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**The Impact of European Law and Case Law on Shaping
Democracy**

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The impact of European law and case-law on shaping democracy

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Introduction

The text of the European Convention on Human Rights and Fundamental Freedoms (the Convention), with its interpretation by the European Court of Human Rights (ECtHR) and its application to constitutional questions by the European Commission on Democracy through Law (Venice Commission) are closely tied to the theory and practice of democracy in Europe. The impact of European human rights case-law on democratic practices is far reaching. This is a positive development overall, but it is a development that is also open to challenge by everyday democratic practices at the domestic level. The aim of this issue paper is to outline the different ways European human rights law and case-law have had an impact on the shaping of democracy and to identify conceptual and institutional challenges to this.

Democracy as the framework for the effective realisation of human rights law

The text of the Convention regards democracy as the best and - by implication - the necessary political framework for the effective realisation of human rights through law. This is reflected both in the text of the Convention as well as in its interpretation and application by the ECtHR and the Venice Commission.

In its preamble the Convention states that ‘an effective political democracy’ is the basis for the realisation of human rights. That is, governments should either strive to maintain high standards of democratic government or they should aim towards democratisation in order to effectively protect human rights. Individual provisions also reinforce this outlook. Article 3 Protocol 1 of the Convention codifies free and fair elections as a right.¹ Articles 8, 9, 10, 11 of the Convention and Article 2 of the 4th Protocol further state that all restrictions to the rights to privacy, freedom of thought and religion, expression, assembly and movement must be prescribed by law and must be justified as a necessary measure in a democratic society.

¹ This is further elaborated in the Code of Good Practice in Electoral Matters, adopted by the Venice Commission in 2002. [www.venice.coe.int/docs/2002/CDL-EL\(2002\)005-e.html](http://www.venice.coe.int/docs/2002/CDL-EL(2002)005-e.html)

This explicit association of democracy with human rights law requires all Council of Europe states to not only maintain democratic standards but also, where necessary, improve them. Litigation before the European Court of Human Rights, therefore, is not only a barometer of respect for human rights law domestically, but also of standards of democratic governance.

Democracy understood as a political regime aiming to expand rights and freedoms

The interpretation of the Convention by the ECtHR over the past fifty years has built on the Convention's provisions on democracy. It has also elaborated a case-law which has strengthened the idea that democratic government must be the underlying political regime for the effective realisation of human rights. In the case-law of the ECtHR, democracy is understood as a political framework that aims to broaden rights and freedoms. The legitimacy of a democratic regime is assessed by the level of care it shows towards human rights protections. The most prominent example of this is the ECtHR's interpretation of the 'necessary in a democratic society' clause in Articles 8, 9, 10, and 11 of the Convention. This clause is interpreted in a way that stresses the expansive interpretation of rights flow from democratic standards. In order to maintain a healthy functioning democracy, rights must be interpreted expansively. They can only be restricted in the most exceptional circumstances.²

The interpretation of individual Convention Articles are also closely connected to understanding democracy as a framework for expanding freedoms. National authorities have negative and positive obligations in this regard. They are obliged not to interfere with rights (negative). They also have to ensure the effective enjoyment of rights (positive).³ In particular, the ECtHR sees freedom of expression and freedom of assembly and association as intrinsic to democracy.⁴ This interpretation does not treat these rights as separate from democracy, rather it sees them as being at the very centre of the improvement of democratic governance. The respect for rights is itself a tool for democratisation and maintaining democratic standards.

However, there is, at times a tension between respecting individual rights and devising public policies that are aimed at protecting public interests. The ECtHR addresses this tension by looking at governments' conduct and justifications on a case by case basis.

Discussion points in this context include:

- Should the 'necessity in a democratic society' test be incorporated in the constitutions of all Council of Europe member states?
- How should democratic decision makers be encouraged to apply the 'necessity in a democratic society' test in their everyday decision-making processes?

² *Cumpăna and Mazăre v. Romania* (2004).

³ *Plattform 'Arzte für das Leben' v. Austria* (1988).

⁴ *Goodwin v. United Kingdom* (1996); *Vogt v. Germany* (1996).

- How adequately does the ‘necessity in a democratic society’ address rights or restrictions that focus on protecting public safety or public order?

Human rights law as the guardian of pre-democratic rights

The European Convention on Human Rights has a range of rights which may be termed as ‘pre-democratic’. Articles 2, 3, 5, 6 and 7 of the Convention (right to life, freedom from torture, inhuman and degrading treatment, freedom from arbitrary detention, right to a fair trial, and freedom from slavery and servitude) illustrate this. The way in which these provisions are interpreted by the ECtHR does not allow for any restriction by democratic authorities.⁵ They are, therefore, never subject to the ‘necessity in a democratic society’ test. These provisions are best seen as being part of a democratic political culture that respects the equal worth of human beings. They receive their legitimacy from the inherent dignity of human beings. Because of their universal justificatory basis, these rights extend to non-citizens and may include extra territorial duties of a positive kind⁶.

The impact of pre-democratic rights on political processes is profound as this suggests that the democratic culture should regard these rights as being outside the sphere of any political negotiation. In recent years counter-terrorism legislation in many Council of Europe member states have placed strain on these rights⁷ and the jurisprudence of the ECtHR has been pivotal in countering national policies that have attempted to restrict these rights.⁸

Discussion points in this context include:

- Are domestic national governments entitled to re-negotiate rights on the basis of a democratic mandate?
- Can there be national referenda on the scope of pre-democratic rights?
- How could political and civil society actors be encouraged to agree that certain rights are outside of the democratic negotiation zone?
- How can a popular domestic backlash with respect to the protection of rights be prevented - such as the right to fair trial of suspects of terrorist acts?

The European Court of Human Rights: respectful of national democratic processes

A much debated doctrine of the ECtHR - the doctrine of margin of appreciation - relies on the idea that national democratic processes and their well-reasoned decisions should be respected. The ECtHR, however, has also been careful in pointing out that rights that constitute the pillars of democratic

⁵ *Saadi v. Italy* (2006).

⁶ *Chahal v. United Kingdom* (1996).

⁷ See Venice Commission Study of 500/2008 on Anti-terrorism Legislation in the Council of Europe Member States.

⁸ *S. and Marper v. United Kingdom* (2008).

societies (most notably freedom of expression) are subject to a very narrow margin of appreciation.⁹ The respect for everyday democratic processes can - at times - be in conflict with the view that democracy is a framework for broadening human rights.

The central question in this respect is whether there should be a 'breathing space' for democratic governments in their every day application of rights and, if so, what is the best way to conceptualise such a breathing space. To what extent does rights protection allow for democratic diversity?

A further question concerns the appropriate scope of the relationship between Constitutional Courts, which have a national democratic constitutional mandate, and the European human rights case-law. What is the appropriate way to understand the case-law of national Constitutional Courts on rights protections? Is there room for different interpretations across Europe given the existing corpus of European human rights law?

European human rights law as protection for non-citizens and marginalised groups

A crucial aspect of European human rights law is the protection it offers for non-citizens and marginalised groups. In democracies, non-citizens do not normally have access to political institutions. Despite their inability to participate in democratic society, their status and rights can be vulnerable through changes in legislation.¹⁰ The case-law of the European Court of Human Rights concerning the expulsion of aliens and standards of treatment of non-citizens in civil matters¹¹ provides an avenue for non-citizens to claim rights from democracies.

European human rights law operates as a mechanism of last resort for individuals or groups who have limited access to political institutions or who cannot take advantage of such access due to the hostile preferences of majorities towards these groups. This usually means marginalised groups such as ethnic, religious or linguistic minorities, sexual minorities, women, or prisoners. Litigation before the European Court of Human Rights provides these individuals with an avenue to air their grievances. Non-discrimination case-law and the doctrine of positive obligations provide important safeguards for empowering those living in the margins of democratic societies.

Discussion points in this context include:

- How do we prevent a popular domestic backlash with respect to human rights judgments, in particular those that protect non-citizens and marginalised groups?

⁹ See also the Venice Commission Opinion 415/2006 on the Role of the Media in Democracy.

¹⁰ *Andrejeva v. Latvia* (2009)

¹¹ *Ozturk v. Germany* (1984), *Cabales and Balkandalı v. United Kingdom*, (1990) *Mengeshe Kimfe v. Switzerland* (2010).

- Should non-citizens and marginalised groups be afforded explicit protection under domestic constitutions?
- How could democratic constituents be encouraged to respect the rights of non-citizens?
- To what extent does the protection of marginalised groups provided through European human rights law increase the participation of these groups in domestic democratic processes?

European human rights law as a guiding principle for democratic decision-makers

The ECtHR offers specific guidance to democratic decision-makers through its case-law on procedural rights. This includes the right to fair trial (Article 6), the right to freedom from arbitrary detention (Article 5) and the right to an effective remedy (Article 13). This is done through the use of doctrines of proportionality and positive obligations in interpreting rights. These procedural guarantees aim to protect the idea of the rule of law as being an integral element of democratic government. Case-law on these rights point to necessary reforms in the administration of justice and are pivotal in the creation and consolidation of independent and impartial judiciaries. In this respect, procedural guarantees prepare the background for the substantive application of rights protections.

The doctrines of proportionality and positive obligations provide concrete guidance to any decision maker who is responsible for providing practical protection to rights and for balancing rights with the public interest. Both of these doctrines speak to everyday democratic practices such as decisions to register political parties and non-governmental organisations, to allow mass protest, to protect protesters from third parties, or to prevent harm to citizens from third parties.

Discussion points in this context include:

- What priorities does European human rights law set in the fields of rule of law and administration of justice for the decision-makers?
- What guidelines exist for countries that are undergoing a transition to democracy from a more authoritarian form of government?
- How should decision makers at all levels of democratic institutions apply the principle of proportionality?
- What problems does multi-level governance in complex societies bring in encouraging decision makers to respect human rights? Should there be constitutional guidance to ensure that decision-makers at all levels are aware of and respect human rights principles?

The opinions expressed in this paper are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.