

ENLARGING THE SCOPE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: HISTORY, PHILOSOPHICAL ROOTS AND PRACTICAL OUTCOMES

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UDK: 341.231.14(4):340.112

Pregledni znanstveni rad

Primljeno: ožujak 2015.

The history of the development of the European Convention on Human Rights represents a unique experience of widening the scope of protection of an international instrument from classical political and civil rights to certain social and economic rights. With a particular focus upon the protection of labour rights under the European Convention, the author researches the roots of expansion of the Convention, analyzing the process of drafting and the capabilities theory of A. Sen, and the application of Convention as a “living instrument”. The paper traces how the judgments of the European Court in social matters contribute to the development of the relevant legislation of the states and establish enforceable standards of human rights protection.

Keywords: European Court of Human Rights, European Convention on Human Rights, labour rights, “living instrument”

1. HISTORY OF THE DRAFTING OF THE ECHR

The history of the development of the European Convention on Human Rights represents a unique experience of widening the scope of protection of an international instrument from classical political and civil rights to certain social and economic rights. The reasons and the ways of broadening the Convention's authority will be discussed in the present paper focusing on the history of the drafting of the Convention and on the integration of new rights into the original text.

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It is commonly said that the Convention was deemed to be the instrument of protection from totalitarianism as it was drafted shortly after the fall of Nazi Germany in the atmosphere of the post-war enlargement of totalitarian Soviet countries.¹ Since the Nuremberg judgments had established a new concept of international responsibility and consequently a new concept of national sovereignty, it was considered necessary to establish effective international guarantees of human rights.²

Human rights, listed solemnly in the *Universal Declaration of Human Rights* in 1948, lacked a mechanism of protection. In the course of 1949 it had become rather evident for the international community that the International Covenant, which was supposed to represent the international guarantee of human rights, would be very long in coming (in that time it was not yet clear that the rights would be divided into two documents³). The adoption of the Convention by the countries of the Council of Europe was a way of implementing the Universal Declaration of Human Rights.

Ten founding countries which created the Council of Europe in 1949 evidently represented a more homogenous group of countries than the members of the UN and could easier reach a consensus on the matter of human rights protection, particularly taking into account that the political and civil rights concerned were already fixed in their domestic legislations.

The drafting of the Convention began shortly after the creation of the Council of Europe in 1949. It was not an easy process as even in this “homogenous” circle of countries there were different views on the due scope of the future convention, the mechanism of protection, and on the possibility of restriction of national sovereignty. The main points of dispute were the following: 1. the definition of rights; 2. the list of rights; 3. the process of supervision and the right to individual petition. A discussion of these controversial points

¹ As Winston Churchill put it in his speech on the First Session of the Consultative Assembly of the Council of Europe in Strasbourg on 12.08.1949 “we have to... protect ourselves against any risk of being overrun, crushed by whatever form of totalitarian tyranny.” Cited from: *Voices of Europe: A Selection of Speeches Delivered Before the Parliamentary Assembly of the Council of Europe, 1949-96*, Council of Europe, Strasbourg, 1997, p. 11.

² Gordon L. Weil, *The European convention on human rights: background, development and prospects*, A.W. Sythoff, Leyden, 1963, p. 22.

³ For example, USSR and Syria opposed the idea of placing economic, social, and cultural rights in a separate instrument. See Daniel J. Whelan, *Indivisible Human Rights: A History*, University of Pennsylvania Press, Pennsylvania, 2011, p. 75

might contribute to our understanding of the roots of the future expansion of the Convention and, therefore, deserves to be presented in more detail.

1.1. The dispute on the definition of rights

According to the Papers of the First Session of the Committee of Ministers⁴ held in Strasbourg in 1949, the proposal to define each right was opposed by some representatives who argued that the rights mentioned were already “abundantly dealt with”.⁵ Based primarily on their experience in drawing up constitutions for ex-colonies, the British favoured a precise definition of the rights to be included. The French representative M. Teitgen thought that mere enumeration, a statement of principles such as in the Universal Declaration of Human Rights, would be easily enough enforced by the European Court.⁶

The final text of the Convention does not contain a fixed definition of rights, leaving to the Court the power of interpretation, which with the years has become the driving force of the Convention’s evolution. It may be presumed that the power of interpretation granted to the Court was not intentional. It seems more probable that the rights were not defined as their meanings were already very familiar to the legal systems of European states and were “already protected thoroughly”.⁷ As the former Vice-President of the European Commission of human rights J. A. Frowein noted, “the countries did not expect that the European Convention would go further than their internal system”.⁸

1.2. Dispute on the list of rights

It is remarkable to note that as early as in the preparatory stages of drafting there were ideas of creation of a “complete code of all the freedoms and fundamental rights, and all the so-called social freedoms and rights”.⁹ The

⁴ *Papers of the First Session of the Committee of Ministers*, Strasbourg, 1949, available at: <http://www.coe.int/t/dgal/dit/ilcd/archives/selection/cm/1949Aug.pdf> (accessed 01.11.2014).

⁵ See the opinion of the French representative M. Schuman. *Ibid.*, p. 34.

⁶ Gordon L. Weil, *op. cit.* (fn. 2), p. 28.

⁷ Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press, New York, 2010, p. 114.

⁸ Jochen Frowein, *The transformation of the constitutional law through the ECHR*, Israel Law Review, Vol. 41, No. 3, 2008, p. 490.

⁹ These words were said by Pierre-Henri Teitgen while presenting the Draft of the Convention on 19.08.1949, cited from Ed Bates, *op. cit.* (fn. 7), p. 59.

Convention was perceived by some members of the drafting committee as a “guarantee for further development of social justice in Europe”¹⁰ although it was initially aimed at protecting only basic civil and political rights.

The idea to include economic or social rights was in the air, but was rejected. One of the fathers of the Convention, Sir David Maxwell-Fyfe, found these rights to be “too controversial and difficult for enforcement even in the changing state of social and international development in Europe”; in his view their inclusion could jeopardize the acceptance of the Convention.¹¹ The approach of the drafters to social rights was vividly expressed by Teitgen: “Certainly, ‘professional’ freedoms and ‘social’ rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union, and then to co-ordinate our economies, before undertaking the generalisation of social democracy.”¹² It is curious to note that Teitgen was in fact one of the judges of the ECtHR in 1978 considering the case *Tyre v. United Kingdom*, where the approach to the Convention as to a living instrument was formulated for the first time.¹³ This approach later permitted to significantly widen the scope of rights, guaranteed by the Convention, including also “professional and social rights” mentioned by Teitgen during the drafting process.

1.3. Dispute on establishment of a process of supervision and the right to individual petition

The structure and powers of the bodies and the issue of supervision were further points of controversy. The authors of the Convention completely overestimated the willingness of certain States to create a human rights instrument that threatened their sovereignty; in 1949-1950 the governments of cer-

¹⁰ Words of the Socialist representative cited in Gordon L. Weil, *op. cit.* (fn. 2), p. 12.

¹¹ See *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949*, Council of Europe, Brill, Strasbourg, 1975, p. 116.

¹² Cited from Ed Bates, *op. cit.* (fn. 7), p. 65

¹³ ECtHR, *Tyrer v. United Kingdom*, 5856/72, 25.04.1978, para 31. See also: George Letsas, *The ECHR as a Living Instrument: Its Meaning and its Legitimacy* (March 14, 2012), available at SSRN: <http://ssrn.com/abstract=2021836> (accessed 20.09.2014).

tain leading states had little desire to see a Convention that could, as they saw it, meddle in internal affairs in any way.¹⁴

National sovereignty was (and still is) the pain point of the Convention. The states were willing to adopt rights that were already fixed in national legislation but saw a danger in the possibility of external control. This is why, initially, only the possibility of interstate claims was provided for in the text. The states were sure that this procedure would be used in very rare cases due to stable diplomatic relations between the European countries. The right to an individual claim and the acceptance of the jurisdiction of the European Court of Human Rights were provided for in the optional clauses of the Convention.¹⁵

The adoption of these clauses was a very slow process. In the beginning, most of the countries practised a “short-term” adherence to these clauses as testing the system and peering the activities of the Commission of Human Rights. The Commission of Human Rights was the most important player on that stage. Only few cases were brought before the Court, established in 1959. Gradually, the Commission gained confidence and finally all states accepted the right of individual petition.¹⁶

We presume that the subsequent acceptance of optional clauses by all member states was the merit of the Commission, which acted very cautiously, knowing that every mistake might blur the bright ideas of the Convention and transform it into a “paper tiger”.

The acceptance of optional clauses marked a new era in the history of the European Court. Together with the Commission, it began to confront violations of human rights in a very bold way. The popularity of the Court grew with the years, it gained authority on both the European and global legal stages¹⁷ and, as Ed Bates noted, “became more willing to interpret the Convention as a type of European Bill of Rights relevant to contemporary Europe.”¹⁸

The changes brought to the European Convention on Human Rights by

¹⁴ Ed Bates, *op. cit.* (fn. 7), p. 77.

¹⁵ See more on acceptance of optional clauses *ibid.*, pp. 105 – 107, 133 – 139.

¹⁶ Lecture of the member of the European Commission of Human Rights Henry G. Schermers, *Protocol 11 to the European Convention on Human Rights*, available at: <http://europainstitut.de/fileadmin/schriften/317.pdf> (accessed 20.10.2014).

¹⁷ See on the use of the Court’s case law by Inter-American court of human rights Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, *The European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 101 – 123.

¹⁸ Ed Bates, *op. cit.* (fn. 7), p. 151.

Protocol 11¹⁹ created a new permanent Court instead of the former two-levelled system and abolished the European Commission. These reforms were particularly important in the circumstances of the enlargement of the Council of Europe. New member states, such as Ukraine, Russia, Georgia or Azerbaijan have very different histories, cultures and perceptions of human rights (and their importance) than the European countries which initially adopted the Convention. The Court now has a “missionary function”²⁰, bringing the light of human rights to the most “obscure” places of the continent.

2. INTEGRATION OF NEW RIGHTS

The development of the protection of human rights under the ECHR and the expansion of the Convention with many social rights is the direct result of the possibility to interpret the text broadly and to take into account “present-day conditions”. In the landmark case *Airey v. Ireland* the Court held that there is no “water-tight division” separating economic and social rights from the field covered by the Convention.²¹ In this judgment the Court integrated the right to legal aid in civil cases into the right to a fair trial, thus confirming the indivisibility of human rights in the circumstances of their factual divisibility.

Human rights listed in the Universal Declaration were eventually divided into two documents both on the International level, where the two Covenants were adopted, and on the European stage, where the Council of Europe adopted the ECHR and the European Social Charter (ESC). Thus, two blocks of rights were formed. This division ultimately led to different levels of protection for political and civil rights on the one hand, and economic and social rights on the other. Although some commentators acknowledge that there is still “an increasing overlap between the two monitoring systems” created by the Council of Europe²², comparing the effects of ECHR and of the ESC, Sec-

¹⁹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, adopted 11.05.1994, entered in force 01.11.1998.

²⁰ Alfred W. B. Simpson, *The ECHR: the First half Century*, University of Chicago Ful-ton Lecture Series, 2004, p. 12, available at: http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1017&context=fulton_lectures (accessed 30.10.2014).

²¹ ECtHR, *Airey v. Ireland*, 6289/73, 09.10.1979, para. 26.

²² Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden, 2009, p. 324.

retary General of the Council of Europe Walter Schwimmer questioned rhetorically whether social rights are a less important category of human rights or even whether they are human rights at all?²³

The Court's approach to the Convention as to a living instrument that makes no "water-tight" division between the blocks of rights is a way to overcome (at least partly) the practical shortcomings of the division of rights and of the differences in the procedure of appeal. Since the Airey case the Court has started to broaden the scope of protection granted by the ECHR and integrate certain social rights. The integration of rights means that the Court reveals new facets of existing rights (for example, the right to manifest one's religion by wearing a religious symbol at work²⁴, the right to appeal against unfair dismissal on political grounds²⁵, or the right to the strike of solidarity²⁶) and integrates new rights into the original text of the Convention (for example, a right to health treatment²⁷, the right to occupational health protection²⁸, or the right to be reinstated in case of unfair dismissal²⁹).

2.1. Philosophical roots of the integrated approach

Philosophical roots of the integrated approach might be found in Sen's concept of freedom.³⁰ The research of V. Montavalou showed that the theory of capabilities may serve as justification of this method of interpretation. This

²³ The speech of the Secretary General of the Council of Europe Walter Schwimmer in *Reforming the European Convention on Human Rights: A Work in Progress, a Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR*, Council of Europe, Strasbourg, 2009, p. 31.

²⁴ ECtHR, *Eweida and Others v. The United Kingdom*, 48420/10, 15.1.2013.

²⁵ ECtHR, *Redfern v. The United Kingdom*, 47335/06, 6.11.2012

²⁶ ECtHR, *The National union of rail, maritime and transport workers v. The United Kingdom*, 31045/10, 08.04.2014, para 86.

²⁷ See Ellie Palmer, *Protecting Socio-Economic Rights Through The European Convention On Human Rights: Trends And Developments In The European Court Of Human Rights*, *Erasmus Law Review*, Vol. 2, No. 4, 2009, pp. 397 – 425, available at SSRN: <http://ssrn.com/abstract=1542674>.

²⁸ ECtHR, *Brincat and others v. Malta*, 60908/11 *et al.*, 24.07.2014.

²⁹ ECtHR, *Oleksandr Volkov v. Ukraine*, 21722/11, 9.01.2013.

³⁰ It is interesting to note that in Sen's Motherland (India) the right to just and humane conditions of work was integrated into the 'right to livelihood'. See Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary*, Oxford University Press, New York, 2014, p. 280.

author referred mainly to the capabilities theory, which contributed to the understanding of a state's obligations in the sphere of human rights as attending to their basic capabilities and making people capable to pursue a series of valuable functions.³¹ The research into the Court's case law on social matters leads to the conclusion that the Court's integrated approach is in fact in many points consonant with Sen's views and that the European Convention is used as an instrument to protect "the real capacity for human beings to lead lives which we have reason to value".³²

As early as in 1979 A. Sen stated that the framework of human rights was missing some notion of "basic capabilities"³³, which are understood as "the opportunity to achieve valuable combinations of human functioning".³⁴ This is the concept that rejects the conceptual differences between blocks of political/civil and economic/social rights³⁵, and argues the necessity of protection of all the rights that influence a person's functioning. Sen's attention was always drawn to the practical implementation of human rights, to the protection of their validity.³⁶ In the famous book "Development as Freedom" A. Sen noted that the notion of freedom "involves both the processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances".³⁷

This approach may be clearly seen in the Airey case. The applicant claimed the violation of the right to a fair trial as she was unable to petition for divorce as she had no money to pay for legal representation. The Government argued that the applicant had the right to go to court without the assistance of a lawyer. The Court went on to investigate whether the applicant was in fact

³¹ See Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, Human Rights Law Review, Vol. 13, No. 1, 2013, pp. 549 – 551.

³² Brian A. Langille, *Core Labour Rights – The True Story (Reply to Alston)*, European Journal of International Law, Vol. 16, No. 3, 2005, p. 432.

³³ Amartya Sen, *Equality of What?*, Tanner Lecture delivered at Stanford University in 1979, available at: http://tannerlectures.utah.edu/_documents/a-to-z/s/sen80.pdf (accessed 23.11.2014).

³⁴ Amartya Sen, *Elements of a Theory of Human Rights*, Philosophy & Public Affairs, Vol. 32, No. 4, 2004, p. 332.

³⁵ *Ibid.*, pp. 345 – 348.

³⁶ Amartya Sen, *Europa e il mondo - Quale sviluppo nel prossimo futuro?*, Lettera internazionale, No. 84, 2005, p. 9.

³⁷ Amartya Sen, *Development as Freedom*, First Anchor Books Edition, New York, 2000, p. 17.

capable of getting a divorce without legal help. Taking into account the high complexity of proceedings before the High Court and the “emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court” the ECtHR found that it was improbable that the applicant could effectively present her own case. The Court noted that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective” and found the violation of the right to a fair trial. Therefore the violation of the Convention right was found as the applicant, who had the right to represent herself before the Court, was not capable of doing this and the State did nothing to remedy the situation.

A. Sen proposes open public reasoning to be central for the understanding of human rights, and supposes that this is the way to definitively settle some disputes about coverage and content.³⁸ This is another important point for the justification of the integrated approach of the ECtHR. The expansion of the European Convention and its coverage of certain labour rights go hand in hand with the development of human rights protection in European countries. The Court is always very attentive to the recent trends of human rights’ protection on both the national and the international level. When the Court finds that the majority of European countries has achieved compromise dealing with a certain matter, it is a sign for the integration of new rights into the Convention or for the emerging of new “facets” of existing rights. This argument can be illustrated with decision in the *K. Markin v. Russia* case, where the Court, based on a comparative analysis of the European experience, found that Art. 8 (in conjunction with Art. 14) provided the right for paternity leave without discrimination. Another example can be found in *Sorensen and Rasmussen v. Denmark*³⁹ case where the Court held that Article 11 of the Convention contains a “negative right of association or, put in other words, a right not to be forced to join an association” and found that the practice of concluding closed-shop agreements violated the freedom of association. In this case much attention was drawn to the legislation of European countries and the provisions of international instruments and the positions of the European Committee of Social Rights.⁴⁰

³⁸ Amartya Sen, *op. cit.* (fn. 34), p. 322.

³⁹ ECtHR, *Sorensen and Rasmussen v. Denmark*, 52562/99 and 52620/99, 11.01.2006.

⁴⁰ As if the Court was following Sen’s advice “not to confine the domain of public reasoning to a given society only”, see Amartya Sen, *op. cit.* (fn. 34), p. 349.

Therefore, the Court was evidently looking for, using Sen's words, "open public reasoning" as a basis of its decision. As a result, the negative aspect of freedom of association was finally integrated into Article 11 of the Convention, in spite of the fact that the provision banning compulsory membership in associations was deliberately excluded from the text of the Convention in the drafting process.⁴¹

In the work prepared for the ILO A. Sen focused on the necessity of elaborating basic rights, legislated or not, as a part of decent society.⁴² By using the integrated method the European Court seems to expand the basic rights rooted in the text of the original Convention. The decisions in the cases *Demir and Baikara v. Turkey*⁴³ and *Enerji Yapi-Yol Sen v. Turquie*⁴⁴ might be considered as bright examples of acknowledgement of the right to collective bargaining and strike. Judgement in *Brincat and others v. Malta* is an example of interpreting Art. 8 of the ECHR as providing employees with the right to receive information about working conditions. In *R.Sz. v. Hungary*⁴⁵ the Court set a rule of wage protection against excessive taxation. In numerous cases the ECtHR underlined the importance of protection from discrimination in employment and social security relations.⁴⁶

2.2. Methods and outcomes of the enlarging of the scope of the ECHR

The Court justifies the integration of new rights or facets of rights by referring to the "living" character of the Convention, which must be interpreted in the light of present-day conditions. This method, even though not directly mentioned in the majority of the cases, largely determined the development of the human rights protection under the European Convention.

Scholars note that the application of this concept means that the interpretations must be adjusted to the evolving values in the European societies and

⁴¹ Gordon L. Weil, *op. cit.* (fn. 2), p. 68.

⁴² Amartya Sen, *Work and rights*, International Labour Review, Vol. 139, No. 2, 2000, p. 122.

⁴³ ECtHR, *Demir and Baykara v. Turkey*, 34503/97, Grand chamber, 12.11.2008.

⁴⁴ ECtHR, *Enerji Yapi-Yol Sen c. Turquie*, 68959/01, 21.04.2009.

⁴⁵ ECtHR, *R.Sz. v. Hungary*, 41838/11, 02.07.2013, see also *Á.A. v. Hungary*, 22193/11 and *P.G. v. Hungary*, 18229/11, 23.09.2014.

⁴⁶ See for example, ECtHR, *Thlimmenos v. Greece*, 34369/97, 06.04.2000; *Danilenkov and others v. Russia*, 67336/01, 30.07.2009; *Andrejeva v. Latvia*, 55707/00, 18.02.2009.

to the new human rights problems brought about by advances in science and technology, which could not have been foreseen in 1950.⁴⁷ These adjustments, for instance, led the Court to expand the protection of private life to electronic correspondence and the use of Internet at work⁴⁸, to argue the necessity of application of contemporary protective measures as far as occupational health was concerned.⁴⁹

The evolutive approach to interpretation was never applied unanimously by the judges of the European Court. Moreover, it was reproached by leading scholars as being illegitimate and leading to unpredictable interpretations of the text of the Convention, contrary to the original intention of the States.⁵⁰

The judges of the ECtHR in particular warned that it would be impossible to implement what would be an important international obligation when it is not sufficiently well defined so that the States may know exactly what it entails⁵¹ and that this would be contrary to the principle of legal certainty.⁵² Judge Pinheiro Farinha noted: “The Court has jurisdiction not to re-draft the Convention but to apply it. Only the High Contracting Parties can alter the contents of the obligations assumed.”⁵³

Former judge of the ECtHR, Franz Matscher, stated that the Court reached the limits of what can be regarded as treaty interpretation in the legal sense and

⁴⁷ Matti Pellonpää, *Continuity and Change in the Case-Law of the European Court of Human Rights*, in: Marcelo Gustavo Kohén (ed.), *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Martinus Nijhoff Publishers, Leiden, 2007, p. 409.

⁴⁸ ECtHR, *Copland v. the United Kingdom*, 62617/00, 03.04.2007.

⁴⁹ ECtHR, *Vilnes and others v. Norway*, 52806/09 and 22703/10, 05/12/2013.

⁵⁰ Richard Bellamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights*, *European Journal of International Law*, Vol. 25, No. 4, 2014, pp. 1019 – 1042; Lord Hoffman, *European Human Rights – A Force for Good or a Threat to Democracy?*, lecture read at the Dickson Poon School of Law, King's College London 17 June 2014, available at: <http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Theat-to-Democracy-17-June-2014.pdf> (accessed 20.08.2014).

⁵¹ ECtHR, *Golder v. The United Kingdom*, 4451/70, 21.02.1975, Separate opinion of Judge Fitzmaurice, para 30.

⁵² Joint concurring opinion of Judges Villiger, Nussberger and De Gaetano in *Lucky Dev v. Sweden*, 7356/10, 27.11.2014.

⁵³ Partly dissenting opinion of Judge Pinheiro Farinha in *Marckx v. Belgium*, 6833/74, 13.06.1979, para. 4.

at times has perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making.⁵⁴

However, in spite of the criticisms and reproaches about the “lack of clarity”⁵⁵ the European Court still interprets each right in accordance with various trends, considering the legal and social developments in Europe.⁵⁶ This approach is particularly indispensable in the sphere of protection of labour rights as many of the rights and freedoms are defined in the Convention in “too general terms to be fully self-executing”.⁵⁷ Scholars suppose that the lack of precision in the terms of the Convention leads to the emergence of the “creative legislative element” in the Court’s power of interpretation, comparable to that of the judiciary in common law countries.⁵⁸ Thus, the Court expanded the right to respect for private life, acknowledging such new rights as the right to reputation⁵⁹, the right to establish and develop relationships with other human beings⁶⁰, and the right to receive information about risks the person is exposed to.⁶¹ The right to freedom of association was complemented by the right to collective bargaining⁶², the right to strike (including the right to solidarity strike)⁶³ and the negative freedom of association.⁶⁴

The Court on numerous occasions faced the necessity of delimiting the use of the evolutive interpretation of the Convention. In *Johnston and Others v. Ireland* it underlined that “the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein

⁵⁴ Judge Franz Matscher, *Methods of Interpretation of the Convention*, in: Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Leiden, 1993, pp. 69 – 70.

⁵⁵ ECtHR, Concurring Opinion of Judge Ziemele in *O’Keeffe v. Ireland*, 35810/09, 28.01.2014, para. 10.

⁵⁶ Isi Foighel, *Reflections of a Former Judge of the European Court of Human Rights*, in: Stéphanie Lagoutte, Hans-Otto Sano and Peter Scharff Smith (eds.), *Human Rights in Turmoil: Facing Threats, Consolidating Opinions*, Brill, Leiden, 2006, p. 277.

⁵⁷ Humphrey Waldock, *The Effectiveness of the System Set up by the European Convention on Human Rights*, *Human Rights Law Journal*, Vol. 1, No. 1, 1980, p. 9.

⁵⁸ *Ibid.*

⁵⁹ ECtHR, *Pfeifer v. Austria*, 12556/03, 15.11.2007, para. 35.

⁶⁰ ECtHR, *Niemietz v. Germany*, 13710/88, 16.12.1992, para. 29.

⁶¹ ECtHR, *Vilnes and others v. Norway*, *op. cit.* (fn. 49).

⁶² ECtHR, *Demir and Baykara v. Turkey*, *op. cit.* (fn. 43).

⁶³ ECtHR, *Enerji Yapı-Yol Sen v. Turkey*, *op. cit.* (fn. 44); *National union of rail, maritime and transport workers v. The United Kingdom*, *op. cit.* (fn. 26).

⁶⁴ ECtHR, *Sorensen and Rasmussen v. Denmark*, *op. cit.* (fn. 39).

at the outset, this is particularly so here, where the omission was deliberate.”⁶⁵ However, this statement did not prevent the Court to conclude the right not to join a trade union as inherent to Article 11, although it was consciously excluded from the text in the drafting process.

Another limit might be found in the acknowledgement of the rule that interpretation must not place an impossible or disproportionate burden on the states. This rule concerns the imposition of positive obligations on the States to ensure the protection of the Convention rights.⁶⁶ For example, in *Brincat and others v. Malta* the Court referred to this rule in the interpretation of the scope of the state’s obligation to ensure the protection of life of employees.⁶⁷

The search for common standards which is a “constant thread running through the case law of the Court” is another limitation of the application of the evolutive interpretation of the ECHR.⁶⁸ Common standards of human rights protection are both the limit and the source of such interpretation. They limit the Court by being too “expansive”, which makes it difficult to find common standards, and, at the same time, provide the Court with the evidence of the development of national law (in particular European), and of the relevant international instruments.

Magdalena Forowicz, author of profound research into the reception of international law in the European Court of Human Rights, noted that the Court finds itself at the apex of two diametrically different judicial paradigms: the open paradigm, characterized by a high level of judicial activism and unhindered references to international law, and the closed one, marked by judicial restraint and few references to international law.⁶⁹

The most vivid application of the “open paradigm” is represented in the already mentioned *Demir and Baikara* case. In the Grand Chamber judgement the Court directly stated the following: “The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. ... In this context, it is not necessary for

⁶⁵ ECtHR, *Johnston and others v. Ireland*, 9697/82, 18.12.1986, para. 53.

⁶⁶ ECtHR, *Koval and others v. Ukraine*, 22429/05, 15.11.2012, para. 73; between labour law cases – *Vilnes and others v. Norway*, *op. cit.* (fn. 49), para. 220.

⁶⁷ ECtHR, *Brincat and others v. Malta*, *op. cit.* (fn. 28), para. 101.

⁶⁸ Sir Nicholas Bratza, *Living instrument or dead letter - the future of the ECHR*, *European Human Rights Law Review*, No. 2, 2014, p. 124.

⁶⁹ Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford University press, New York, 2010, p. 4.

the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.”

The Court further referred to the norms of the European Social Charter, which was not ratified by Turkey, and concluded that the right to collective bargaining was ‘an essential element’ of the right to freedom of association. This approach triggered a wave of criticism from both the judges of the European Court and scholars. It was called to be in conflict with the approaches taken by other international tribunals⁷⁰ and contrary to the 1969 Vienna Convention on the Law of Treaties.⁷¹

Examples of the influence of international instruments on the protection of labour rights by the European Court demonstrate that references to the ILO Conventions and the European Social Charter are the source of further development of the protection of labour rights under the ECHR.⁷² It permits the Court to interpret the ECHR in “harmony with other rules of international law of which it forms part”⁷³ and broaden the scope of the Convention.

The broadening of the scope of the Convention through the integration of certain social rights was reproached by representatives of member states as threatening the Court’s ability to do what was most important and as shifting the role of the Court away from its key objectives.⁷⁴ Russian authorities, for example, heavily criticized the Court for rulings which undermined the

⁷⁰ Ragnar Nordeide, *Demir & Baykara v. Turkey - European Court of Human Rights judgment on rights of trade union formation and of collective bargaining*, American Journal of International Law, Vol. 103, No. 3, 2009, p. 572.

⁷¹ Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, *No consensus on consensus? The practice of the European court of human rights*, Human Rights Law Journal, Vol. 33, No. 7-12, 2013, p. 252.

⁷² ECtHR, Veniamin Tymoshenko and others v. Ukraine, 48408/12, 02.10.2014, para 32 – 49; Sidabras and Dziautas v. Lithuania, 55480/00 and 59330/00, 27.07.2004; Sorensen and Rasmussen v. Denmark, *op. cit.* (fn. 39); Enerji Yapi-Yol Sen v. Turkey, *op. cit.* (fn. 44), para. 24, 32.

⁷³ ECtHR, Rantsev v. Cyprus and Russia, 25965/04, 07.01.2010, para. 274.

⁷⁴ See David Cameron, *European Court of Human Rights*, The Guardian, 24.03.2012, available at: <http://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full> (accessed 20.04.2015).

Constitutional values of the country⁷⁵ in the case concerning parental leaves for servicemen.⁷⁶ The ECtHR ruling against Germany in the Görgülü case⁷⁷, which concerned parental rights, made the Federal Constitutional Court conclude that the European Court was not a higher ranking court in relation to the domestic courts, because the Convention was ordinary statute law⁷⁸ and therefore its decisions were not automatically binding for German Courts. The judgment in the Hirst case, where it was held that the blanket ban on prisoners voting violated the Convention, stirred up discussions on the legitimacy of the Court's decisions in Great Britain.⁷⁹ It led to "vitriolic" fury directed against the judges of ECtHR.⁸⁰ Prominent scholars criticized the Court for considering itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.⁸¹ However these criticisms have rarely been upheld by human rights scholars or NGOs. Therefore, the development of the European Convention through the integration of new rights, though questionable from the point of view of international law, is the way "to do good"⁸² and expand the protection of human rights.

⁷⁵ ECtHR, Konstantin Markin v. Russia, 30078/06, 07.10.2010.

⁷⁶ See the article of the president of the Russian Constitutional Court Valeriy Zorkin, *The limits of pliability* (Predel ustupchivosti), *Rossyskaya gazeta*, 29.10.2010, available at: <http://www.rg.ru/2010/10/29/zorkin.html> (accessed 07.10.2014).

⁷⁷ ECtHR, Gorgulu v. Germany, 74969/01, 26.02.2004.

⁷⁸ Felix Müller and Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006*, *German Law Journal*, Vol. 9, No. 2, 2009, p. 164.

⁷⁹ Lord Phillips, *European Human Rights – A Force for Good or a Threat to Democracy?*, lecture read at the Dickson Poon School of Law, King's College London 17 June 2014, available at: <http://www.kcl.ac.uk/law/newsevents/newsrecords/2013-14/assets/Lord-Phillips-European-Human-Rights--A-Force-for-Good-or-a-Theat-to-Democracy-17-June-2014.pdf> (accessed 20.01.2015); David Conway, *British Sovereignty v. The European Convention on Human Rights: The Case of John Hirst*, available at: <http://www.libertylawsite.org/2012/11/23/british-sovereignty-v-european-convention-on-human-rights-the-case-of-john-hirst/> (accessed 20.01.2015).

⁸⁰ Sir Nicolas Bratza, *The Relationship between the UK Courts and Strasbourg*, *European Human Rights Law Review*, No. 5, 2011, pp. 505 – 512.

⁸¹ Lord Hoffmann, *The Universality of Human Rights*, *Judicial Studies Board Annual Lecture*, 19 March 2009, available at: <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2013/hoffmann.pdf> (accessed 20.01.2015).

⁸² Justice Scalia, being invited to the European Court, said that the power to do good came into every judge's hand. Cited from Sir Nicholas Bratza, *op. cit.* (fn. 80), p. 117.

3. CONCLUSIONS

The criticisms of states are understandable; the Court was usually very reluctant to interfere with the matters of social character leaving the states a wide margin of appreciation in the sphere of general social and economic policy.⁸³ It abstained from the protection of pensions and wages of applicants due to austerity measures⁸⁴, of the rights to housing⁸⁵, the rights of disabled persons⁸⁶ or of the right to work.⁸⁷ However, the most important issues of economic and social policies, concerning in particular vulnerable persons⁸⁸ or discrimination⁸⁹, are still dealt with by the Court. The judgments of the European Court in social matters contribute to the development of relevant legislation of the states and establish enforceable standards of human rights protection. The abolishment of discrimination on the ground of sex in regards of parental leaves and benefits⁹⁰, and on the ground of nationality in regard of welfare benefits and pensions⁹¹, protection of the right to strike and to collective bargaining⁹², and the striking of provisions on dismissal of servicemen

⁸³ See ECtHR, *R.Sz. v. Hungary*, 41838/11, 02.07.2013, para. 38; *Koufaki and Adedy v. Greece*, 57665/12 and 57657/12, 07.05.2013, para. 31; *Stec and Others v. UK*, 65731/01 and 65900/01, 12.04.2006, para. 52.

⁸⁴ ECtHR, *Koufaki and Adedy v. Greece*, *op. cit.* (fn. 83); *Mihăieş and Senteş v. Romania*, 44232/11 and 44605/11, 02.03.2012; *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, 62235/12, 57725/12, 08.10.2013; *Panfile v. Romania*, 13902/11, 20.03.2012; *Khoniakina v. Georgia*, 17767/08, 19.06.2012; *Maggio and others v. Italy*, 46286/09 *et al.*, 31.05.2011.

⁸⁵ ECtHR, *Chapman v. The United Kingdom*, 27238/95, 18.01.2001; *James and others v. The United Kingdom*, 8793/79, 21.02.1986; *Marzari v. Italy*, 36448/97, 04.05.1999.

⁸⁶ ECtHR, *Zehnalova and Zehnal v. The Czech Republic*, 38621/97, 14.05.2002; *Botta v. Italy*, 21439/93, 24.02.1998; *Farcaş v. Romania*, 32596/04, 30.09.2010.

⁸⁷ ECtHR, *Panfile v. Romania*, *op. cit.* (fn. 84), para. 18; *Sobczyk v. Poland*, 25693/94 and 27387/95, 10.02.2000; *Dragan Cakalic v. Croatia*, 17400/02, 15.09.2003; *Torri and Others v. Italy and Bucciarelli v. Italy*, 11838/07 and 12302/07, 24.01.2012.

⁸⁸ ECtHR, *I.B. v. Greece*, 552/10, 03/10/2013.

⁸⁹ *Thlimmenos v. Greece*, *op. cit.* (fn. 46).

⁹⁰ ECtHR, *Willis v. The United Kingdom*, 36042/97, 11.06.2002; *Markin v. Russia*, *op. cit.* (fn. 75).

⁹¹ ECtHR, *Andrejeva v. Latvia*, 55707/00, 18.02.2009; *Gaygusuz v. Austria*, 17371/90, 16.09.1996.

⁹² ECtHR, *Demir and Baikara v. Turkey* *op. cit.* (fn. 43) and *Enerji Yapi-Yol Sen v. Turkey*, *op. cit.* (fn. 44).

for homosexuality⁹³ are examples of undisputable achievements of the Court in the sphere of protection of social and economic rights. Therefore, in spite of criticisms from both the judges of the European Court and the member states, the Court “can speak with a strong voice”⁹⁴ protecting political, civil, economic and social rights, and has acquired a “truly constitutional character for the whole European continent”.⁹⁵

⁹³ ECtHR, *Lustig-Prean and Beckett v. The United Kingdom*, 31417/96 and 32377/96, 27.09.1999.

⁹⁴ Sir Bob Hepple, *The Aims of Equality Law*, Current legal problems, Vol. 61, No. 1, 2008, p. 22.

⁹⁵ Paul Mahoney, *The European Convention On Royal Rights: Royalty, Aristocracy And The European Convention On Human Rights*, in: Marcelo Gustavo Kohen (ed.), *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international*, Martinus Nijhoff Publishers, Leiden, 2007, p. 341.

Sažetak

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PROŠIRENJE OKVIRA EUROPSKE KONVENCIJE O LJUDSKIM PRAVIMA: POVIJEST, FILOZOFSKI KORIJENI I PRAKTIČNI REZULTATI

Povijest razvoja Europske konvencije o ljudskim pravima predstavlja jedinstveno iskustvo širenja okvira zaštite međunarodnim pravnim instrumentom od klasičnih političkih i građanskih prava na određena društvena i ekonomska prava. S posebnim naglaskom na zaštitu radničkih prava prema Europskoj konvenciji autorica istražuje korijene širenja Europske konvencije, analizirajući proces njezine pripreme i teoriju o mogućnostima A. Sen te primjenu Konvencije kao “živog instrumenta”. Rad prati kako presude Europskog suda u materiji socijalnog prava pridonose razvoju nacionalnih zakonodavstava i postavljaju sudski ostvarive/provedive standarde zaštite ljudskih prava.

Ključne riječi: Europski sud za zaštitu ljudskih prava, Europska konvencija o ljudskim pravima, radna prava, “živi instrument”

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