independence from other rights listed in the Convention.[107] We can highlight two types of scenarios the Court follows regarding accessory scope of the Article 14:

1) complaint is examined from both angles - substantive provision and Article 14,

2) the Court does not examine a complaint under Article 14 when it found a violation of substantive provision.

In most of the cases, Court hold particular order when dealing with complaints. Firstly, it starts from examination of whether there has been a breach of substantive provision and after that decides if it is necessary to examine a separate violation of Article 14.[108] One of the first cases that clarifies when it is necessary to examine a complaint also under Article 14 is of *Nachova and others v. Bulgaria* (Applications nos. 4357798 and 43579/98), that was confirmed later in the case of *Lakatošová and Lakatoš v. Slovakia* (Application no. 655/16), where the Court stated that *"the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but*

---

105 *Molla Sali v. Greece*, Application no. 20452/14, Council of Europe: European Court of Human Rights, 19 December 2018, para. 123.

106 *Ibid.,* para. 132.

107 Oddný, M. A. (2003). *Equality and non-discrimination under the European Convention on Human Rights.* The Hague: Martinus Nijhoff Publishers, p. 37.

108 Mačkić, J. (2018). *Proving Discriminatory Violence at the European Court of Human Rights*. Leiden, The Netherlands: Brill, p. 31-32. Available at: https://brill.com/view/title/36113.

may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. ***This is a question to be decided in each case on its facts and depending on the nature of the allegations made****"*[109] [highlighting added]. Those cases are examples of situations where the Court considered complaints from the angle of Article 14 and found a violation of the latter (in conjunction of the substantive provision and alone under another Article of the Convention) on the basis of existed evidence.

In the second scenario, the Court does not view an examination of Article 14 as necessary when it finds a violation of another article of the Convention. The decision whether to examine a violation of Article 14 or not depends on special details of the case, important element of which should be imposing evidence that indicates the existence of discrimination. In the case of *Religious community of Jehovah's witnesses v. Azerbaijan* (Application no. 52884/09) the European Court explained: *"Where a substantive Article of the Convention or its Protocols has been relied on, both on its own and in conjunction with Article 14, and a separate breach has been found of the substantive Article, it is* ***not generally necessary*** *for the Court to consider the case under Article 14 also, though the position is* ***otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case****"*[110] [highlighting added]. In the afore-mentioned case, inequality was taken into account during examination of the complaint under Article 10 of the Convention and the Court found *"no cause for a separate examination of the same facts from the standpoint of Article 14 of the Convention"*[111]. In such cases as of *N.B. v. Slovakia* (Application no. 29518/10) and *V.C. v. Slovakia* (Application no. 18968/07) "lack of evidence" was the main obstacle for examination of Article 14. In the afore-mentioned cases, applicants (women of Roma origin) became subjects of sterilisation without their prior informed consent. The Court found no evidence that *"the doctors involved acted in bad faith, that the applicant's sterilisation was a part of an organised policy, or that the hospital staff's conduct was intentionally racially*

---

[109] *Lakatošová and Lakatoš v. Slovakia,* Application no. 655/16, Council of Europe: European Court of Human Rights, 11 December 2018.

[110] *Religious community of Jehovah's witnesses v. Azerbaijan,* Application no. 52884/09, Council of Europe: European Court of Human Rights, 20 February 2020.

[111] *Ibid.,* para. 46.

motivated"[112]. Even though the Human Rights Commissioner and ECRI found legislation and practice as particularly affect members of Roma community, the Court did not develop this thought and thus, did not consider the necessity of examination under Article 14.[113]

In cases like these, the standard of proof is very high when it comes to such sensitive areas of life (like racial/political/religious motivations of a crime) that often leads to a dismissal of complaints under Article 14. However, more detailed examination of historical obstacles that lead to the emergence of discriminatory treatment would bring to applicants the moral satisfaction they needed and could help to deal with structural discrimination in the future.

In cases of *Babat and others v. Turkey* (Application no. 44936/04) and *Osman v. Bulgaria* (Application no. 43233/98) the Court *"has examined the main legal question raised in the present application"* under Article 2 and 3 of the Convention respectively, and concluded that *"there is no need to give a separate ruling on the applicant's remaining complaint under Article 14 of the Convention"*[114]. Scholars try to explain that unwillingness of the Court to examine a separate violation of Article 14 in these cases from the angle that the principle of prohibition of discrimination is general and *"runs throughout the Convention as a whole"*, so its elements has an impact on all of the provisions.[115] As the Court stated, *"although Article 14 has no independent existence it is as though formed an integral part of each of the provisions laying down rights and freedoms"*[116] (see also *Marckx v. Belgium*, Application no. 6833/74, para. 32; *Khamtokhu and Aksenchik v. Russia*, Applications nos. 60367/08 and 961/11, dissenting opinion of Judge Pinto de Albuquerque, para. 18).

As we can observe, cases related to discrimination are complex and require accurate examination. In its decision whether to apply provisions of Article 14 or not, ECtHR relies on a strong base of evidence that is hard to reach in cases where a sensitive issue may be included or, as we have analysed in a previous chapter, an intersection of grounds. Where the Court does not find it necessary to consider a complaint from the angle of Article 14, it would be relevant to determine a

---

[112] *N.B. v. Slovakia,* Application no. 29518/10, Council of Europe: European Court of Human Rights, 12 June 2012, para. 121.

[113] *V.C. v. Slovakia,* Application no. 18968/07, Council of Europe: European Court of Human Rights, 08 November 2011, para. 177-179.

[114] *Babat and others v. Turkey,* Application no. 44936/04, Council of Europe: European Court of Human Rights, 12 January 2010, para. 44.

[115] Mačkić, J. (2018), p. 36.

[116] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Applications nos. 9214/80, 9473/81, 9474/81, Council of Europe: European Court of Human Rights, Report of the Commission, 12 May 1983.

more clear line of reasoning so it would be used to develop similar future complaints from the perspective of an argumentation/evidence-base. Such broad authority to examine cases for the purposes of discrimination can have two positive consequences for the concept - either to widen or narrow the latter.

Article 1 of Protocol no. 12 to the European Convention on Human Rights

*P*rovisions of Article 1 of Protocol no.12 read: *"The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."*[117] Though the first look may seem likes Article 1 of Protocol 12 (here and after - Protocol) duplicates Article 14 of the Convention, further examination clarifies this vagueness. From 2005, Article 14 is complemented with the general provision of prohibition of discrimination as Protocol 12 is named to have an independent, non-discriminatory character.[118]

The main contribution of Protocol 12 is that it creates an opportunity for separate examination of Article 1 without conjunction to any other substantive provision of the Convention or "other status". However, not all the countries who signed the Protocol have actually ratified it, as with positive changes it also brings a line of obligations. We can observe that the scope of Article 1 goes beyond "rights and freedoms set forth in Convention" and, due to the Explanatory Report to the Protocol, include cases where personal experiences of unequal treatment such as:

> *"i. in the enjoyment of any right specifically granted to an individual under national law,*
>
> *ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner,*
>
> *iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies),*

---

[117] Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177.

[118] Gerards, J. (2013), p. 101.

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).”[119]

One of the first cases where ECtHR recognised power of Protocol 12 is *Sejdić and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06) as *“complaint concerned a ‘right set forth by law’”*, so the broad scope of Article 1 of Protocol No. 12 made it applicable.[120] In the above-mentioned case, the Court found a violation of Article 1 of the Protocol alone.[121] Following this, in case of *Savez Crkava «Riječ Života» and others v. Croatia* (Application no. 7798/08) the Court stated, that in order to consider Article 1 of the Protocol applicable, a complaint should follow one of the four categories mentioned in the Explanatory Report to the Protocol (para. 104).[122] With regard to the recognition of the breach of Article 14 taken together with Article 9 of the Convention, the Court considered a separate examination of Article 1 of the Protocol was unnecessary.[123] It leads to conclusion that in order to be examined under Article 1 of the Protocol, a complaint should contain circumstances that fall beyond the ambit of Article 14 of the Convention; in other cases separate examination seems meaningless.

Moreover, as we have observed in previous parts of this chapter, caselaw of ECtHR when examining Article 14 of the Convention, goes beyond its provisions due to the broad interpretation of “other status”, even though its scope remains limited. Nevertheless, when any “other status” cannot be taken in the conjunction with other provisions listed in the Convention, Article 1 of Protocol 12 plays a great role. In the case of *Baralija v. Bosnia and Herzegovina* (Application no. 30100/18), which involved *”the different application of the same legislation depending on a person’s residence”*, the Court applied Article 1 of Protocol 12 because, first of all, the difference in treatment was based on being a voter as “other status” (which is not covered by the Convention), and, secondly, the applicant proved that he was in an analogous situation to others treated differently.[124] This shows us, that even though the Court uses similar criteria when examining

---

[119] Council of Europe, *Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 04.11.2000.

[120] *Sejdić and Finci v. Bosnia and. Herzegovina*, Application nos. 27996/06 and 34836/06, Council of Europe: European Court of Human Rights, 16 March 2010, para. 53.

[121] *Ibid.*, para. 56.

[122] S*avez Crkava Riječ ivota and Others v. Croatia*, Application no. 7798/08, Council of Europe: European Court of Human Rights, 9 December 2010, para. 104.

[123] *Ibid.*, para. 115.

[124] *Baralija v. Bosnia and Herzegovina*, Application no. 30100/18, Council of Europe: European Court of Human Rights, 29 October 2019, Available at: http://hudoc.echr.coe.int/eng?i=001-197215.

whether discrimination happened under Article 1 of the Protocol, it takes into account the scope within difference in treatment took place.

Even though general Protocol 12 to the ECHR brings positive changes, it leaves a number of inaccuracies. For example, as we can see on the example of the case of *Savez Crkava Riječ Života and Others v. Croatia* mentioned above, provisions of both articles discussed in this chapter overlap and it is in the jurisdiction of the Court to create and/or interpret correlation between them. Broad scope of the Protocol contains an obstacle for some of the member states of CoE as among the 38 members who signed Protocol 12, only 20 ratified the document. The Joint Committee on Human Rights of the United Kingdom states that such *"unacceptable uncertainties"* of the Protocol, such as large potential of application, can lead to *"explosion of litigation."*[125] The Committee also emphasised the fact that it is unclear whether the Protocol, as in Article 14 of the Convention, allows the possibility of objective and reasonable justification of a difference in treatment.[126]

The Committee on Legal Affairs and Human Rights of the CoE's Parliamentary Assembly in one of its Reports in 2000 also mentioned that the Draft Protocol no. 12 *"does not really fulfil its expectations"* as the grounds in Article 12 replicate to those of Contains Article 14. In their opinion, even though the list of prohibited grounds of discrimination in Article 14 is inexhaustible, due to the "age" of the Convention, it included only those that were especially odious during that time and that is why Article 1 of Protocol 12 should be complemented to meet present circumstances with such ground as sexual orientation.[127] As we can observe, those recommendations were not taken into consideration by the CDDH as an inclusion of new grounds could lead to unwarranted interpretation of the Article, its unnecessary and excessive extension, and, as a result, possibility of denial to adopt the document.

Prohibition of discrimination presented in the Article 26 of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (here and after - Covenant) is a multilateral and internationally recognised treaty, the aim of which was to allocate in a legal manner the principles listed in Universal Declaration of Human Rights. Adopted by the General Assembly

---

[125] Joint Committee on Human Rights, Seventeenth Report, 31 March 2005. Available at: https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm.

[126] *Ibid.*

[127] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Report no. 8614, 14 January 2000, Summary.

of the United Nations in 1996, it includes two articles which may interest us - Article 2 and 26. Provisions of Article 2 (para. 1) read: *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction* ***the rights recognized in the present Covenan****t, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*[128] [highlighting added]. This article can be comparable with Article 14 of the ECHR as it has the same accessory character as the latter and protection against discrimination under this Article is limited to *"the rights recognised in the present Covenant."*

The content of Article 26 of the Covenant is different as it states: *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[129] The UN Human Rights Committee in its General Comment no. 18 says, that even though *"Article 26 does not merely duplicate the guarantee already provided for in Article 2, but provides in itself an autonomous right. The application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.*"[130]

The distinctive feature of Article 26 is not only its broad scope of protection, but also a requirement to establish legislation that guarantee an effective protection against discrimination. Nevertheless, it does not mean that signatories are obliged to enact legislation in particular sphere, but, if such legislation is already adopted, then it *"must comply with Article 26 of the Covenant"*[131]. One such examples can be the case of *Pauger v. Austria* (Communication No. 415/1990), where the Human Rights Committee viewed the Austrian Pension Act as such that include discriminatory provisions towards widowers in comparison with widows, which does not comply with requirements of Article 26 of the Covenant.[132]

---

[128] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2, para. 1.

[129] *Ibid.,* Article 26.

[130] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

[131] *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/29/D/172/1984, 09 April 1987, para. 12.4.

[132] *D. Pauger v. Austria*, Communication No. 415/1990, UN doc. U.N. Doc. CCPR/C/65/D/716/1996, 30 April 1999, para. 10.2.

In comparison with Article 1 of Protocol no. 12 to the ECHR, Article 26 of the Covenant provides, besides the principle of non-discrimination, the general principle of equality as a fundamental human right, on the importance of which it has also emphasised the Parliamentary Assembly of CoE in its Report no. 8614 mentioned above, but that was not included in the Protocol. Mentioned in Article 26, the right of equality plays an important role as it is not limited to differences in treatment that are based on personal characteristics, but includes any unreasonable differentiation between individuals, which fulfils rules of generality under international the equal protection clause.[133] Nevertheless, provisions of Article 26 are more precise in the sense that its word-combination "equal before the law" and "equal protection of the law" does not make all the differences of treatment discriminatory, but only those which cannot be considered as reasonable and objective.[134] For example, differences in treatment considered to be justifiable if they aim to restore the rights that were violated before as in the case of *R.D. Stalla Costa v. Uruguay* (Communication no. 198/1985), where the applicant was not allowed to apply for a job in the public service as during that time *"only former public employees who were dismissed as a result of the application of Institutional Act No. 7 of June 1977 were currently admitted to the public service"*[135]. The Human Rights Committee found no violation of Article 26 as *"taking into account the social and political situation in Uruguay during the years of military rule…the Committee understands the enactment of Act by the new democratic Government of Uruguay as a measure of redress"*.[136]

Overall we can observe that provisions of Article 26 of the International Covenant on Civil and Political Right are more progressive than Article 14 of ECHR and Article 1 of Protocol 12 to ECHR, that lead judges to act completely within the scope of the Covenant, while the ECHR grants them with more discrete authority, that may lead to both the positive and negative consequences that we discussed above.

---

[133] Altwicker, T. (2011). *International equal protection law*, Summary, p. 497. Available at: https://www.mpil.de/files/pdf2/beitr223.pdf.

[134] *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984, 9 April 1987, para. 13.

[135] *R.D. Stalla Costa v. Uruguay*, Communication No. 198/1985; U.N. Doc. CCPR/C/30/D/198/1985, 9 July 1987, para. 2.1.

[136] *Ibid.*, para. 10.

3. Compliance of signatory states with obligations under Article 14 of the ECHR

In the previous chapter we have described a legislative mechanism of protection against discrimination on the example of the caselaw of the European Court of Human Rights and defined the main gaps in interpretation of Article 14 of the European Convention on Human Rights. Despite the activity provided by the Court and the Council of Europe in the promotion of equality, one of the most important actors in the field of protection against discrimination are states themselves, with the aim of providing a community with effective mechanisms through which they can realize core human rights. However, it may seem that the level of compliance among states with human rights obligations leaves a lot to be desired. The aim of this chapter is to analyse, on the basis of the ECtHR judgements, the level of compliance with Article 14 of the ECHR by the members of the Council of Europe, potential obstacles that prevent countries from complying with their obligations, and the factors that may potentially increase an adherence to anti-discriminatory provisions among states. In this chapter, particular attention is dedicated to the role of the local non-governmental organisations as a motivational force with respect to human rights.

3.1. The issue of state compliance

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) establishes the inalienable rights and freedoms of every person and obliges the states that have ratified the Convention to guarantee these rights to every person under their jurisdiction. The Council of Europe made an important contribution to the compliance of the contracting states with their obligations under ECHR through the elaboration of 16 protocols, one of which (no. 11, entered into force 01.11.1998) restructured the control mechanism of human rights protection. It established the compulsory jurisdiction of the European Court on Human Rights (ECtHR), binding force and execution of judgments and became a pre-condition towards ratification of the Convention.[137] An activity of the ECtHR on behalf of the Convention, caused changes in the legal frameworks in the number of countries and introduced a practice of the equal treatment among signatories. Interpretation, the development of the scope of protection Article 14, lead to the changes in legislation of CoE member states, such as: decriminalisation of homosexuality in the many countries of Europe (starting with the case of *Dudgeon v. The United Kingdom*, Application no. 7525/76), emergence of anti-discriminatory campaigns to support

[137] Keller, H., Stone Sweet, A. (2008). *Assessing the Impact of the ECHR on National Legal Systems.* Yale Law School, Faculty Scholarship Series (88), p. 679. Available at: https://digitalcommons.law.yale.edu/fss_papers/88/.

minorities, creating educational and integrity programmes for the latter (cases of *Kalanyos and Others v. Romania*, Application no. 57884/00; *D.H. and others v. The Czech Republic*, Application no. 57325/00), to the equal treatment of parents of both genders when deciding on custody rights (case of *Salguiero da Silva Mouta v. Portugal*, Application no. 33290/96; *Zaunegger v. Germany*, Application no. 22028/04; *Sporer v. Austria*, Application no. 35637/03), to the decriminalisation of objections to serve in military because of religious or any other personal beliefs (case of *Thlimmenos v. Greece*, Application no. 34369/97), to the introduction of changes in the processes of prosecution of racially-motivated crimes, banning extremist activities (case of *Koky and Others v. Slovakia*, Application no. 13624/03), to the recognition of the identity of post-operative transgender (case of *B. v. France*, Application no. 13343/87) and many others.

Despite the fact that the Convention has been ratified by 47 countries and has brought many positive changes with the help of the European Court of Human Rights, a general level of compliance among members of CoE differs dramatically. Among all of the factors that may serve as obstacles to compliance, scholars highlight a low quality of laws, bad governance, and inability of states to implement effectively international treaties into the national legal field. However, the concept of compliance is more complex and requires an analysis of substantive theoretical framework.

Theoretical arguments

One of the theories that aims to explain the behaviour of actors in terms of compliance, is the irrelevance of international law which is based on the principles of the game theory. Followers of this approach argue that the presence of international treaties do not play such a big role as country's own interests. States are viewed as rational actors that weigh pros and cons while making a decision whether to comply or not.[138] However, adversaries of this theory (followers of the theory of the "relevance of international law") claim that it does not reflect the realms as international legal obligations alter states interests in a way that with the signature of the treat, a country accepts particular rules of behaviour, violation of which costs it, first of all, reputation, and after that material expenses.[139] The more valuable one country's reputation is, the more benefits it will receive and more doubts it will go through before violating an agreement. Some of the actors also

[138] Guzman, A. (2002). *A Compliance-Based Theory of International Law*. California Law Review, 90(6), 1823-1887, p. 1843. doi:10.2307/3481436.

[139] Simmons, B.A. (2000). *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs.* The American Political Science Review, 94(4), 819-835, p. 819. Available at: http://www.jstor.com/stable/2586210.

tend to develop another side of their reputation which is "toughness", when non-compliance reflects opposing interests of a state and willingness to express its own position towards an issue at stake.[140]

Nevertheless, behaviour towards compliance with obligations is needed in order to gain credibility and the stronger those obligations are, the more severe the consequences of defection from the long-term perspective.[141] One of the solutions to overcome an issue of non-compliance that adherents of enforcement approach propose, is to shape a state's interests in an opposite way, that is, to use various coercive mechanisms in the forms of monitoring (data collection, reporting) or sanctions, so the scenario of defection will lose its attractiveness.[142] In most of the cases international actors do not have high expectations for those who are thought to be unreliable and thus lose interest in cooperation with them.[143]

However, compliance is not always about compulsion, but capabilities of states to implement international norms successfully. This argument refers to the managerial theory of compliance that connects incentives to follow rules with technical capacities of doing so and the nature of rules, that sometimes seems uncertain.[144] Despite the fact that a lot of attention in the literature was brought to the role of INGOs in the promotion of compliance with human rights laws and treaties, a proper functioning of the domestic system remains the key step countries have to take in order to follow their commitments successfully.[145] For one actor to effectively apply and follow an international rule, a strong *"compliance coalition"* is needed in the form of cooperation of domestic judiciaries, political elites, executives that are able to make a *"snowball"* out of the compliance process, leading from micro to macro-modifications both in the internal and external affairs.[146]

---

[140] Guzman, A. (2002), p. 1849.

[141] Keohane, R.O. (1992). *Compliance with International Commitments: Politics Within a Framework of Law.* Proceedings of the Annual Meeting (American Society of International Law), 86 (1-4), 176-180, p. 179. Available at: http://www.jstor.com/stable/25658631.

[142] Roper, S.D. (2017). *Compliance with the European Convention on Human Rights: testing competing theoretical perspectives with post-communist countries.* East European Quarterly, 45(3-4), 123-141, p. 126. Available at: https://politicalscience.ceu.edu/sites/politicalscience.ceu.hu/files/attachment/basicpage/1095/stevenroper.pdf.

[143] Simmons, B.A. (2000), p. 828.

[144] *Ibid.,* p. 126.

[145] Hillebrecht, C. (2012). *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*. Human Rights Quarterly, 34(4), 959-985, p. 964. Available at: http://www.jstor.com/stable/23352236.

[146] *Ibid.*, p. 965.

Several authors also argue that one of the main characteristics that reflects an adherence of states to compliance with international commitments (and also can potentially explain non-compliance) is an existence (an absence respectively) of the strong culture of the rule of law. Countries that share common values towards the functioning of domestic legal system with regard to international rules and norms tend to perform a higher level of compliance than those whose linkage to the rule of law is weak.[147] However, some countries with a low rule of law index may perform better in front of the Court than developed ones because of the following factors: 1) population of the country may not be observed with their rights, which leads to an absence of the litigation culture among them and, as a result, ineffective protection; 2) inability of the weak civil society actors to provide support; 3) an absence of the equal treatment bodies that people can report to about violations of human rights, get an advice and assistance in further proceedings; 4) poor judiciary resources; 5) and, ineffective monitoring mechanisms.[148]

Plenty of studies on this matter connect non-compliance not with political will of the state, but with existence of the resources to follow international rules successfully. Simmons notes, that international human rights treaties may impact domestic politics through three mechanisms: 1) they alter the national agenda through identifying the priorities of signatories that may lead to legislative changes in countries where executive powers are on a more strong position; 2) through leveraging litigation providing that judicial system in a given country is relatively independent, not influenced by purely political interests; 3) and, by empowering political mobilization, that tends to be more successful in "transitional democracies" where people are more motivated and institutionally capable to push the state towards the protection of human rights.[149]

Grewal and Voeten also put an emphasis on the lack of institutional capacities to implement ECtHR judgements as an obstacle to compliance with human rights obligations. Thus, they point that new democracies often require legislative changes to deal with violations of human rights, which usually is much more time consuming for them than for stable democracies as the latter owe a reliable system of checks and balances, and rarely struggle with structural issues of

---

147 Simmons, B.A. (2000), p. 828.

148 Falkner, G., Treib, O. (2008). *Three Worlds of Compliance or Four? The EU-15 Compared to New Member States.* Journal of Common Market Studies, 46(3), 293-313, p. 304-306.

149 Simmons, B. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press, 1-451, p.152. doi:10.1017/CBO9780511811340.

implementation of the ECtHR judgements (such as UK, Germany).[150] In the worst scenario non-compliance may be the cause by both factors - weak commitment among politicians to obligations under ECHR and structural issues in judicial system (such as in Russia, Turkey).[151] Regarding this, our first hypotheses states as follows:

H: A combination of political incentives and institutional capacities serves as a catalyst for states compliance with human rights obligations and an exclusion of one of the components of this equation leads to opposite results.

Testing this hypotheses will be on the top-10 violators of the Article 14 of the ECHR regarding the number of convictions against them before the European Court of Human Rights.

Data and methods

On the basis of Annual Report 2019 of the European Court of Human Rights and HUDOC database of the caselaw of the Court we have identified 10 countries that have the highest number of convictions in violation of Article 14 of the European Convention of Human Rights and listed them in Table 1. This data includes decisions on violation of Article 14 alone and in conjunction with other provisions and Protocols to the ECHR.

We have included data on pending and closed cases, taken from the HUDOCEXEC database, to get information on the adopted changes in cases where supervision has been closed that shows us how countries implement decisions of the ECtHR, how much time it takes and what prevents them from doing so. We have included the data regarding the convictions *per capita* that may tell us about the application of Article 14 in the respective countries (for example, the more country violates Article 14 - the more convictions it has) and the data on the *rule of law index* that shows us an overall respect for human rights in particular state.

Table 1. Convictions in violation of Article 14 of the ECHR.

Country	Convictions	Per capita**	Pending decisions	Closed cases	Rule of law index
UK	46	0,690	1	42	0,79
Romania	40	2,060	7	28	0,63
Austria	27	3,048	2	19	0,82

[150] Grewal, S., Voeten, E. (2015). *Are New Democracies Better Human Rights Compliers?* - International Organization, 69, 497-518, p. 500. doi:10.1017/S0020818314000435.

[151] Keller, H., Stone Sweet, A. (2008), p. 685.

Country	Convictions	Per capita**	Pending decisions	Closed cases	Rule of law index
Russia	21	0,146	18	0	0,47
Turkey	19	0,231	15	3	0,43
Greece	15	1,398	3	12	0,61
Germany	13	0,157	2	9	0,84
France	10	0,149	1	7	0,73
Bulgaria	8	1,142	1	6	0,55
Ukraine	7	0,165	4	1	0,51

*from the first time the country was convicted in violation of Article 14 till the last
** calculated as the number of convictions divided by population size
The source for the data on violations is HUDOC and the annual Survey of Activities, the European Court of Human Rights, 1959-2019. The source of closed and pending decisions HUDOCEXEC, European Court of Human Rights.
The source for the population data is Eurostat.

The theory states that lack of institutional capacities, weak system of check and balances, prevent countries from implementing decisions of the ECtHR and protect human rights effectively. If this is correct, then the higher the number of pending decisions - the weaker are respective institutions in the state. For the estimation of countries institutional capacities in Table 2 we have used the data provided by The Freedom House in the Nations in transit dataset, that includes rates in the 29 formerly communist countries from Central Europe to Central Asia. Among them we are interested in Bulgaria, Romania, Russia and Ukraine. They ranked countries on a scale from 1-7 (1 is the lowest and 7 is the highest level of democracy) regarding:

““National Democratic Governance” - *Considers the democratic character of the governmental system, the independence, effectiveness, and accountability of the legislative and executive branches*,

“Local Democratic Governance” - *Considers the decentralization of power; the responsibilities, election, and capacity of local governmental bodies; the transparency and accountability of local authorities*,

“Judicial Framework and Independence” - *Assesses constitutional and human rights protections, judicial independence, the status of ethnic minority rights, guarantees of equality*

before the law, treatment of suspects and prisoners, and compliance with judicial decisions".[152] To make the further comparison with other states easier we have normalised the data so all the countries are ranked from 0 to 1.

Table 2. Development of the checks and balances in post-communist countries

Country	National Democratic Governance	Local Democratic Governance	Judicial framework and Independence	Democracy score
Bulgaria	4,25 (0.54)	4,75 (0.62)	4,5 (0.58)	4,54 (0.59)
Romania	4 (0.50)	4,5 (0.58)	4,25 (0.54)	4,43 (0.57)
Ukraine	2,5 (0.25)	3,25 (0.37)	2,5 (0.25)	3,39 (0.39)
Russia	1,25 (0.04)	1,5 (0.08)	1,25 (0.04)	1,39 (0.06)

*data collected from The Freedom House data base, Nations in Transit Project, period of 2005-2015.
**normalized data presented in the brackets (from 0 to 1, where 0 is the lowest and 1 is the highest rank).

We have also included the newest data on such countries as the United Kingdom, Germany, Austria, France, Greece and Turkey (as well as on post-communist countries to compare if they increased their positions over time) that helps us to measure strength of their institutions from The World Justice Project Rule of Law Index 2020, which includes rates on general adherence to the rule of law and, what we are especially interested in – "Constraints on government powers", that measures whether government powers are effectively limited by the legislature, judiciary.[153]

Figure 1. Constrains on government powers in 2020

We have also used the data provided by the Reports of the European Commission against Racism and Intolerance regarding the status of the equality bodies in some of the countries to measure their capacities in the protection of human rights.

---

[152] The Freedom House, Nations in Transit Methodology. Available at: https://freedomhouse.org/reports/nations-transit/nations-transit-methodology.

[153] The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

Interpretation of the data and results

From the data presented in Table 1 we can observe that the United Kingdom and Romania are on the top of convictions in violations of Article 14; on the bottom of the table is Ukraine and Bulgaria. However, once we control for *per capita* situation is slightly changed, bringing Austria to the top. Controlling for *per capita* let us come to the different conclusions regarding the manner of application Conventions provisions in the country. Such position of the highly-developed countries regarding the respect for the core human rights as Austria and United Kingdom can be explained by the role of the Convention in these countries. Where the courts for a long time were hesitant to apply the ECHR directly, especially in the case of the Northern Ireland, were guaranteed by the Convention rights play a supplementary role to the domestic system of human rights protection.[154] This leads us to the first conclusion that countries where the Convention is applied directly (like Germany and France) should show better level of compliance than those who see ECHR through the prism of the national law.

However, it does not mean that such countries as Russia, Turkey, and Ukraine apply the Convention on the same level with Germany and France as respect for human rights and their protection in those countries differs dramatically, which do not lead us to the conclusion that the adherence for its provisions in those states is similar. The low number of applications and, following this, convictions regarding the violation of Article 14 by the countries with the worst rankings can be explained with the absence of beliefs among populations in appropriate protection of their rights that is reinforced by the overall aggravating situation in the state concerning weak legislative, executive, and judicial branches. On the contrary, in countries where individuals are more observed about the scope of their rights and possible ways of protection number of applications and convictions may be higher. What matters more is how countries satisfy judgements of the ECtHR, that can be determined by their institutional capacities and developed system of checks and balances.

Once we control for the *pending and closed cases* the picture changes, bringing on the top Russia, Turkey, and Romania, leaving the UK and Austria on the bottom of the table. Some cases of Turkey and Russia are pending since 2005, most of them already for more than 6 years since the date of the final judgement (same with Bulgaria, Ukraine, Greece), while the UK and Austria satisfied almost all of the judgements and in a shorter period of time (less than a year regarding the

---

[154] Keller, H., Stone Sweet, A. (2008). *Assessing the Impact of the ECHR on National Legal Systems.* Yale Law School, Faculty Scholarship Series (88), 677-712, p. 685.

payments and on average up to 2-3 years regarding the general measures, e.g., implementing changes into legislation; same with Germany, France).

We claim that in the case of the countries with the highest ranks of "Constraints on government powers" and the "Rule of law" this is the result of the highly developed institutional system and also proper functioning of the checks and balances. We have also analysed the Reports on countries done by the European Commission against Racism and Intolerance, that highlights the situation related to racism and intolerance in the CoE member states. In the recent documents ECRI pointed out, above all, on the lack of independence of the police and prosecution authorities among judiciaries, that are often exposed to the political pressure, on the absence of independent equality bodies in Russia,[155] Turkey,[156] Ukraine,[157] and Romania,[158] and overall lack of sufficient financial and human resources of the equality bodies as well as a competence to investigate cases concerning discrimination. First of all, that shows why those countries have low index of the rule of law, they lack appropriate mechanisms that would allow to protect human rights in accordance with provisions of the Convention. Secondly, the data presented in the Table 2 and Figure 1 can explain why most of the cases remain pending for a long period of time. Countries on the bottom are characterised with the weak systems of check and balances, low transparency, and accountability from legislative, executive, and judicial branches and overall lack of institutional capacities that prevents them from satisfying the judgements of the ECtHR fast and effectively.

We cannot also exclude the political and cultural component of this process concerning that in such countries as Russia and Turkey takes place highly widespread hate speech by public officials and politicians that only heats up the tension between communities and makes an implementation and maintenance of anti-discrimination laws in accordance with provisions of Article 14 impossible. For a comparison, such countries as Russia, Turkey, Ukraine, and Romania are the leaders not only

---

[155] European Commission against Racism and Intolerance, *ECRI report on the Russian Federation (fifth monitoring cycle)*, adopted on 04 December 2018, published on 05 March 2020, p. 14,15, 21. Available at: https://rm.coe.int/fifth-report-on-the-russian-federation/1680934a91.

[156] European Commission against Racism and Intolerance, *ECRI Conclusions on the implementation of the recommendations in respect of Turkey (subject to interim follow-up)*, adopted on 03 April 2019, published on 06 June 2019. Available at: https://rm.coe.int/interim-follow-up-conclusions-on-turkey-5th-monitoring-cycle-/168094ce03.

[157] European Commission against Racism and Intolerance, *ECRI report on Ukraine (fifth monitoring cycle)*, adopted on 20 June 2017, published on 19 September 2017, p. 13, 28, 29. Available at: https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8.

[158] European Commission against Racism and Intolerance, *ECRI report on Romania (fifth monitoring cycle)*, adopted on 03 April 2019, published on 05 June 2019, p. 9, 10, 23. Available at: https://rm.coe.int/fifth-report-on-romania/168094c9e5.

in the number of pending decisions regarding the violation of Article 14, but also other Articles of the Convention and its Protocols.

Regarding the data presented, we can claim that an exclusion from the equation "political incentives + institutional capacities = enhanced compliance" one of the elements - either political incentives or institutional capacities leads to a negative results in terms of compliance with Article 14 as countries are not able to satisfy the judgements of the ECtHR in a relatively short period of time, that leads to the question of if it will ever happen. However, a presence of the developed system of checks and balances can still overcome lack of political incentives. When we deal with an absence with both elements at once as in the cases with Turkey and Russia, where countries historically showed hostility towards different groups of individuals (for example, LGBT community) chances of compliance and implementation of any decisions of the ECtHR and recommendations of ECRI becomes impossible.

3.2. The role of local NGOs in enhancing compliance

A lot of attention in the literature is brought to the consequences of human rights violations for countries in forms of financial, reputation, and other losses. Studies of Lebovic and Voeten show that for some countries major violations of human rights cause a reduction of bilateral and, more often, multilateral aid. They become targets for various kind of sanctions for non-compliance with international legal regime and, finally, "reputational outsiders".[159] One of the actors that play a particular role in the process of shaping a country's reputation are NGOs. Even though several researchers claim that the limited effectiveness of NGOs in the protection of human rights and in compliance among states with their obligations overall, growing number of literature resources indicates a positive impact of their activities on mentioned processes. Being famous for their "naming and shaming" campaigns, international organisations can cause a wave of public shaming to that extent that those governments who tend to hesitate with commitment to international norms eventually bend under demands of the majority.[160] A related issue is that NGOs do not have as much power as international governmental organisations to impose restrictive mechanisms, such as

---

[159] Lebovic, J.H., Voeten, E. (2009). *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators.* Journal of Peace Research, 46(1), 79-97, p.80. Available at: http://www.jstor.com/stable/27640800.

[160] Lebovic, J.H., Voeten, E. (2006). *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR.* International Studies Quarterly (2006) 50, 861–888, p.869. Available at: https://blogs.commons.georgetown.edu/erikvoeten/files/2011/10/LeboISQ.pdf.

economic sanctions, on violators and have to solve problems of non-compliance in other ways.[161] In this sense, shaming campaigns provide another type of sanctions – *"public condemnation"* - which may have an imposing effect in combination with domestic pressure, active support of international governmental organisations, and involvement of other states, that have power and capacities to undertake more harsh decisions.[162] This is on account of the particular amount of allocations of the resources the majority obtains and punishment strategies it can use against disobedient countries. Promoters of human rights aim to push forward developments towards democracy with its internal rules of respect for the rule of law so states could react to the impact and pressures of international institutions more thoroughly.[163]

However, shaming is not the only role NGOs perform in favour of the promotion of human rights. They are also highly involved in the processes of direct assistance to the victims of violations (through legal assistance or providing humanitarian resources), actively participate in hate crime recording and data collection that are often used in further reports (as well as in shadow reports), punishment strategies against violators of human rights that lead to legislative and structural changes.[164] Other than that, NGOs can cooperate directly with governments by providing technical expertises for policymakers, represent civil society by being a constituent of state delegations that enhances transparency and accountability of policies.[165] Ratifications of international treaty itself does not improve human right rates in the country, as we have already seen in the previous chapter states, tend to violate rules regardless of an existence of their commitments. However, researchers claim that a number of individuals who participate in NGOs, as well as the level of democracy in the country, may change the adherence to the rule of law in terms of the protection of human rights. Regarding this, the main concern in this research is placed on the role of local NGOs in states that varies differently, are dependent on their legal status, have factual capacity to provide their activity, readiness of governments to cooperate with them, and reply to detected violations fast and effectively.

---

[161] Bussmann, M., Schneider, G. (2015). *A porous humanitarian shield: The laws of war, the red cross, and the killing of civilians*. The Review of International Organizations, 11 (3), 337-359, p. 346.

[162] *Ibid.,* p. 346.

[163] Lebovic, J.H., Voeten, E. (2006), p. 869.

[164] Council of Europe. *Human Rights Activism and the Role of NGOs.* Available at: https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos.

[165] Yasuda, Y. (2015). *Rules, Norms and NGO Advocacy Strategies*. Routledge, 1-228, p. 6. doi: 10.4324/9781315687179.

On the basis of data presented in the reports of the Council of Europe, Committee on Legal Affairs and Human Rights, the Expert Council on NGO law, and the evidence from European INGOs, we analyze whether the activities of non-governmental organisations have a positive impact on the level of compliance with the Convention among the countries that received the highest amount of convictions in violation of the Article 14 of the ECHR. The studies show that the scope of impact of NGOs on the compliance with the Convention in countries at issue is limited. Our task is to examine why it happens and what can be done to improve the role of local NGOs in respective states.

Theoretical arguments

Existing studies on the impact of local NGOs on states' compliance with human rights obligations create a biased understanding whether their activities are actually beneficial or have no effect at all. We argue that their influence can be measured regarding the actors they cooperate with and the status of domestic NGO in the country at issue. Thus, scholars claim that cooperation with IOs help to raise domestic violations on the international field and the affect states behaviour towards the respect of the rule of law. Tallberg et. al highlight several aspects of NGOs-IOs interaction: 1) it is of NGOs interest to influence policies that decision makers provide; 2) it is useful to IOs to have several sources of information as it is difficult to effectively process data on different issues simultaneously (this is especially the case in questions of compliance, collecting data on which concusses a lot of resources and cannot be as efficient as collected by local NGOs); 3) following the latter, close cooperation with population gives NGOs an invaluable information regarding non-compliance with human rights obligations, that are transferred to IOs for free, saving their time and finances; 4) NGOs are often used for the purposes of the expertise of treaties, thus enhancing the process of their implementation.[166]

Intergovernmental organizations such as the UN-family, the European Commission against Racism and Intolerance (ECRI), the European Agency for Fundamental Rights (FRA), and the Council of Europe widely use NGOs for the purposes of collecting and analysing information on human rights violations. Theo van Boven, who was a head of the former UN Centre for Human Rights, once said that it is owing to NGOs UN receiving 85% of UN information, due to the lack of

[166] Tallberg J., Dellmuth, L.M., Agne, H., Duit, A. (2015). *NGO Influence in International Organizations: Information, Access and Exchange*. Cambridge University Press, 48, 213-238, p. 216.

the resources and staff they were not able to collect that amount of data by themselves.[167] Indeed it is hard to imagine how intergovernmental organizations, as well at transnational NGOs can be deeply involved with domestic issues without information provided by national actors, primarily from local NGOs. However, an ability to collect necessary information and effectively use it depends on the level of authority that is given to organization by the state on the territory of which it functions.

At the same time, Marchetti views NGO-government relationships as a combination of 2 forms: cooperation or competition.[168] In terms of cooperation, what is expected from NGOs is to provide expertise regarding policies and strategies and analyse how they comply with the human rights regulations. They are tasked to perform as special tools for the transfer of the democracy and destruction of the old, non-democratic regimes. As competitors, NGOs main roles are: 1) to be watchdogs whose aim is to bring accountability and transparency; 2) critics of existing policies, developers of renewed standards; 3) and, as advocates and representatives of civil society, promoters of the culture of human rights defense.[169] Relationships between non-governmental organizations and states can be fruitful and effective if both of them follow similar ideas towards improving human rights situation in a country and manage to achieve a certain level of trust between each other.[170] As soon as NGOs achieve popularity within members of community their level of power grows, giving them an ability to put pressure on the government and to shape its policies.[171]

When we are talking about cooperation, the role of the state shifts from the "enemy" to a "partner", even though NGOs need to keep impartiality in order to estimate the scope of violations and non-compliance effectively. However, in transition countries their role can be limited due to structural constraints that keep local NGOs in a shadow.[172] The scope of power of the local NGOs is defined by the national regulations that often allow states to block NGOs that do not meet their

---

[167] Baehr, P. (2009). *Non-Governmental Human Rights Organizations in International Relations.* Palgrave Macmillan UK, 1-199, p. 53. doi: 10.1057/9780230233706.

[168] Marchetti, R. (2018). *Government–NGO Relationships in Africa, Asia, Europe and MENA*. Routledge, 1-272, p.150

[169] *Ibid.*, p. 152.

[170] *Ibid.*, p. 260.

[171] DeMars, W., Dijkzeul, D. (2015). *The NGO Challenge for International Relations Theory*. Routledge, 1-340, p. 132.

[172] Yuwen, L. (2016). *NGOs in China and Europe: Comparisons and Contrasts*. Routledge, 1-340, p. 302.

criteria. In some countries, regulations are so strict that NGOs prefer not to form at all, establish themselves in other states or their activities have an insignificant effect. Some of the governments tend to perceive those NGOs who deal with human rights violations as fighting against state "hostile" organisations.[173] When it is not possible to provide an efficient activity locally due to the national regulations, existing domestic non-governmental organisations, local movements, protestors, and other human rights defenders may reach the agenda of transnational NGOs such as Amnesty International (AI) and Human Rights Watch (HRW), especially when the issue at stake constitutes for INGO a particular importance.[174] Even though a lot of attention in the literature was given to the activity of AI and HRW, researchers emphasise a special significance of domestic human rights defenders as people who bring local violations of human rights to international scope of attention.[175]

Scholars also put an emphasis on local conditions such as *"political freedom, economic development, and exposure to the international community"* that empower domestic NGOs in their activities and serve as prerequisites to successful estimation of existing regime in the country in terms of adherence to the protection of human rights.[176] Rulers of autocratic and unstable regimes tend to delegitimize their opponents when the latter presents a threat to their existence.[177] That is why regime type plays a crucial role in the analysis of the status of local NGOs and the scope of their activities inside the country.

On the basis of the data concerning 10 countries with the highest amount of convictions in violation of the Article 14 of the European Convention on Human Rights, we came up with the following hypothesis:

H: Countries who create plausible conditions for the emergence and development of local NGOs present a better level of compliance with their human rights obligations than those who apply strict regulations on organisations activities.

As soon as a country builds an appropriate perspective local NGOs and establishes a suitable environment for their activities, the number of non-governmental organisations grows. They start to

---

[173] DeMars, W., Dijkzeul, D. (2015), p. 132.

[174] Meernik, J., Aloisi, R., Sowell, M., Nichols, A. (2012). *The Impact of Human Rights Organizations on Naming and Shaming Campaigns*. The Journal of Conflict Resolution, 56 (2), 233-256, p. 236.

[175] *Ibid.*, p. 241.

[176] *Ibid.*, p. 237-238.

[177] Dukalskis, A., Patane, C. (2019). *Justifying power: when autocracies talk about themselves and their opponents.* Contemporary Politics, 25(4), 457-478, p. 461. doi: 10.1080/13569775.2019.1570424.

share their findings with IOs, bring attention to domestic issues, and shape states policies towards respect of human rights and the rule of law. We expect stable democracies such as the UK, Austria, Germany, and France will show a certain level of loyalty towards local NGOs as they care about their reputation as human rights defenders. They tend to comply with international obligations and react to violations of human rights fast and effectively. On the contrary, from the countries who did not finish a transition to democracy yet and can be characterised with a low respect for the human rights such as Russia, Turkey, Romania, Greece, Bulgaria, and Ukraine, we expect an insufficient level of cooperation with local NGOs and an application of governmental constraints on their activities.

Status of local NGOs in CoE member states

With the adoption of *Recommendation to member states on the legal status of non-governmental organisations in Europe* in 2007, the Committee of Ministers of the Council of Europe identified basic principles of the NGOs activities, as well as common rules countries should follow in order to endow non-governmental organisations with power for the development of human rights and democracy. Those recommendations, above all, establish a prohibition of persecution of individuals on the basis of their commitment to a non-governmental organisation (para. 24) and the creation of such an environment, where *"the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions"* takes place (para. 76).[178]

Following that, in 2008, the *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders* was adopted, recognising that human rights defenders are frequent targets of persecutions, threats and assaults that may indicate the general attitude towards human rights in the state of issue.[179] In the paragraph 2 of this Declaration, CoM is calling on member states to create a suitable environment for human rights defenders so they will be able to provide their activities properly, to protect and respect them, to enhance the institutional capacity regarding the reaction on their complaints, to provide them with an access to various protection mechanisms including the European Court of Human Rights and to cooperate

---

[178] Committee of Ministers, *Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, 10 October 2007.

[179] Committee of Ministers, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities,* 06 February 2008.

with local defenders as well as with other intergovernmental organisations (in particular OSCE/ ODHIR).[180]

Additionally, in 1986 the Council of Europe adopted *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, Article 2 of which called other states to *"recognise the legal personality and capacity as acquired by an NGO in the Party in which it has its statutory office, as of right in the other Parties."*[181] However, even though the Council of Europe repeatedly calls on member states to sign and ratify this Convention and emphasise an important contribution of INGOs into the advancement of the major principles of international community, Convention was ratified only by 12 countries, among which are the United Kingdom, Greece, France, and Austria. This shows unreadiness of countries to accept INGOs and their scope of activities without scepticism and a grain of dread. Despite the existence of legal mechanisms for an appropriate functioning of NGOs, the level of adherence to the CoE's recommendations varies differently.

In the previous chapter, on the basis of HUDOC database, we identified 10 countries that received the highest number of convictions in violation of Article 14 of the European Convention on Human Rights. Those are the United Kingdom, Romania, Austria, Russia, Turkey, Greece, Germany, France, and Bulgaria. Countries with the highest amount of pending decisions convicted in violations of Article 14 of the ECHR - Russia and Turkey, remain permanent targets of CoE critics as states who often neglect status and rights of local NGOs and its members.

Thus, due to the information provided by the Committee on Legal Affairs and Human Rights, members of NGOs fighting for the respect of human rights and the rule of law in Russia are constantly exposed to arrests, false charges and, as a result, imprisonments and restrictions on freedom of expression for their pro-active criticism of the government.[182] Russian legislation on non-governmental organisations contains categories of *"foreign agents"* and *"undesirable organisations."* The status of "foreign agents" organisations get for "*being engaged in 'political activity' and receiving funding from abroad".*[183] Whatever publications those organisations are

---

[180] *Ibid.*

[181] Council of Europe, *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, 24 April 1986, ETS 124.

[182] Committee on Legal Affairs and Human Rights, *Situation of human rights defenders in Council of Europe member states*, 26 June 2019, AS/Jur (2019)31, paras. 17-22.

[183] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *How to prevent inappropriate restrictions on NGO activities in Europe*, Report 13940, 08 January 2016, para. 11.

producing, they are marked as *"published and distributed by the organisation, performing the functions of a foreign agent,"* that has a special negative meaning in Russia due to the historical circumstances when by a wording "foreign agents" were meant enemies that seek to discredit the government and destabilise the country as a whole.[184]

Regarding the information from the Parliamentary Assembly, the legislative amendment *"has led to the closure of dozens of domestic NGOs that received foreign funding and termination of operations of the major international and foreign donor organisations that supported the activities of Russian NGOs"*.[185] Russian laws on the crime of treason create a real obstacle to any exchange of information with the United Nations and other major intergovernmental organisations, as it can be applied to local human rights defenders, so any activity and cooperation with *"foreigners"* becomes life-threatening.[186] Moreover, a lot of organisations because of their status as "undesirable organisations" get a refusal to be registered and their activities considered as ones that *"threaten Russia's sovereignty, safety, and territorial integrity,"* in particular those that seek to defend rights of LGBT community are considered to provide activities that *"may result in a decrease in a population"*.[187] Those organisations that are allowed to function, in fact do not have any power and ability to change issues they are concerned about. For example, this is the case with a special type of NGOs - National Cultural Autonomies (NCAs) - that should work towards improvement of the socialisation and domestic integration of minorities, actually do not participate in decision making, in any consulting processes on minority issues even when it comes to the development of learning materials for students.[188]

Government does not provide consultations with organisations working on minority issues or other NGOs that promote equality[189], that keeps Russia among the countries with one of highest level of "hostility" towards vulnerable societal groups. In its information notes and reports the Committees of CoE often uses data from the Consortium of 12 NGOs "ProtectDefenders.eu", which

---

184 *Ibid.*, para. 12.

185 Parliamentary Assembly, *New restrictions on NGO activities in Council of Europe member States*, Resolution 2226(2018), 27 June 2018, para. 7.

186 Parliamentary Assembly, 08 January 2016, para. 7.

187 McBride, J., Expert Council on NGO law of the Conference of INGOs of the Council of Europe, *Non-governmental organisations: review of developments in standards, mechanisms and case law 2017-2019*, Review CONF/EXP (2020)1, February 2020, para. 158.

188 Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on the Russian Federation*, ACFC/OP/IV (2018)001, 20 February 2018, para. 55.

189 *Ibid.,* para. 40.

during the years of 2016-2020 received 82 reports of violations against human rights defenders, 42 of which were NGO/Grassroots group members.[190] As Consortium proclaims that this list of violations is not complete and that reality presumably is much worse as a lot of issues stay unreported. Unwillingness of the Russian government to cooperate with local and international NGOs towards the development of human rights situation in the country keeps the latter among the main human rights abusers.

Similarly, in Turkey numbers of human rights defenders become victims of harassment, arrests, and also murders. From 2016 "ProtectDefenders.eu" received 150 reports regarding violations against defenders, 45 of which were NGO/Grassroots group members, 5 people from the whole amount were killed, 85 exposed to judicial harassment.[191] Regarding the information given by the Parliamentary Assembly of CoE from the implementation of the state of emergency in 2016 in Turkey, around 1,719 non-governmental associations and foundations were forced to stop their activities and close under aegis of *"anti-terrorism security operations"*.[192] In particular, this was the case with those organisations who were protecting Kurds from discrimination as the latter is often associated with terrorists.

Following this, members of NGOs were arrested for allegedly participating in terrorist organisations (such as the chair of the Turkish branch of Amnesty International and the Director of Amnesty International), members of LGBT organisations were charged with providing support to terrorists plus as *"undermining the image of Turkey"* and many others.[193] In general, there are a very limited amount of NGOs in the country, they are constantly monitored by the government, lots of them get refused registration, and some of the members of NGOs got prosecuted.The bureaucratic regime preceding the registration is very complicated, especially those regulations concerning financial status and resources from abroad. All that has to be reported to the government prior to receiving funds. Strict rules of conducting the audit overall create an implausible environment for the existence of human rights in NGOs.[194] Turkey can be characterised on the basis

---

[190] ProtectDefenders.eu, *List of Alerts against Human Rights Defenders: Russia*, 2016-2020. Available at: https://www.protectdefenders.eu/en/stats.html?yearFilter=all&regionFilter=&countryFilter=RU#mf.

[191] ProtectDefenders.eu, *List of Alerts against Human Rights Defenders: Turkey*, 2016-2020. Available at: https://www.protectdefenders.eu/en/stats.html?yearFilter=all&regionFilter=&countryFilter=TR#mf.

[192] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Protecting human rights defenders in Council of Europe member States*, Report 14567(2018), 06 June 2018, para. 22.

[193] *Ibid.*, paras. 23-24.

[194] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *How to prevent inappropriate restrictions on NGO activities in Europe*? - Report 13940, 08 January 2016, paras. 50-51.

of data provided by the team of World Justice Project Rule of Law Index as one of the countries with the lowest "Fundamental Rights" rate that indicates an adherence of the country to the respect of the core human rights (0.32 out of 1; 123th place out of 128 countries analysed) as well as the lowest "Constraints on Government Powers" rate that indicates, above all, an ability of independent civil society organisations to express their opinion on government policies without fear of being prosecuted (0.30 out of 1; 124th place out of 128).[195] Regarding those rates, Russia got 0.44 on the "Fundamental Rights" index and 0.36 on "Constraints on Government Powers" and ranked 104th and 115th out of 128 countries respectively.

In such countries as Romania and Ukraine, governments put on NGOs additional rules regarding the regular submission of their financial reports; non-compliance will lead to fines or strengthened tax policies towards organisations.[196] The environment in Romania can be described as having limited cooperation between the state and the NGOs. The latter remain targets of hate-speech (more precisely, they are named to be "foreign agents") and only half of them actually provide some activities.[197] Members of NGOs in Romania complain about the lack of support from the government, that is oriented on limiting the activities of organisations and discredits them in the eyes of society, as well as any access to public information that prevents NGOs from shaping states' policies towards the improvement of human rights situation in the country.[198]

Similarly, in Ukraine and Bulgaria activities of NGOs have little effect due to the fact that government remains salient to their propositions for the improvement of legislation and reports about violations of human rights.[199] In particular, Roma local NGO "Chiricli" in Ukraine was totally ignored by the government which keeps living conditions of the minorities poor, even though the organisation tries to improved them as much as possible.[200] In Bulgaria NGOs suffer

---

[195] The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

[196] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *New restrictions on NGO activities in Council of Europe member States*, Report 14570, 07 June 2018, paras. 25-26.

[197] United States Agency for International Development, *2018 Civil Society Organization sustainability index for Central and Eastern Europe and Eurasia*, 22nd Edition, September 2019, p. 178. Available at: https://www.fhi360.org/sites/default/files/media/documents/resource-csosi-2018-report-europe-eurasia.pdf.

[198] INGOs Conference of the Council of Europe, *Civil participation in the decision-making process: Follow-up fact finding visit to Romania 3-5 December 2018,* Report, September 2019, p. 10. Available at: https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-romania-ii-2018/168097e57e.

[199] United States Agency for International Development, 2018, p. 234.

[200] Council of Europe, Advisory Committee on the framework Convention for the protection of national minorities, *Fourth opinion on Ukraine.* ACFC/OP/IV (2017)002, 05 March 2018, paras. 61, 63.

from the lack of investment and negative speeches from the government; in particular those who spread gender equality, fight for LGBT rights, and criticise states policies.[201]

Recently in Greece the government decided to introduce new rules of registration for local and foreign NGOs that are working in the areas of asylum, migration, and social inclusion.[202] Even if NGOs are not working primarily in this field but *"are active in monitoring and defending human rights, acting in solidarity with refugees, providing legal or psycho-social assistance to specific individuals in detention or reception facilities or on their premises without implementing programmes or agreements with the state"* should register and stick to the new regulations as well.[203] NGOs in Greece now are required to provide annual audit reports plus those regarding all activities they conduct during the past two years, information on beneficiaries and staff participating, as well as data about all the changes that should be reported within 24 hours, and interventions organisations were and will be participating in.[204] Those measures are thought to be disproportionate, unjustifiable, and cause several unpleasant consequences. The negative context of NGOs in the Greek political discourse caused a number of attacks from local groups against organisations and their members thus creating a hostile environment for the activity of NGOs and total disregard of all the efforts that have been taken for the improvement of the rule of law in the country.[205]

Contrasting situations, we can observe in the United Kingdom, Austria, Germany, and France, where NGOs actively participate in policy making. In the United Kingdom NGOs participate in a number of processes, among them are: preparing reports and policy papers, meeting with governmental representatives, MPs, Ministers, and separate departments, participating in "roundtables" of all Parliamentary groups and Committees.[206] Public debates are also common in the UK where the aim of the government is to hear the opinions and recommendations of

---

201 United States Agency for International Development, 2018, pp. 63, 65.

202 Amnesty International, G*reece: worrying legal developments for asylum-seekers and NGOs,* Public statement, EUR 25/2259/2020, 04 May 2020. Available at: https://www.amnesty.org/en/documents/eur25/2259/2020/en/.

203 Refugee Support Aegean, *Risk of Repression: New Rules on Civil Society Supporting Refugees and Migrants in Greece*, May 2020, p. 2. Available at: https://rsaegean.org/wp-content/uploads/2020/05/RSA_Comments_NGO_Registry.pdf.

204 *Ibid*., p. 4.

205 *Ibid*., p. 1.

206 INGOs Conference of the Council of Europe, *Civil participation in the decision-making process: Follow-up fact finding visit to the United Kingdom 20-21 May 2018 & 16 October 2018,* Report, October 2019, p. 12. Available at: https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-uk-2018/168098146f.

organisations regarding particular issues (e.g., on public debate on gender recognition in 2018). Such local UK NGOs as Community Security Trust (CST), Galop, and Tell MAMA routinely cooperate with the police in monitoring hate incidents and report to the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE) regarding the data on hate crimes based on intolerance towards different groups of society, in particular muslims, jews, members of LGBT community, and Christians.[207]

In its latest conclusion on the UK European Commission against Racism and Intolerance (ECRI) appreciated efforts, the country made for extensive monitoring in the field of equality as well as public availability of data collected from multiple resources.[208] Overall the United Kingdom is among the countries with the highest "Constraints on Government Powers" and "Fundamental Rights" rank (0.82 and 0.79 out of 1 respectively; 13th place in the world)[209] that characterise it as a state with the strong adherence to the rule of law that is achieved, above all, with the help of free and independent activity of local human rights organisations.

In Germany NGOs are also actively cooperating with the police, who transfer data to organisations and examines a necessity of qualification of additional cases as hate crimes, that enhances reporting and recording of violations based on intolerance.[210] Local non-governmental organisations in cooperation and with the support of the state, are making an essential contribution into integration of asylum seekers and refugees all over Germany.[211] The government cooperates with organisation through their involvement in several federal programmes, among which is "Living Democracy!" One of the goals of the state is to strengthen the capacity of institutions in dealing with racism, homophobias, and other forms of discrimination and inequality.[212] Several

---

[207] OSCE, ODIHR hate-crime reporting: United Kingdom, Available at: https://hatecrime.osce.org/united-kingdom.

[208] European Commission against Racism and Intolerance, *ECRI conclusions on the implementation of the recommendations in respect of the United Kingdom subject to interim follow-up*, 06 June 2019, p. 5. Available at: https://rm.coe.int/interim-follow-up-conclusions-on-the-united-kingdom-5th-monitoring-cyc/168094ce06.

[209] The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

[210] European Commission against Racism and Intolerance, *ECRI Report on Germany,* 17 March 2020, para. 59. Available at: https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be.

[211] *Ibid*., para. 60.

[212] Advisory Committee On The Framework Convention For The Protection Of National Minorities, *Fifth report of the Federal Republic of Germany in accordance with Article 25 (2) of the Council of Europe Framework Convention for the Protection of National Minorities*, ACFC/SR/V(2019)001, 31 January 2019, paras. 53-54.

Federal states signed treaties with local associations of German Sinti and Roma with the aim of the promotion of tolerance towards minorities, protection against discrimination, and their integration in local communities.[213] Government and federal councils provide regularly funding to those organisation and involve them in consultations and decision-making processes for improving living conditions of Sinti and Roma. Domestic German NGOs such as MANEO, Inssan, and FAIR international, regularly report to ODIHR data on hate crimes, in particular homophobic and sexist insults, and violence against Muslims.[214]

Germany (as well as France and Austria) created a plausible environment for local and international NGOs. They do not require an organisation to have a legal entity, foreign associations can provide their activity without restrictions if they have domestic legal personality, and they are also allowed to create registered branches/associations in previously mentioned countries according to the law of the State in which they operate.[215] Germany is characterised by the World Justice Project as a country with an impressively high measure regarding strong positions of civil society organisations ("Constraints on Government Powers" - 0.85, 6th place in the world) and protection of human rights ("Fundamental Rights" - 0.85, 5th place in the world).[216]

In France, the government aims to strengthen its cooperation with NGOs in the form of partnerships that takes place through the sharing of information regarding racist incidents, enhancing methods of protection, and rehabilitation of victims.[217] The absence of constraints on NGOs activities in France make possible the exchange of information between local organisations and intergovernmental organisations such as ECRI and OSCE.[218] Local organisations regularly participate in the protection of the human rights in front of the courts and, as they report, in 70% of the cases decisions of the courts confirm the institution's observations regarding the violations.[219] As well as in Germany, French local organisations (such as Singa, France Terre d'Asile, and La

---

213 *Ibid.*, paras. 12-17.

214 OSCE, ODIHR hate-crime reporting: Germany, Available at: https://hatecrime.osce.org/germany.

215 Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *How to prevent inappropriate restrictions on NGO activities in Europe*? - Report 13940, 08 January 2016, paras. 67-69.

216 The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

217 European Commission against Racism and Intolerance, *ECRI Report on France,* 08 December 2015, para. 86. Available at: https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be.

218 OSCE, ODIHR hate-crime reporting: France, Available at: https://hatecrime.osce.org/france.

219 Défenseur des droits, *Rapport annuel d'activité 2019*, p. 14. Available at: https://www.defenseurdesdroits.fr/sites/default/files/rapport_annuel/raa-2019-num-accessopti.pdf.

Cimade) are effectively involved in the process of integration of migrants into communities by protecting their rights in relations with police, providing them with living conditions, and educational trainings. That also showed its effects in the attitudes of the local population towards refugees.[220] Regarding the WJP Index, France is highly ranked in the fields of "Fundamental Rights" (0.73 out of 1, 21st place worldwide) and "Constraints on government Powers" (0.73, 19th place).[221]

In Austria, the situation with NGOs has changed during the recent years. Even though formally they did not experience harsh restrictions on their activities as other countries we have analysed previously and regularly they received funding from the government, their involvement in the decision making, and consultation processes declined significantly.[222] Representatives of local organisations in Austria claim that in order to prevent criticism, politically-motivated financial cuts have happened in such areas of activities as promotion of gender equality, integration of refugee and asylum seekers, and the development of education that reduced a possibility of further existence for some NGOs.[223] NGOs in Austria, especially those who expressed critique towards governmental policies, became frequent targets of hate speeches, in particular those who deal with asylum issues because of the activities that are named to *"attract an influx of refugees that can promote the business of illegal smuggling".*[224] There are flaws in cooperation between the state and NGOs in Austria pointing to the Committee on the Elimination of Discrimination against Women of the United Nations, admitting that *"financial support for civil society organisations providing support to women who are victims of gender-based violence is insufficient"*,[225] and European Union Agency

---

[220] Duarte, S. (2019). *Exploring French citizenship: the role of Non-Governmental Organisations (NGOs) in refugee integration*. Texas Christian University, Department of Political Science, p. 35. Available at: https://repository.tcu.edu/bitstream/handle/116099117/26971/Duarte_Sunkin_Honors_Thesis_SPR19_Final.pdf?sequence=1.

[221] The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

[222] Civic Space Watch. (2019). *Austria: The situation of civil society has changed significantly under the current government – new report says*, 24 April 2019. Available at: https://civicspacewatch.eu/austria-the-situation-of-civil-society-has-changed-significantly-under-a-the-current-government-new-report-says/.

[223] Simsa, R., Neunteufl, F., Ahlfeld, C., Grasgruber-Kerl, R., Heckermann, B., Moder, C., Pranzl, J., Stadlbauer, J. (2019). *Civil Society Index: Update 201*9, p. 39. Available at: https://gemeinnuetzig.at/wp-content/uploads/2019/04/IGO19_csi_Bericht_193x297_Kern_190415.pdf.

[224] CIVICUS, (2020). *New government action plan reveals change in attitude towards CSOs and Human Rights, 12 March 2020*. Available at: https://monitor.civicus.org/updates/2020/03/12/new-government-action-plan-reveals-change-attitude-towards-csos-and-human-rights/.

[225] Committee on the Elimination of Discrimination against Women, *Concluding observations on the ninth periodic report of Austria*, CEDAW/C/AUT/CO/9, 30 July 2019, para. 22(d).

for Fundamental Rights, claiming that they now received *"any information about structured and systematic cooperation between law enforcement agencies and civil society organisations related specifically to recording and collecting data on hate crimes"*.[226] Except of a number of foreign NGOs located in Austria, local organisations such as ZARA, Dokustelle, and OIDAC regularly cooperate with INGOs (ECRI, OSCE), providing them with reports on hate crimes and bringing their attention to national issues.

Despite the constraints recent Austrian government were trying to put on NGOs, they perform a particularly important role for the Austrian society as they usually act as *"helpers"* that create a high level of conviction among the population that NGOs and *"make a decisive contribution to society"* - 90% of population, or *"show social problems and try to solve them"* - 81% of population.[227] An absence of restrictions on the activities of NGOs and the relative amount of freedom they have in Austria makes these organisations a powerful tool in the promotion and protection of fundamental rights of the population. The Word Justice Project 2020 in Austria moved down in the rule of law index however, remained one of the countries with the strongest respect for the human rights (8th position worldwide).

Results and summary

The findings show that countries who do not put constraints on the activities of the local NGOs, who supply them with open sources of information, and cooperate with organisations also on the stage of decision making perform better in protection and respect of human rights. Unique data from local NGOs allow states to react on violations quicker and save their reputation as human rights defenders on the international arena.

This research can be summarized with data provided by the World Justice Project Rule of Law Index 2020 in Table 1, where we can highlight countries with the highest levels of civic participation and non-governmental checks, that are connected to effectively guaranteed freedom of assembly and association, ensure the ability of NGOs to report and comment on states policies without fear of being prosecuted or oppressed. As a result, they show a higher protection of fundamental rights (Germany, Austria, UK, France).

---

[226] European Union Agency for Fundamental Rights, *Hate crime recording and data collection practices across the EU*, 21 June 2018, p. 29. Available at: https://fra.europa.eu/en/publication/2018/hate-crime-recording-and-data-collection-practice-across-eu.

[227] Simsa et. al., 2019, p. 23.

Table 1. Scores of the countries regarding the data from the World Justice Project Rule of Law Index 2020[228]

Country	Freedom of association	Civic participation	Non-governmental checks	Fundamental Rights
Germany	0.90	0.86	0.85	0.85
Austria	0.88	0.81	0.84	0.85
UK	0.89	0.83	0.84	0.79
France	0.81	0.74	0.71	0.73
Greece	0.76	0.64	0.69	0.65
Romania	0.65	0.59	0.67	0.70
Bulgaria	0.67	0.60	0.61	0.61
Ukraine	0.65	0.59	0.61	0.61
Russia	0.41	0.39	0.39	0.44
Turkey	0.30	0.28	0.26	0.32

We can also observe countries that are "in the middle," where local NGOs do not experience harsh measures of oppression, but do not have enough capacities, support, and guarantees from the governments to reach higher positions and effectively participate in the processes of human rights protection - Greece, Romania, Bulgaria, Ukraine. The countries that show the worst index with regards to respect of fundamental rights are the countries where local NGOs experience the worst conditions of existence and are not able to influence the human rights situation in the country.

[228] The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

Conclusion

The thesis concentrated on caselaw of the European Court on Human Rights regarding the framing and interpretation of the scope of Article 14 of the European Convention of Human Rights that establishes prohibition of discrimination, behaviour of a certain members of the Council of Europe in terms of compliance with anti-discriminatory provisions of the Convention, and the role of local non-governmental organisations as human rights defenders in particular states. We have tested the ability of states to comply with obligations under Article 14, both in theoretical framework and empirical cases taken as a basis the number and duration of pending and closed cases where the country was convicted in violation of the respective provision. We have analysed the status of local NGOs in "Top-10 violators of Article 14" and to what extent they help to increase an adherence towards the respect for human rights.

In the first part of the thesis we have observed that cases related to discrimination require an accurate examination from the Court that establishes high standards of proof and relies on a strong evidential base when making a decision. However, in some cases where a sensitive issue is at stake or an intersection of grounds shows a clearer line of reasoning, explicit and clear terminology (e.g., in cases of multiple/intersectional discrimination that are not introduced yet in the European legal praxis) from the Court is desired so individuals could develop future similar complaints from the perspective of an argumentation/evidence-base.

The thesis also examines a distinction between anti-discriminatory provisions of Article 14 of the ECHR and Article 1 of the Protocol 12 to the ECHR and their application by the ECtHR. However, ratification of the Protocol 12 by the 20 countries out of 38, constraints the process of establishing a general principle of prohibition of discrimination, without providing a link to substantive provisions of the Convention and its Protocols. Despite the fact that the European Commission against Racism and Intolerance in its Reports on particular countries emphasised a necessity of ratification of the Protocol 12 multiple times, states are still hesitant to do this. It can be explained by the imprecise potential of application of the Protocol, that leaves the Court with too large authority of the examination of the cases for the purpose of discrimination. We have drawn a line between the respective Articles of the International Covenant on Civil and Political Rights, the wording of which established an autonomous right of equality, however, limiting it by the provisions of law that can potentially justify unequal treatment if it is based on reasonable and objective criteria, which Article 1 of the Protocol 12 lacks. This inaccuracy does not let the process of the protection against discrimination move further and develop the situation in CoE member states.

The thesis also analyses an ability and capacities of states to comply with provisions of Article 14. Regarding this our hypothesis concerning the combination of political incentives and institutional capacities as necessary factors in the process of compliance with anti-discriminatory provisions was confirmed. We have checked theoretically and empirically that the countries where there are strong institutional capacities, developed system of checks and balances, and overall policies are oriented towards the respect for human rights, there are better levels of compliance with Article 14 as they satisfy the judgements of the European Court on Human Rights much faster than those who does not develop the factors analysed. The equation "political incentives + institutional capacities = enhanced compliance" stops working when one of the elements is missing but developed system of checks and balances can still overcome the lack of political incentives. However, when we deal with an absence with both elements at once (as in the cases with Turkey and Russia), chances of compliance and implementation of any recommendations/decisions of the ECtHR becomes impossible.

The thesis also looked for alternative ways of enhancing compliance of states with human rights obligations such as activities of local non-governmental organisations. We found that their roles are in direct dependence with their status in the respective country such as an amount and extent of the restrictions they experience. Countries that cooperate with local NGOs perform better in protection and respect of human rights due to the unique information organisations provide them with, which enables states to react on violations quicker and save their reputation as human rights defenders on the international arena. On the contrary, weak positions of local NGOs in countries that apply boundary conditions on their activity and create a hostile environment for their emergence, restrains a system of protection against discrimination and other violations of human rights from development, making those countries permanent targets of criticism from the international community.

The level of protection against discrimination differs from the one country to another as well as the efforts they put towards adherence to the provisions of Article 14 of the Convention. In future studies it would be necessary to analyse punishment strategies the international community uses in order to prevent and sanction violations of human rights as well as the conditionality of the intensity of punishment regarding the actors' political objectives, and recipients of human rights performance.

List of references

Official documents and reports

1. Advisory Committee On The Framework Convention For The Protection Of National Minorities, *Fifth report of the Federal Republic of Germany in accordance with Article 25 (2) of the Council of Europe Framework Convention for the Protection of National Minorities*, ACFC/SR/ V(2019)001, 31 January 2019, paras. 53-54.
2. Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on the Russian Federation*, ACFC/OP/IV (2018)001, 20 February 2018, para. 55.
3. Committee of Ministers, *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities,* 06 February 2008.
4. Committee of Ministers, *Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, 10 October 2007.
5. Committee on Legal Affairs and Human Rights, *Situation of human rights defenders in Council of Europe member states*, 26 June 2019, AS/Jur (2019)31.
6. Committee on the Elimination of Discrimination against Women, *Concluding observations on the ninth periodic report of Austria*, CEDAW/C/AUT/CO/9, 30 July 2019, para. 22(d).
7. Council of Europe, Advisory Committee on the framework Convention for the protection of national minorities, *Fourth opinion on Ukraine.* ACFC/OP/IV (2017)002, 05 March 2018, paras. 61, 63.
8. Council of Europe, *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*, 24 April 1986, ETS 124.
9. Council of Europe. *Human Rights Activism and the Role of NGOs.* Available at: https:// www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos.
10. European Commission against Racism and Intolerance, *ECRI conclusions on the implementation of the recommendations in respect of the United Kingdom (subject to interim follow-up)*, 06 June 2019. Available at: https://rm.coe.int/interim-follow-up-conclusions-on-the-united-kingdom-5th-monitoring-cyc/168094ce06.
11. European Commission against Racism and Intolerance, *ECRI Conclusions on the implementation of the recommendations in respect of Turkey (subject to interim follow-up)*, adopted on 03 April 2019, published on 06 June 2019. Available at: https://rm.coe.int/interim-follow-up-conclusions-on-turkey-5th-monitoring-cycle-/168094ce03.

12. European Commission against Racism and Intolerance, *ECRI Report on France,* 08 December 2015, para. 86. Available at: https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be.
13. European Commission against Racism and Intolerance, *ECRI Report on Germany,* 17 March 2020, para. 59. Available at: https://rm.coe.int/ecri-report-on-germany-sixth-monitoring-cycle-/16809ce4be.
14. European Commission against Racism and Intolerance, *ECRI report on Romania (fifth monitoring cycle)*, adopted on 03 April 2019, published on 05 June 2019, p. 9, 10, 23. Available at: https://rm.coe.int/fifth-report-on-romania/168094c9e5.
15. European Commission against Racism and Intolerance, *ECRI report on the Russian Federation (fifth monitoring cycle)*, adopted on 04 December 2018, published on 05 March 2020, p. 14,15, 21. Available at: https://rm.coe.int/fifth-report-on-the-russian-federation/1680934a91.
16. European Commission against Racism and Intolerance, *ECRI report on Ukraine (fifth monitoring cycle)*, adopted on 20 June 2017, published on 19 September 2017, p. 13, 28, 29. Available at: https://rm.coe.int/fifth-report-on-ukraine/16808b5ca8.
17. European Union Agency for Fundamental Rights, *Hate crime recording and data collection practices across the EU*, 21 June 2018, p. 29. Available at: https://fra.europa.eu/en/publication/2018/hate-crime-recording-and-data-collection-practice-across-eu.
18. INGOs Conference of the Council of Europe, *Civil participation in the decision-making process: Follow-up fact finding visit to Romania 3-5 December 2018,* Report, September 2019, p. 10. Available at: https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-romania-ii-2018/168097e57e.
19. INGOs Conference of the Council of Europe, *Civil participation in the decision-making process: Follow-up fact finding visit to the United Kingdom 20-21 May 2018 & 16 October 2018,* Report, October 2019, p. 12.Available at: https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-uk-2018/168098146f.
20. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *How to prevent inappropriate restrictions on NGO activities in Europe*? - Report 13940, 08 January 2016.
21. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *New restrictions on NGO activities in Council of Europe member States*, Report 14570, 07 June 2018.
22. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Protecting human rights defenders in Council of Europe member States*, Report 14567(2018), 06 June 2018.

23. Parliamentary Assembly, *New restrictions on NGO activities in Council of Europe member States*, Resolution 2226(2018), 27 June 2018.

24. United States Agency for International Development, *2018 Civil Society Organization sustainability index for Central and Eastern Europe and Eurasia*, 22nd Edition, September 2019, p. 178. Available at: https://www.fhi360.org/sites/default/files/media/documents/resource-csosi-2018-report-europe-eurasia.pdf.

25. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

26. Council of Europe, *Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 04.11.2000.

27.Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Report no. 8614, 14 January 2000, Summary.

28. Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177.

29. Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation N. 7 on National legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, 13 December 2002, CRI (2003)8.

30. Council of Europe: European Commission Against Racism and Intolerance (ECRI), Recommendation No. 7 on National legislation to combat racism and racial discrimination, Adopted by ECRI on 13 December 2002, 13 December 2002, CRI (2003)8.

31. Council of the European Union, *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June 2000, Official Journal L 180, 19/07/2000 P. 0022 - 0026.

32. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, (2007). *Tackling Multiple Discrimination: Practices, policies and laws.* Available at:https://eige.europa.eu/library/resource/EUCALE000447448.

33. European Union Agency for Fundamental Rights, Council of Europe, (2018). *Handbook of European anti-discrimination law.* Available at: https://www.echr.coe.int/Documents/Handbook_non_discri_law_ENG.pdf.

34. Joint Committee on Human Rights, Seventeenth Report, 31 March 2005. Available at: https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm.

35. UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

36. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2, para. 1.
37. UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

Judgements of the ECtHR and UN HR Committee

38. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Applications nos. 9214/80, 9473/81, 9474/81, Council of Europe: European Court of Human Rights, Report of the Commission, 12 May 1983.
39. *B.S. v. Spain,* Application no. 47159/08, Council of Europe: European Court of Human Rights, 24 October 2012.
40. *Babat and others v. Turkey,* Application no. 44936/04, Council of Europe: European Court of Human Rights, 12 January 2010.
41. *Baralija v. Bosnia and Herzegovina*, Application no. 30100/18, Council of Europe: European Court of Human Rights, 29 October 2019.
42. *Biao v. Denmark,* Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016.
43. *Burden v. The United Kingdom*, Application no. 13378/05, Council of Europe: European Court of Human Rights, 29 April 2008.
44. *Carvalho Pinto de Sousa Morais v. Portugal,* Application no. 17484/15, Council of Europe: European Court of Human Rights, 25 October 2017.
45. *Chassagnou and others v. France,* Applications nos. 25088/94, 28331/95 and 28443/95, Council of Europe: European Court of Human Rights, 29 April 199.
46. *Cînța v. Romania*, Application no. 3891/19, Council of Europe: European Court of Human Rights, 18 February 2020.
47. *Clift v. The United Kingdom*, Application no. 7205/07, Council of Europe: European Court of Human Rights, 13 July 2010.
48. *D. Pauger v. Austria*, Communication No. 415/1990, UN doc. U.N. Doc. CCPR/C/65/D/ 716/1996, 30 April 1999.
49. *D.H. and others v. The Czech Republic*, Application no. 57325/00, Council of Europe: European Court of Human Rights, 13 November 2007.
50. *Dahlab v. Switzerland*, Application no. 42393/98, Council of Europe, European Court of Human Rights, 15 February 2001, decision on admissibility.

51. *E.B. v. France,* Application no. 43536/02, Council of Europe: European Court of Human Rights, 22 January 2008.

52. *Ēcis v. Latvia*, Application no. 12879/09, Council of Europe: European Court of Human Rights, 10 January 2019.

53. *Engel and others v. The Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Council of Europe: European Court of Human Rights, 8 June 1976.

54. *Euromak Metal DOO v. The Former Yugoslav Republic of Macedonia*, Application no. 68039/14, Council of Europe: European Court of Human Rights, 14 June 2018.

55. *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984, 9 April 1987.

56. *Fabian v. Hungary*, Application no. 78117/13, Council of Europe: European Court of Human Rights, 5 September 2017.

57. *Garib v. The Netherlands*, Application no. 43494/09, Council of Europe: European Court of Human Rights, 6 November 2017.

58. *J.D. and A. v. The United Kingdom,* Applications nos. 32949/17 and 34614/17, Council of Europe: European Court of Human Rights, 24 February 2020.

59. *Maktouf et Damjanović v. Bosnia and Herzegovina*, Applications no. 2312/08 and 34179/08, Council of Europe: European Court of Human Rights, 18 July 2013.

60. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, Application no 17247/13, Council of Europe: European Court of Human Rights, 26 May 2020.

61. *Molla Sali v. Greece*, Application no. 20452/14, Council of Europe: European Court of Human Rights, 19 December 2018.

62. *N.B. v. Slovakia,* Application no. 29518/10, Council of Europe: European Court of Human Rights, 12 June 2012.

63. *N.D. and N.T. v. Spain,* Applications nos. 8675/15 and 8697/15, Council of Europe: European Court of Human Rights, 13 February 2020.

64. *Konstantin Markin v. Russia,* Application no. 30078/06, Council of Europe: European Court of Human Rights, 22 March 2012.

65. *Khamtokhu and Aksenchik v. Russia*, Applications nos. 60367/08 and 961/11, Council of Europe: European Court of Human Rights, 24 January 2017.

66. *Lakatošová and Lakatoš v. Slovakia,* Application no. 655/16, Council of Europe: European Court of Human Rights, 11 December 2018.

67. *Lithgow and others v. The United Kingdom*, Application no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, Council of Europe: European Court of Human Rights, 8 July 1986, para. 120.

68. *R.D. Stalla Costa v. Uruguay*, Communication No. 198/1985; U.N. Doc. CCPR/C/30/D/ 198/1985, 9 July 1987.

69. *Religious community of Jehovah's witnesses v. Azerbaijan,* Application no. 52884/09, Council of Europe: European Court of Human Rights, 20 February 2020.

70. *S. W. M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/29/D/ 172/1984, 09 April 1987.

71. *Savez Crkava Riječ ivota and Others v. Croatia*, Application no. 7798/08, Council of Europe: European Court of Human Rights, 9 December 2010.

72. *Sejdić and Finci v. Bosnia and. Herzegovina*, Application nos. 27996/06 and 34836/06, Council of Europe: European Court of Human Rights, 16 March 2010.

73. *Shelley v. United Kingdom*, Application no. 23800/06, Council of Europe: European Court of Human Rights, 4 January 2008, the Court's assessment.

74. *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic,* Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992 (1995).

75. *Sommerfeld v. Germany*, Application no. 31871/96, Council of Europe: European Court of Human Rights, 08 July 2003.

76. *Strand Lobben and others v. Norway*, Application no. 37283/13, Council of Europe: European Court of Human Rights, 10 September 2019.

77. *Thlimennos v. Greece,* Applications no. 34369/97, Council of Europe: European Court of Human Rights, 06 April 2000.

78. *V.C. v. Slovakia,* Application no. 18968/07, Council of Europe: European Court of Human Rights, 08 November 2011.

79. *Zhdanov and others v. Russia,* Applications nos. 12200/08, 35949/11 and 58282/12, Council of Europe: European Court of Human Rights, 16 October 2019.

Other reports and literature

80. Amnesty International, G*reece: worrying legal developments for asylum-seekers and NGOs,* Public statement, EUR 25/2259/2020, 04 May 2020. Available at: https://www.amnesty.org/en/ documents/eur25/2259/2020/en/.

81. AL RAMIAH, A., HEWSTONE, M., DOVIDIO, J.F., PENNER, L.A. (2010). *The social psychology of discrimination: theory, measurement and consequences.* In: Making Equality Count: Irish and International Research Measuring Equality and Discrimination, p. 85.

82. ALTMAN, A. (2020). *Discrimination*, The Stanford Encyclopedia of Philosophy, Summer 2020 Edition, Available at: https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=discrimination.

83. ALTWICKER, T. (2011). *International equal protection law*, Summary, p. 497. Available at: https://www.mpil.de/files/pdf2/beitr223.pdf.

84. ANTOINE, R.M.B. (2018). *An Intersectional Approach to Addressing Gender and Other Forms of Discrimination in Labour in the Commonwealth Caribbean.* University of Oxford Human Rights Hub Journal, Vol. 1 (2018), p. 89. Available at: https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/09/4-Intersectional-Approach-to-Labour-Discrimination.pdf.

85. BAEHR, P. (2009). *Non-Governmental Human Rights Organizations in International Relations.* Palgrave Macmillan UK, 1-199, p. 53. doi: 10.1057/9780230233706.

86. BUSSMANN, M., SCHNEIDER, G. (2015). *A porous humanitarian shield: The laws of war, the red cross, and the killing of civilians*. The Review of International Organizations, 11 (3), 337-359, p. 346.

87. BURRI, S., SCHIEK, D. (2009). *Multiple Discrimination in EU Law: Opportunities for legal responses to intersectional gender discrimination,* p. 3. Available at: https://eige.europa.eu/library/resource/aleph_eige000008236.

88. CHRISTOFFERSEN, A. (2017). *Intersectional approaches to equality research and data,* p. 9. Available at: http://www.ecu.ac.uk/wp-content/uploads/2017/04/Research_and_data_briefing_2_Intersectional_approaches_to_equality_research_and_data.pdf

89. Civic Space Watch. (2019). *Austria: The situation of civil society has changed significantly under the current government – new report says*, 24 April 2019. Available at: https://civicspacewatch.eu/austria-the-situation-of-civil-society-has-changed-significantly-under-a-the-current-government-new-report-says/.

90. CIVICUS, (2020). *New government action plan reveals change in attitude towards CSOs and Human Rights, 12 March 2020*. Available at: https://monitor.civicus.org/updates/2020/03/12/new-government-action-plan-reveals-change-attitude-towards-csos-and-human-rights/.

91. DE BURCA, G, SCOTT, J. (2001). *The EU and the WTO. Legal and Constitutional Issues.* Oxford, Portland, Oregon: Hart Publishing, p. 234. Available at: https://academic.oup.com/bybil/article-abstract/73/1/362/310701?redirectedFrom=fulltext.

92. Défenseur des droits, *Rapport annuel d'activité 2019*, p. 14. Available at: https://www.defenseurdesdroits.fr/sites/default/files/rapport_annuel/raa-2019-num-accessopti.pdf.

93. DEMARS, W., DIJKZEUL, D. (2015). *The NGO Challenge for International Relations Theory*. Routledge, 1-340, p. 132.

94. DUARTE, S. (2019). *Exploring French citizenship: the role of Non-Governmental Organisations (NGOs) in refugee integration*. Texas Christian University, Department of Political Science, p. 35. Available at: https://repository.tcu.edu/bitstream/handle/116099117/26971/Duarte_Sunkin_Honors_Thesis_SPR19_Final.pdf?sequence=1.

95. DUKALSKIS, A., PATANE, C. (2019). *Justifying power: when autocracies talk about themselves and their opponents*. Contemporary Politics, 25(4), 457-478, p. 461. doi: 10.1080/13569775.2019.1570424.

96. FALKNER, G., TREIB, O. (2008). *Three Worlds of Compliance or Four? The EU-15 Compared to New Member States.* Journal of Common Market Studies, 46(3), 293-313, p. 304-306.

97. GREWAL, S., VOETEN, E. (2015). *Are New Democracies Better Human Rights Compliers?* - International Organization, 69, 497-518, p. 500. doi:10.1017/S0020818314000435.

98. GUZMAN, A. (2002). *A Compliance-Based Theory of International Law*. California Law Review, 90(6), 1823-1887, p. 1843. doi:10.2307/3481436.

99. GERARDS, J. (2013). *The Discrimination Grounds of Article 14 of the European Convention on Human Rights.* Oxford University Press: Human Rights Law Review, 99-124, p. 114.

100. GIDDENS, A., GRIFFITHS, S. (2008). *Sociology*. In: Cambridge, Malden: Polity, 2008. Available at: https://politybooks.com/giddens7/studentresource/summaries/Student_Summary_16.asp.

101. HALLDENIUS, L. (2005). *Dissecting "Discrimination"*. In: Cambridge Quaterly of Health Care Ethics 14, 455-463, p. 457. Available at: https://www.cambridge.org/core/journals/cambridge-quarterly-of-healthcare-ethics/article/dissecting-discrimination/4D25DDE0D0AA1CF4750271421EA40E9A.

102. HEINRICHS, B. (2012). *What Is Discrimination and When Is It Morally Wrong?* In: Jahrbuch für Wissenschaft und Ethik. 12. 97-114, p. 100. Available at: https://www.researchgate.net/publication/236633286.

103. HILLEBRECHT, C. (2012). *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*. Human Rights Quarterly, 34(4), 959-985, p. 964. Available at: http://www.jstor.com/stable/23352236.

104. KEOHANE, R.O. (1992). *Compliance with International Commitments: Politics Within a Framework of Law.* Proceedings of the Annual Meeting (American Society of International Law), 86 (1-4), 176-180, p. 179. Available at: http://www.jstor.com/stable/25658631.

105. KNUDSEN, S.V. (2006). *Intersectionality - A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks,* p. 63 in Éric Bruillard et. al (eds.): *Caught in the Web or Lost in the Textbook?* Caen: IARTEM, stef, Iufm,2006 (pp. 61-76).

106. KOHLER-HAUSMANN, I. (2014). *Discrimination*. Available at: https://www.oxfordbiblio graphies .com /view/document /obo-9780199756384/obo-9780199756384-0013.xml.

107. KOHLER-HAUSMANN, I. (2019). *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination,* p. 1181. Available at: https://papers.ssrn.com/ sol3/papers.cfm?abstract_id=3050650.

108. KELLER, H., STONE SWEET, A. (2008). *Assessing the Impact of the ECHR on National Legal Systems.* Yale Law School, Faculty Scholarship Series (88), p. 679. Available at: https:// digitalcommons.law.yale.edu/fss_papers/88/.

109. LA BARBERA, M., CRUELLS LÓPEZ, M. (2019), *Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v. Spain*. Law & Society Rev, 53: 1167-1201, p. 1192. Available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/lasr.12435.

110. LAKI, I. (2014). *The concept of discrimination nowadays.* In: Struktúrafordulók. Studies in Political Science - Politikatudományi Tanulmányok (2014). MTA TK Politikatudományi Intézet, Budapest, pp. 252-259, p. 190. Available at: http://real.mtak.hu/25124/.

111. LEBOVIC, J.H., VOETEN, E. (2006). *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR.* International Studies Quarterly (2006) 50, 861–888. Available at: https://blogs.commons.georgetown.edu/erikvoeten/files/2011/10/LeboISQ.pdf.

112. LEBOVIC, J.H., VOETEN, E. (2009). *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators.* Journal of Peace Research, 46(1), 79-97, p.80. Available at: http://www.jstor.com/stable/27640800.

113. MAČKIĆ, J. (2018). *Proving Discriminatory Violence at the European Court of Human Rights*. Leiden, The Netherlands: Brill, p. 31-32. Available at: https://brill.com/view/title/36113.

114. MAKKONEN, T. (2002). *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore,* p. 19. Available at: https://www.abo.fi/wp-content/uploads/2018/03/2002-Makkonen-Multiple-compound-and-intersectional-discrimination.pdf.

115. MARCHETTI, R. (2018). *Government–NGO Relationships in Africa, Asia, Europe and MENA*. Routledge, 1-272, p.150

116. MCBRIDE, J., Expert Council on NGO law of the Conference of INGOs of the Council of Europe, *Non-governmental organisations: review of developments in standards, mechanisms and case law 2017-2019*, Review CONF/EXP (2020)1, February 2020, para. 158.

117. MEERNIK, J., ALOISI, R., SOWELL, M., NICHOLS, A. (2012). *The Impact of Human Rights Organizations on Naming and Shaming Campaigns*. The Journal of Conflict Resolution, 56 (2), 233-256, p. 236.

118. ODDNÝ, M. A. (2003). *Equality and non-discrimination under the European Convention on Human Rights.* The Hague: Martinus Nijhoff Publishers, p. 37.

119. Ontario Human Rights Commission, (2001). *An intersectional approach to discrimination. Addressing Multiple Grounds in Human Rights Claims,* p. 5. Available at: http://www.ohrc.on.ca/sites/default/filesattachmentsAn_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf)

120. OSCE, ODIHR hate-crime reporting: France, Available at: https://hatecrime.osce.org/france.

121.OSCE, ODIHR hate-crime reporting: Germany, Available at: https://hatecrime.osce.org/germany.

122. OSCE, ODIHR hate-crime reporting: United Kingdom, Available at: https://hatecrime.osce.org/united-kingdom.

123. PAGER, D., SHEPHERD, H. (2008). *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets.* In: Annual review of sociology, *34*, 181–209, p. 182. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2915460/.

124. PERONI, L. (2017). *Age and Gender Discrimination: Laudable Anti-Stereotyping Reasoning in Carvalho Pinto v. Portugal.* Strasbourg Observers, Available at: https://strasbourgobservers.com/2017/09/28/age-and-gender-discrimination-laudable-anti-stereotyping-reasoning-in-carvalho-pinto-v-portugal/#more-3897.

125. ProtectDefenders.eu, *List of Alerts against Human Rights Defenders: Russia*, 2016-2020. Available at: https://www.protectdefenders.eu/en/stats.html?yearFilter=all&regionFilter=&countryFilter=RU#mf.

126. ProtectDefenders.eu, *List of Alerts against Human Rights Defenders: Turkey*, 2016-2020. Available at: https://www.protectdefenders.eu/en/stats.html?yearFilter=all&regionFilter=&countryFilter=TR#mf.

127. Refugee Support Aegean, *Risk of Repression: New Rules on Civil Society Supporting Refugees and Migrants in Greece*, May 2020, p. 2. Available at: https://rsaegean.org/wp-content/uploads/2020/05/RSA_Comments_NGO_Registry.pdf.

128. ROPER, S.D. (2017). *Compliance with the European Convention on Human Rights: testing competing theoretical perspectives with post-communist countries.* East European Quarterly, 45(3-4), 123-141. Available at: https://politicalscience.ceu.edu/sites/politicalscience.ceu.hu/files/attachment/basicpage/1095/stevenroper.pdf.

129. SIMMONS, B. A. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press, 1-451. doi:10.1017/CBO9780511811340.

130. SIMMONS, B.A. (2000). *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs.* The American Political Science Review, 94(4), 819-835, p. 819. Available at: http://www.jstor.com/stable/2586210.

131. SIMSA, R., NEUNTEUFL, F., AHLFELD, C., GRASGRUBER-KERL, R., HECKERMANN, B., MODER, C., PRANZL, J., STADLBAUER, J. (2019). *Civil Society Index: Update 2019*, p. 39. Available at: https://gemeinnuetzig.at/wp-content/uploads/2019/04/IGO19_csi_Bericht_193x297_Kern_190415.pdf.

132. SMITH, B. (2016). *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*. The Equal Rights Review, Vol. Sixteen (2016).

133. SOSA, L. (2017). *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* Cambridge: Cambridge University Press, p. 18. Available at: https://www.cambridge.org/core/books/intersectionality-in-the-human-rights-legal-framework-on-violence-against-women/3437DD6E6E381E020188871CE778DDCF.

134. TALLBERG, J., DELLMUTH, L.M., AGNE, H., DUIT, A. (2015). *NGO Influence in International Organizations: Information, Access and Exchange*. Cambridge University Press, 48, 213-238, p. 216.

135. The Freedom House, Nations in Transit Methodology. Available at: https://freedomhouse.org/reports/nations-transit/nations-transit-methodology.

136. The World Justice Project, *The WJP Rule of Law Index 2020 report*. Available at: https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020.

137.The Open Society Justice Initiative (2012). *ECHR reform: Margin of Appreciation*. Available at: https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf

138. TOBLER, C. (2008). *Limits and potential of the concept of indirect discrimination,* Office for Official Publications of the European Communities, 2008. Available at: https://op.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

139. YASUDA, Y. (2015). *Rules, Norms and NGO Advocacy Strategies*. Routledge, 1-228, p. 6. doi: 10.4324/9781315687179.

140. YUWEN, L. (2016). *NGOs in China and Europe: Comparisons and Contrasts*. Routledge, 1-340, p. 302.