A critical study of the contributions of The European Court of Human Rights: Right to Life, Right to Fair Trial & Right to Privacy

UNDER THE GUIDANCE OF:

Prof. H. K. Nagraj

SUBMITTED BY:

Tanushree Rao

ID No. 755

LL.M. (Human Right Laws)

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NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

CERTIFICATE

This is to certify that, this dissertation on **"A critical study of the contributions of The European Court of Human Rights: Right to Life, Right to Fair Trial & Right to Privacy"**, submitted by **Tanushree Rao** (LL.M. ID No. 755) as part of the degree of Master of Laws (Human Right Laws) for the academic year 2016-17 of National Law School of India University, Bangalore, is the product of bona-fide research carried out under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.

31.05.17

Prof. H. K. Nagraj,

NLSIU, Bangalore.

DECLARATION

I, **Tanushree Rao** [ID No. 755, LL.M. (Human Right Laws)], 2016-17, do hereby declare that this dissertation on the subject of **"A critical study of the contributions of The European Court of Human Rights: Right to Life, Right to Fair Trial & Right to Privacy"** is the product of research undertaken by me in the partial fulfillment of the requirements of degree of Master of Laws (LL.M.) from National Law School of India University, Bangalore, under the guidance of Prof. H. K. Nagraj Sir.

This research work is original, to the best of my knowledge, except for such help of works derived from such authorities as have been referred to at the respective places for which necessary acknowledgement have been made.

It is further averred that to the best of my knowledge, this research work has not been submitted either in whole or in part, for any other degree or diploma from any other university or educational institute.

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Tanushree Rao

ID No. - 755

LL.M. (Human Rights Laws)

NLSIU, Bangalore

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This dissertation is modest attempt at appreciating the law and its enforcement. It also gave me some insight of related subject and otherwise along with knowledge regarding research methodology.

Tanushree Rao,

ID No.755, LL.M.,

(Human Right Laws).

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Chapter I

Introduction

The European convention on human rights was the immediate response to a World War II which led to the dark holocaust. However, the origin of European Court of Human rights can be discovered from the foundations of human rights. The principle that law must protect the human rights of individuals against the abuses of government and its machinery, can be traced back from John Locke's Two treatise of Government published in 1690.[1]

Locke opined that even before the formation of government, human rights came into existence. This idea of Locke led to the glorious revolution in 1688 in United Kingdom and eventually led to the foundation of the basic human rights of the individuals. Besides this Jean Jacques Rousseau [2] in 1762 brought the revolutionary idea that 'man is born free and everywhere he is in chain' and this led to the democratic revolution in America and in Europe. The traces of Human Rights can be found in the American War of Independence and the French

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[1] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, 3rd Ed. (2008), Oxford University press, at 9.

[2] *Id*

Declaration of the Right of Man[3]. However, the term human rights was never used in that period and this is reasonably a recent phenomenon which was probably coined in the late 19th century when this terms was used against the abolition of slavery.[4]

The importance of human rights is realized after the First World War and for enjoyment of human rights it was necessary to safeguard international peace and security. In this connection the League of Nations was established with the Treaty of Versailles to protect the world from the war and to settle dispute peacefully. But the League of Nations failed to prevent the world from the scourge of World War II.[5]

After World War II the victorious Allies powers understood that for protection of the future generation from the tyranny international peace and security depends on the domestic protection of individual rights. Further there is need for an international supervision over such domestic practices. Therefore the United Nations Charter has taken the colossal step and expressly recognized 'universal respect for, and observance of human rights and fundamental freedoms for all

[3] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (2007), at 18, Oxford University Press.

[4] *William Lolyd Garrison*, Research Begins Here New World Encyclopedia, http://www.newworldencyclopedia.org/entry/William_Lloyd_Garrison, 24/6/2017.

[5] JariEloranta, *WHY DID THE LEAGUE OF NATIONS FAIL?* (2005), at 1, Historical Center of the former Imperial Ottoman Bank,

without distinction as to race, sex, language or religion.'[6] The outcome of these changes was due to the emergence of the idea that how states treat individuals within their authority is the legitimate concern of other state and this paved the way for the birth of international human rights enforcement instruments and the concept of international community.[7] Subsequent to the World War II assertion that individual have rights by 'virtue of being human' was understood to mean that state have obligation by virtue of being members of the international community.[8]

Thus this principle of international human rights limited the concept of state sovereignty. In furtherance of this principle the United Nations drafted the Universal Declaration of Human Rights which was the source of inspiration for the European Convention of Human Rights.

This principle that individual is the member of the international community intervenes over the sovereignty of the nation brought a shift from the positive law which advocated that it was the sovereign who had exclusive right to protect the individual. The European Court of Human Rights is the departure from this notion of positive law. Therefore before analyzing this departure it is important

[6]Article 55 and 56,United Nations Charter, 1945.

[7]George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (2007), at 19, Oxford University Press.

[8]*Id*

to note that rights are generally claimed against the national governments. However the international human rights instruments would not only limit the actions of the state authority but would also seek to impose limitations upon the authority of the state.

The European Convention of Human Rights is the outcome of this principle of international community which gained the strength after the World War II. In 1948 the Winston Churchill the Prime Minister of the United Kingdom proposed for the creation of an instrument to unify the European nations and this led to the creation of the Council of Europe in 1949 by the Treaty of London.[9] At the time of the formation of the Council of Europe it was recommended by the delegates to prepare the European Convention on Human rights for the purpose of avoiding the repetitions circumstances which occurred during the Second World War. This European Convention has also been identified has no only the savior from the war but also the one which aims to protect the states from the Communist subversion. Largely this was the reason for the European Convention to be the mirror of civil and political rights.[10] Thus, finally after long deliberations the council of Europe completed its first major endeavor and

[9] *Winston Churchill: Calling for a United States of Europe*, European Commission, at 2, https://europa.eu/european-union/sites/europaeu/files/docs/body/winston_churchill_en.pdf, 29/6/2017.

[10] Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *The European Convention on Human Rights* (6th Ed. 2006) at 598, Oxford University Press.

signed the European convention on Human rights in 1950s and the soul of the Convention is Strasbourg legal machinery, the instrument to enforce the human rights enunciated under the Convention.

The European convention introduced two enforcement machineries, i.e. the European Commission of Human Rights and the European Court of Human Rights for the purposes of protection and promotion of the right guaranteed therein. The need for the legal machinery to enforce human rights was to curb the rampant human rights violation against the individuals which Pierre Henry Tietgen has highlighted in his speech after World War II as follows "'we must act first by creating a conscience that can raise the alarm. That conscience can only take the form of special court of Europe."'[11]

Currently Forty seven High Contracting parties are members of the European Convention on Human Rights. The Convention does not oblige the High Contracting States to pay compensations if they contravene the European Convention of Human Rights. Instead the ECHR states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedom of the Convention."[12]

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[11] *ECHR- Film on the European Court of Human Rights*, European Court Of Human Rights (2016),https://www.youtube.com/watch?v=EPWGdhgQlgk , 29/6/2017.

[12]Article 1, The European Convention on Human Rights and Fundamental Freedom, 1950.

Articles 32, 34, and 46 of the ECHR give the European Court of Human Rights the jurisdiction to entertain individual applications as well to interpret and apply the Convention mandatorily. The judgment of the Court will be binding on the state parties.[13]

The European Court of Human Rights as a supranational judicial body has the full authority to determine the human rights violations by the contracting states, which marks limitations on state sovereignty besides controlling exercise of powers by the state authorities resulting in human rights infringement.

The European Court of Human Rights goes beyond conventional instruments for adjudication and has had a profound impact on the jurisprudential development of the human rights. The number of judges is the same as that of parties to the convention and they are independent and are not the representative of member states.[14] The European Commission on Human Rights in the beginning acted as the filter of correspondences and rejected some complaints which prima facie failed to establish the violation of the human rights. However since 1999 by the Protocol 11 which merged the Commission with the European Court of Human Rights enlarged the scope of the court and allowed individuals to directly file compliant before the European Court of

[13] Article 46, The European Convention on Human Rights and Fundamental Freedom, 1950.

[14] Article 21, The European Convention on Human Rights and Fundamental Freedom, 1950.

Human Rights.[15] Since its inception the court has pronounced more than 19,500 judgments and it has been the responsibility Council of Europe to execute all judgment of the Court.[16]

Now the European Court of Human rights, which is the supranational judicial body has not only developed rich human rights jurisprudence, but has also guided and inspired the works of other courts through its precedents. However the present study will particularly focus only on the contributions of the court regarding certain human rights enunciated under the Convention that is Right to life under Article 2, right to fair trial under Article 6 and Right to privacy under Article 8 of the Convention. The rationality behind analysis of exclusively these three rights is Right to life which is indispensable without which the other rights become illusory. The study will analyze both substantive and the procedural duty of the High Contracting Parties to protect life and it will also examine the scope of right to life and will try to respond on the most central questions that has been before the court, that whether the term "everyone" in the right to life provision includes life of unborn child and whether right to die is inherent in right to life.

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[15] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, (3rd Ed. 2008), at 13, Oxford University press.

[16] *Overview 1959-2016, ECHR, Council of Europe*, (2017), at 3, Public Relations Unit of The Court , https://edoc.coe.int/en/european-court-of-human-rights/7158-echr-overview-1959-2015.html ,12/6/2017.

Regarding the right to fair trial the studies have shown that since the inception of the court more than 41 percent of the violation found by the court have concerned Article 6 of the Convention whether on account of fairness (17.63%) or the length (21.13%) of the proceeding[17]. In 2016 nearly a quarter of all violations were found by the court concerned with this provision[18]. Therefore the study will briefly analyze the substantive case law before the court and kinds of remedies and compensation granted by the Strasbourg Court if the High Contracting Parties violate the spirit of fair trial which integrate varied aspects like impartial tribunal, access to justice, and length of proceeding in the domestic court and execution of judgment by the state authority. Therefore in these cases the court has done the teleological interpretation and stated that there was no justification for interpreting Article 6 restrictively.

With respect to right to privacy the court determined many debatable issues regarding which both national courts and the legislature failed to make balance between this conflict of rights, for instance in the cases of abortion the court found it difficult to legally deal with the matter of abortion and how to balance the practice of abortion within the internal principle of the Convention. Under Privacy

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[17] *Overview 1959-2016, ECHR, Council of Europe*, (2017), at 6, Public Relations Unit of The Court , https://edoc.coe.int/en/european-court-of-human-rights/7158-echr-overview-1959-2015.html ,12/6/2017.

[18] *Id.*

right European Court of Human rights also formulated the principle of surrogacy regime within the structure of the European Convention on Human Rights, and on the issue of the night flight it interpreted the balance between the economic benefit of the state and the peaceful enjoyment of the individual. Thus the present study will examine the European court of human rights and its role in the broad development of jurisprudence of these key human rights.

1.1Statement of problem

Under the Rome statute of 1950 the European Convention on Human Rights was adopted with the vision to achieve unity between the Contracting parties and to protect human rights which can establish peace and justice in the world. For this the Convention established the European Court of Human Rights under Article 19. The European court of Human Rights has the duty and the authority to enforce the Fundamental freedoms and human rights enunciated in the Convention. Since its inception the European Court of human rights has made colossal contributions concerning human rights in the European region through its Judgments and interpretations particularly concerning the Rights to privacy under Article 8 of the Convention and raised the scope of personal autonomy of the individual.

The European Court of human rights has contributed to human rights jurisprudence with reference to right to life and even attempted to resolve the most debated questions whether right to life includes right to die, besides expounding rights of fetus. Thus its judgments are referred by many national courts which indicate that the European court of Human Rights has become the global epitome of human rights protection. In a similar way this Court has dealt with purposive and dynamic interpretation of right to fair trial with a view to protect rights in a pragmatic and effective manner. Since 1959 this Court has gained remarkable authority and has contributed through its judgments to the development of the new regime of human rights protection. However it is important to carry out a critical study of the contributions made by the European court of human rights development of the jurisprudence particularly concerning the right to life, right to privacy and right to fair trial.

1.2 Aims and Objective

The aim of the study is to describe on the contribution of the European Court of Human Rights concerning protection and promotion on the right to life, right to fair trial and right to privacy with the help of the its precedents . Further study aims to exhibit how the European court of Human Rights has been a catalyst for

the constructive change and evolved the broad interpretation of the aforementioned rights.

1.3 Hypothesis

Though European Court of Human Rights has made significant contributions in the development of the rights concerning right to life, right to fair trial as compare to right to life and right to fair trial the court has much to do with regard to the development of right to privacy.

1.4 Research Questions

- Why interpretation of right to life was challenging for the European court of Human Rights?
- How European Court of Human rights interpreted the positive and the negative obligation of the state to safeguard the right to life of the individuals?
- How European Court of Human Rights interpreted the jurisprudence behind the personal autonomy of the individual and protected the right to privacy of the individual against the arbitrary exercise of the state?

- How European Court of Human Right protected the civil and the criminal right to fair trial under the Convention?
- How European court of Human Rights extended the scope of the access to the court with teleological interpretation?

1.5 Research Methodology

The research is essentially doctrinal with emphasis on qualitative approach. The Research design models used are analytical and descriptive. The research work comprised of interpretative method to analyze the cases before the European Court of Human rights. Data are collected from both primary and as well as secondary sources all of which are mentioned in the bibliography. Primary sources include International Human Rights Convention, statutes, enactment and case laws. Secondary sources include handbook on the case laws of the European Court of Human Rights, reports of the Council of Europe and academic literature.

1.6 Importance of the Study

This study will be valuable for the lawyers and the judge's particularly human rights lawyers. Besides this the study aims to assist the students of human

rights and those researchers who aspire to do research in the domain contributions of European Court of Human Rights.

1.7 Scheme of Study

The present study will begin with insight into the background history of the European court of human rights and in the third chapter it will proceed with its foundation in the Europe at Strasbourg and what is the admissibility criterion of the court to determine the case.

The later part of the study will do the in-depth analysis of the judgment of the court and how it interpreted these human rights and extended its scope and tried to bring justice to the individuals of the Europe. The study aims not to do comprehensive study of every judgment of the court case by case but to try to find in an objective and systematic process the coherency of the jurisprudence of the European Court of Human Rights contributed in the arena of the right to life, right to privacy and right to fair trial.

Besides this it will also elucidate that what is the procedure of execution of this judgment pronounced by the court as judgment of court is not an end in itself but a promise of future change. This chapter will also expose that in spite of some challenges before the court it has been the catalyst for positive change in many

new democracies contributing the long term deep `security across the whole continent.[19]The last concluding chapter will briefly conclude all the chapters with some suggestions

1.8 Scope and limitations

The scope of the study includes the descriptive analysis of the case laws before the European court of Human Rights particularly the aforementioned rights. Besides this due to paucity of time the study is purely doctrinal and empirical research has not been conducted.

1.9 Mode of Citation

The "Uniform Mode of Citation" is followed throughout the project.

1.10 Literature Review

The various studies made so far, make an attempt towards analyzing European court of Human rights at Strasbourg. The brief literature available so far is as follow.

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[19]Jean-Claude Mignon, *European court of human rights is not perfect, but it's still precious*, The Guardian, https://www.theguardian.com/law/2012/apr/19/european-court-of-human-rights-human-rights, 21/6/2017.

- **European Human Rights: Taking a Case under the Convention, Luke Clements, Naula Mole, Alan Simmons, second edition, 1996.**

  His book involves the development of the court after the introduction of the Protocol 11 in the convention his writing is more Euro centric and the book endeavors to provide practical handbook to the individual and the lawyers who aspire to file the complaint to the European court of human rights. The book broadly presents the precedent section to incorporate the format of the letter of application, complaint and the bill of costs.

- **The European Convention On Human Rights, Clare Ovey and Robin C.A. White, Oxford University Press, Fourth Edition, 2006.**

  This book is regarding the European Convention and its usefulness. The book also elucidates the decision of the commission on the criteria of admissibility of the case. This book covers the substantial case law of the court to assist the reader to examine both the progress of the convention and the present status of the case law. The book also gives insight regarding the procedural aspect of the case and also elucidated the role of the Committee of Minister.

- **A Theory of interpretation of the European convention on Human rights, George Letsas, Oxford , 2007**

  This book is regarding the method of interpretations used by the European Court of Human rights with the philosophical analysis. The book gave in depth analysis of the various interpretation methods for instance the margin of appreciation, intentionalism, Textualism, evolutive, conventionalism, and liberal principle of the human rights interpretation.

- **The Europe of rights: The Impact of the ECHR on National Legal system, Helen Keller and Alec Stone Sweet, Oxford, 2008.**

  This book is the exhaustive study of the European Convention of Human rights and eighteen different national legal systems. This book concentrates on the effect of the Court and the Convention on the domestic legal system of the different European countries including France, Turkey, Germany, Switzerland, Italy, and Ukraine etc.

- **European Human rights Law: Text and Material, Mark W. Janis , Richard S Kay, Anthony W. Bradley, Oxford Third Edition 2008.**

This book introduces the European human rights law and its aim is to examine the expedition of the legal process and the substantive law developed over the last 50 years pursuant to council of Europe and convention for the protection of human rights and fundamental freedom. It also incorporates the way European Human Rights law must be supportive for the judges, lawyers and the student across Europe.

- **A guide to the implementation of Article 2 of the European Convention on Human Rights, DouweKorff, Human Rights Handbook, No. 8.**

  This is the handbook where the writer examines Article 2 of the European Convention of Human Rights with the case law analysis of the European Court of Human Rights. The handbook is written with the view to assist the judges, and legal professional like lawyers and the prosecutors concerning the interpretation of this right by the European Court of Human rights. The handbook covers wide number of cases regarding the right to life and how court widens the scope of right to life.

- **The right to Fair Trial, Nuala Mole and Catharina Harby, A guide to the implementation of Article 6 of the European Convention on Human Rights. Human rights handbooks, No. 3**

  This handbook intends to assist the reader about the legal procedure that High Contracting Parties must follow at domestic level to comply with the obligation under Article 6 of the European Convention on Human Rights. This handbook elucidates case law concerning both the civil and the criminal obligation under Article 6 of the Convention.

- **Ursula Kilkelly ,The Right to respect for Private and Family life, A guide to the implementation of Article 8 of the European Convention on Human Rights.**

  This handbook elucidates the test applied by the judges of the European Court of Human Rights when any complaint regarding Article 8 of the Convention comes before the court. Besides this, the handbook also incorporates the interpretive technique used by the court with respect to right to privacy for instance, the margin of appreciation.

- **The Future of the European Court of Human Rights, Michael O'Boyle**

  This article outlines the issues that how the European Court of Human Rights established the legitimacy of some of its controversial judgment like Mac Cann v. United Kingdom and how it was criticized by the European countries. This article examines the contribution of the court has made in developing the corpus of law and how it becomes the epitome for other nations as a beacon of human rights protection in spite of its criticism and challenges.

From the above mentioned literature it is certain that every book, article, and the handbook examines one of the core subject concerning the European Court of Human Rights. However no work has explored specifically the contribution of the court exhaustively in the domain of right to life, right to fair trial and right to privacy with an insight into the procedure of the execution of its judgment.

Hence the study will fill the research gap of the above mentioned literature and it will contribute towards the exclusive role of the European Court of Human Rights in developing the jurisprudence as regards to the above mentioned human rights.

Chapter II

Foundation and the structure of the European Court of Human Rights

2.1 Council of Europe

"Our constant aim must be to build and fortify the strength of the United Nations Organization. Under and within that world concept we must re-create the European Family in a regional structure called, it may be, the United States of Europe. And the first practical step would be to form a Council of Europe. If at first all the States of Europe are not willing or able to join the Union, we must nevertheless proceed to assemble and combine those who will and those who can. The salvation of the common people of every race and of every land from war or servitude must be established on solid foundations and must be guarded by the readiness of all men and women to die rather than submit to tyranny"[20].

This is the appeal of the Winston Churchill in the Zurich which is considered as the groundbreaking for the formation of the United Europe. Perhaps needless to say World War II changed the continent of Europe irrevocably.[21]The European Convention on Human Rights was response to this event which broke the

[20] Winston Churchill's *"Speech to the academic youth" was held on September 19th 1946 at the University of Zurich in Switzerland, the Churchill Society*, http://www.churchill-society-london.org.uk/astonish.html, 21/5/2017

[21] James A. Sweeney, *The European Court of Human rights in the Post-Cold War Era: Universality in Transition*, (1st ed., 2013). at 7, Rutledge Taylor and Francis Group.

conscience of Europe. The Council of Europe is the outcome of the developed interests in the formation of regional arrangement for human rights the reaction to the Second World War.[22] It was Winston Churchill the British Prime Minister who advocated for the creation of the united states of Europe after the culmination of hostilities. This view was warmly endorsed by other European specifically those who were against the communist ideology.

The idea of European Human Rights Charter pre dates the formation of the Council of Europe in 1949. [23] Movements for the Unification of Europe proliferated post- 1945, but many of them came together for the first time in the form of international Committee of the Movement for European Unity.[24] This committee from 7TH to 10th May 1948, held the Hague congress of Europe under the honorary chairmanship of the Winston Churchill. In his keynote speech the honorary Prime Minister Winston Churchill, argued that a European Charter of Human rights should be at the centre of the new programme of European Unification. Delegates not only endorsed this idea but also proposed the instrument for judicial enforcement process and a European Parliamentary Assembly. Initially Britain objected for this proposal on the ground that an

[22]A.W.Brian Simpson, *Britain and the European Convention*, (Vol.34, 2001), at 523-554, Cornell International Law Journal.

[23] James A. Sweeney, *The European Court of Human rights in the Post-Cold War Era: Universality in Transition,* (1st ed., 2013), at 7,Rutledge Taylor and Francis Group.

[24]*id*

Assembly would provide an unwelcome platform for communist, while a court of Human rights would create an equally unwelcome judicial authority superior to any British Court. However Britain accepted the proposal subsequently for the creation of both the instruments.[25]

This International Committee of the movement of European unity invited 800 eminent high level delegates for 16 states including Member of Parliament, leaders of opposition trade union members, journalists, and intellectuals. This led to the formation of the statute of the Council of Europe, which was signed in May 1949 by Belgium, Denmark, France Ireland, Italy, Luxembourg the Netherlands, Norway, Sweden and the UK also later became the founding members. After ratification by seven states, the Statute came into effect on 3rd August 1949.The Council of Europe was not created with the aim of military defense of Western Europe therefore it was not praised as its formation was not facilitating the closer European Integration though this role was eventually taken up by the European Union (a name that France and Italy had actually suggested for the Council Of Europe indicating their early support for further integration).[26]

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[25]A.W.Brian Simpson, *Britain and the European Convention*, (Vol. 34, 2001), at 619, 612.Cornell International Law Journal.

[26] A. W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*,(2001) at 642, Oxford University Press.

The statute of the Council of Europe from the outset is committed to the principles that form the "basis of all genuine democracy".[27]Further statute also state that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council".[28]

The statute of the Council of Europe clearly state that only those state that are able and willing to comply with the provision of the Article 3 could join the council of Europe. In fact the statute of the Council of Europe also provide that if any state will violate the Article 3 than under Article 8 such contracting state will be either expelled or suspended.

There are two reasons that why Council of Europe strongly advocate for the Protection of human rights and the Rule of Law. The First rational reason behind this was the ideological conflict between the Western and the Eastern Europe was at the time of its foundation was getting more serious. Further the need to demonstrate the opposition to communism and dictatorship was clear. The people involved in the drafting of the statute of the Council of Europe were aware that the first step towards the suppression of dictatorship would be the

[27]Preamble, Statute of the Council of Europe, 1949.

[28]Article 3, Statute of the Council of Europe, 1949.

creation of Council of Europe. The Council of Europe would be a means of preventing the descent to tyranny.

The core institution of the council of Europe are its Committee of Minister and Parliamentary Assembly and presently known as the Parliamentary Assembly of the Council of Europe.[29] The committee of Minister is comprised of the Foreign Minister of the member state or their alternative.[30]

The parliamentary assembly composed of the delegates of the contracting state discusses the topic of human rights and asks European government to take initiative and report back to the council. The assembly elects the secretary general of the Council who has overall responsibility for the strategic management of the organization and elected for a period of five years by the parliamentary Assembly from a list of candidate drawn up by the Committee of Ministers. [31] The secretary General is the depositary for ratification of the Convention with all the duties that entails. The secretary General also has an important monitoring function under which provides "on receipt of a request from the Secretary General of the Council of Europe any High Contracting party shall

[29]Article 10, Statue of the Council of Europe, 1949.

[30]Article 14, Statute of the Council of Europe, 1949.

[31]Article 36, Statute of the Council of Europe, 1949.

furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provision of this convention."[32]

The Assembly is the driving force of the council of Europe through its recommendations the assembly demands the actions on behalf of the 820 million people it represents. Together all 47 members of the committee of minister discuss the priorities for decision and actions. It is the governing body. It relies on the parliamentary Assembly for advice. The committee of Minister has a unique role within the European Convention system this committee is executive body while the PACE[33] is the deliberative organ of the Council. The Council of Europe to keep check on the contracting state it also maintains the regular reporting system to ensure that state is implementing the human rights obligation of the Convention this measure of reporting is also present in other International human rights instrument.[34] This procedure of reporting is proactive rather than reactive which require that state should examine the state of their law.

As per the recent amendment of the Protocol 11 of the Convention for the Protection of Human Rights and Fundamental Freedom the committee of

[32]Article 57, Statute of the Council of Europe, 1949.

[33] Parliamentary Assembly of the Council of Europe.

[34] Article 40, International Covenant on Civil and Political Rights, 1966, Article 16-22, International Covenant of Economic Social and Cultural rights, 1966.

Minister supervises the enforcement of the judgment of the European Court of Human Rights. This work is carried out at four stages by four meetings every year. For this purpose the Committee adopts the final resolution and in some cases it adopt the interim resolution and both this resolution are under the public domain. Applicant can easily access the resolution which is adopted for their case. The President of Germany Joachim Gauck said that "we need the Council of Europe today more than ever as critical forum for human rights". Thus we can see that council of Europe was established with the aspiration to become the leading Human Right Organization of continent.

The six core principle underpinned the Council of Europe certain unspecified "spiritual and moral values"- the Cumulative influence of Greek Philosophy, Roman Law the humanism of the Renaissance and the French Revolution[35]this is said to constitute the Common heritage of the signatory states and the foundation stone of the council of Europe is the individual freedom, political liberty, and the Rule of Law human rights which form the basis of all genuine democracy. Council of Europe is distinct in this sense but it is also unique as it defines the Human Rights in a further treaty popularly known as the European Convention of Human Rights this is for the purpose of the enforcement of its genuine democracy and for the promotion of the closer unity among the

[35] Lord Gladwyn, *The European idea*, (Vol. 1,1966) at 45, 46, London Weidenfield and Nicolson.

contracting states. Besides this the European Convention on Human Rights is the most celebrated achievement of the Council of Europe since its foundation. It has sponsored some 200 treaties on various subjects like data protection, farming, terrorism, etc. Most popular are the European Social Charter 1961, the European Convention on the Prevention of Torture and degrading treatment 1987 but it is only European Convention of Human rights which provides the judicial process for the adjudication of complaints by individual or member state.[36]

2.2 Magnification of the Council of Europe

We have examined that the end of World War II was the catalyst for the creation of the Council of Europe. The initial member of the European Convention was engaged with the World War so even the operation of Council of Europe in the earlier period had the post conflict or transitional element. The extension of the Council of Europe in the early 1990s to include the emerging democratic countries by this extension it even changed the role of the European Court of Human Rights. After the disintegration of Russia many new member joined the Council of Europe like Poland, Bulgaria, Estonia, Lithuania, Slovenia, Romania,

[36]Article 19 The European Convention of Human Rights and Fundamental Freedom, 1950.

Andorra, Albania, Moldova, Macedonia, Ukraine, Russia, Croatia, Georgia, Armenia, Azerbaijan, Serbia, Monaco, and the most recent Montenegro in 2007.

Thus we can see that many states joined the Council of Europe and even non-European Countries joined the Council of Europe. It is this profound implication that this magnification has on the type of cases comes before the court especially the cases of right to life, privacy and the issues of fair trial.

2.3 The Genesis of the European Convention on Human Rights

"Does European have a right to have an abortion? A right to publish cartoons that offend religious people? A right to assisted suicide and euthanasia? Rights publicly to deny the holocaust these are some of the legal questions whose answers depend on the rights that the European Convention on Human Rights grants to the 800 million people that live in Europe."[37]In 1950 the new Council of Europe accomplished its first major endeavor by drafting of the European Convention Human Rights. The Convention was negotiated in the immediate aftermath of a cataclysmic war, against the background of economic, social, and political reconstruction, the result of which were than far from certain. This

[37] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (2007), at 1, Oxford University Press.

context heavily conditioned the "original intent"[38] of the fourteen States that would sign the Treaty, understood as the aim and purpose that the Council of Europe expected to the European Convention Human Rights to serve.[39]It was widely expected that one of the early task of the Council would be to craft and implement a human rights convention for Europe.[40] Indeed Article 3 of the Statute of the Council of Europe provided that Every member of the Council of Europe must accept the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.[41] On 12 July 1949 a draft Convention on Human Rights and a draft statute for a European Court were prepared by Pierre Henri Teitgen, Sir David Maxwell Fyfe and Professor Fernand Dehose and submitted to the Council's Committee of Ministers.[42] Nonetheless at the first session of the Committee of Minister on 9 august 1949, a seven to four votes with one abstention decided to eliminate the definition safeguarding and development of human rights and of fundamental

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[38] Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on the National Legal System*, (2008), at 5, Oxford University Press.

[39]George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (2007), at 7, Oxford University Press.

[40] A.H Robertson, *The Council of Europe: its structure, functions and achievements*, (1956), at 2 London Institute of World Affairs Stevens London.

[41] *I Collected Edition Travaux Preparatoires*, Council Of Europe, 1977 at 7.

[42] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, (3rd Ed. 2008), at 13, Oxford University press.

liberties as an agenda item for the forthcoming first meeting of the consultative Assembly. [43] Delegates from Norway, France, and Sweden opposed the human rights agenda item because the matter had already been extensively discussed" at the United Nations in the Debate leading up to the Universal Declaration of Human Rights.[44]

On 19 august 1949 a motion was put to the Assembly by Teitgen of France, Max well Fyfe of the United Kingdom and 45 others which read in part:

The assembly recommends that the Member state of the Council of Europe should, in pursuance of the aim enunciated in Article I of the Statute, accept the principle of Collective responsibility for the maintenance of human rights and fundamental freedom and for this purpose should immediately conclude a convention by which each member state would undertake:

a) To maintain intact human rights and fundamental freedom assured by the Constitution, laws and administrative practice actually existing in their respective countries at the date of the signature of the Convention.

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[43] *Id*

[44] *Id*

b) to set up a European Commission of Human Rights and European Court of Human Rights for the purpose of assuring the observance of the above-mentioned convention.[45]

The general debate on the motion closed on the day it had begun with a proposal for a European Human Rights Convention being forwarded to the consultative Assembly's Committee on legal and Administrative Question. Pierre-Henri Teitgen selected that day 19 August 1949 as the date when the European Convention on Human rights emerged into positive law.[46] In the beginning of the preparation of the European Convention on Human Rights the major issue raised was of the definition of the "human rights" in the convention because all the contracting state were the progressive democratic state and each state has its own definition of fundamental rights so in this the Pierre Teitgen suggested that we should discard for the moment this desirable maximum and we should agree that what minimum could be achieved in this short period and which consist in defining the seven, eight or ten fundamental freedom that are essential for democratic way of life and which our country

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[45] *Id*

[46] *I Collected Edition Travaux Preparatoires*, Council Of Europe (1977), at 18.

should guarantee to all their people[47].Finally committee unanimously supported this opinion of the PerrieTeitgen.

The major precursor of the convention was the Universal Declaration of Human Rights and the perception of the English Common law. The legal committee's proposed draft Convention contained twelve substantive rights each explicitly reference to Article of the Universal Declaration of Human Rights called for the European Court and the European Commission of Human rights and gave individual as well as state the right of petition. The European commission of Human Rights and state could refer cases to the court[48] however this proposal of the commission and the court was not hailed by all as they opposed the remedy to individual petition. However the PerrieTeitgen favored this unique provision and expressed his opinion in the speech at France against the world War that democracies do not become Nazi countries in one day. Evil progresses cunningly with a minority operating to remove the levers of control. One by one freedom is suppressed in one sphere after another. It is important to intervene before it is too late. An international court within a council of Europe, and a system of supervision and guarantee, could be the conscience of which we all

[47] *id*

[48] Meyer and Nouzha, Avocat, *The right to individual petition under Article 34*, https://www.meyer-nouzha-avocats.com/english/european-court-of-human-rights-key-case-law-issues/european-court-of-human-rights-the-right-to-individual-petition/, 15/6/2017.

have need , and of which other countries have perhaps a special need[49]. With the enumerated rights agreed but disputes still raging about the role of the court and the right of individual petition the draft convention returned to the hands of the Committee of Minister. In August 1950, the Committee of Minister decided to make both the jurisdiction of the Court and the right of individual petition optional.[50]This text than was substantially the same as that signed by the government on 4th November 1950 and ratified by eight state.[51] The European Convention for the protection of Human Rights and Fundamental Freedom came into force on 3rd September 1953.[52]The European Court was constituted in the year 1958.

2.4Progress of the European Convention on Human Rights

Though adoption of the human rights convention at international stage it was exceptional but what is extraordinary about the Convention was the Strasbourg legal machinery. The soul of the Convention was this enforcement of human rights as provided under the convention through this instrument. Besides this the convention in 1998 expanded its remedial scope by introducing two optional

[49]Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, (3rd Ed. 2008), at 16, Oxford University press.

[50] *I Collected Edition Travaux Preparatoires*, Council Of Europe 1977, at, 34.

[51] *I Collected Edition Travaux Preparatoires*, Council Of Europe 1977, at, 34.

[52] The European Convention on Human Rights and Fundamental Freedoms, 1950.

clauses the original article 25 now mandatory by the new Article 34 giving individual as well as states the right to petition the European Commission of Human rights for the relief an old Article 46 now mandatory by the new Article 32 that gave the European court of human rights judicial jurisdiction to hear and try cases already reported upon by the Commission.[53] In the beginning the European government was reluctant to accept the optional clause. However gradually by 1998 what had been originally conceived as real as well as legal option became perceived in Europe as politically non-optional. Indeed by 1995 all 30 states then party to the Convention had accepted both Article 25 right of Individual petition and Article 46 jurisdiction of the court.[54]

The European Court of Human Rights enshrines human rights that are both legal and liberal they entail liberal egalitarian principles that impose condition or the legitimate that impose conditions on the legitimate use of coercion by Member State against person within their jurisdiction. [55]

Article 1 of the Convention which provides that the high contracting parties shall secure to everyone within their jurisdiction the rights and freedom defined in

[53]Lord Gladwyn, The European idea, (1966) at 45 and 46, London Weidenfield and Nicolson.

[54]D.J Harris, M Boyle, E.P. Bates, C.M. Buckley, *Law of the European Convention on Human Rights*, (2nd Ed. 2009) at 81, Oxford University Press.

[55] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, 2007, at 23, Oxford University Press.

section 1 of this Convention. It is the Article 1 which transmutes this declaration of rights into a set of commitment for the state which ratify the Convention. The comprehensive approach of the Convention is based on the Principle of solidarity and the subsidiary. Solidarity refers to the undertaking by the contracting parties to secure the rights protected under the Convention in their national legal order, while subsidiary refers to the role of the court of human rights being subsidiary to the institution of national legal system in adjudicating on claims that the rights have been violated. It is due to this reason that a compliant cannot made to the court of human rights until all efforts to resolve the dispute have been undertaken within the national legal order and therefore it also not the appellate court.

On the basis of this there is also an argument that the convention should be incorporated in the national legal system through the domestic acts. And many countries in fact incorporated the convention law in the in the domestic law to give full effect to the rights enunciated in the convention. Therefore the convention has the status of national law in Germany and constitutional law in Austria. In France the Convention has an intermediate status, higher than ordinary legislation but lower than the constitution. United Kingdom enacted the human rights Act 1998 which gave effect to the Convention.

However whether or not states incorporate the convention specifically provides that state law is obliged by appropriate means, 'to ensure that their domestic legislation is compatible with the Convention and, if indeed be to make any necessary adjustments to this end.[56]

Thus we can see that the Convention as a supra-national judicial body has the full authority to determine the human rights violation by the contracting state. The experience of incorporations shows that the convention gains a high profile within the national legal order, as public authorities to determine the extent to which any action is compatible with the rights guaranteed in the Convention. Thus Article 1 of the Convention imposes the double obligation on one hand and the negative obligation which need state not to infringe the rights protected in the Convention and on the other hand, the positive obligation over state to make sure that right protected by the European Convention on Human Rights are guaranteed to those within the jurisdiction of states becoming parties to the convention.

The creation of the European Convention Human Rights itself was stimulated by the activities of the United Nations, which was established in 1945. Universal

[56]De beckr v. Belgium, [1962] ECHR 1.

Declaration of Human Rights was the source of motivation for the European Convention of human rights which was signed in 1948[57].

The European Convention on Human rights for the protection of human rights and fundamental freedoms establishes not only the world's most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international legal process.[58] The European Convention was created both in response to the atrocities committed in World War II and once again as a reaction to the powerful communist eastern Block. The Convention was to be built on the democratic values that informed the statute of the Council of Europe and were considered common to the states that first signed it, evidencing their common heritage and shared cultural values[59]. The European Convention entered into force in 1953 established a basic catalogue of rights binding on signatories and new institution charged with the monitoring and enforcing compliance

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[57]Universal Declaration of Human Rights, 1948.

[58] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, (3rd Ed. 2008) at 70 Oxford University press.

[59] James A. Sweeney, *The European Court of Human rights in the Post-Cold War Era: Universality in Transition,* (1st ed., 2013 at 21 Rutledge Taylor and Francis Group.

"The establishment of the European Convention of human rights was also the Cold War endeavor with certain geopolitical connotation and subsequently it was turned into the advanced legal system what we know presently. Its initial procedure was dominated by a group of highly experienced expert who managed to both build up its legal functionality. The quick drafting of the ECHR certainly reflect that it was against the fear of totalitarianism on one hand and the rising power of national communist parties and on the other side the imperial expansions of the soviet union. Perhaps because of this none of the Eastern European Countries ratified the European Convention Human Rights however, subsequently regardless of their difference with the Western Europe they also realized that this instrument of human rights would be the protection of liberal European democracy. The like-mindedness behind this also reflects that why majority of the parties to the European Convention of Human Rights tended to perceive this instrument as a measure against an external threat. More concisely the Convention was assumed to provide political and legal way for deterring the future rise of totalitarianism in Europe.

This unique system consisted of the two core organs –the European Commission of Human Rights and the European Court of Human Rights for the purpose of enforcement of the provisions of the convention.

2.5 Strasbourg legal machinery

2.5.1 European commission of Human Rights

The legal machinery of the European Convention of human rights is consisted of two core organs the commission and the court for the purpose of enforcement of the provision of the Convention.

As we have examined that how during the negotiation of the council of Europe in 1949-1950, delegates expressed the opinion that for the purpose of enforcing with the court there should also be the European Commission of Human rights. At the time of framing the convention the role of the commission was discussed and formulated which clearly enunciate that the commission would be the protective of the judicial function. The purpose of the Commission was to act like a kind of Barrier which would weed out frivolous or mischievous petitions[60]. It was also anticipated that the commission facilitate suits against state parties, professed as a vital element in the system efficacy.

So since its inception, the European Commission of Human Rights was blessed and cursed with an intermediate position in the system of European Human rights law. It has twofold functions at one place it is like a shield for the Court from a possible deluge of individual complaint, a function that also protected the traditional sovereignty of the member state. The commission was meant also to

[60] *I Collected edition of the Trauvax preparatoires,* Council of Europe 1975 at, 48.

serve as an international institution directly accessible to individual, a radical departure from traditional state centered international legal process.

Therefore you can see that the Commission stood as an intermediary both between individual and government, and between individual and the Strasbourg Court.

The European Convention on Human Rights set up the European Commission of Human rights alongside the European Court of Human Rights, both explicitly required to "ensure the observance of the engagement under-taken by the High Contracting Parties in the present Convention.[61]

The members of the Commission, equal in number to the parties to the Convention, were elected by the Council of Europe's Committee of minister from states dawns up by the consultative assembly to serve six years renewable terms. The Commission met in Strasbourg ordinarily for periodic two week sessions. For example, in 1992 with the press of considerable business the commission held two week session.

Complaint about violations of human rights protected by the Convention was sent first to the Commission. Under article 24 of the Convention states could

[61]Article 19, The European Convention for the Protection of Human Rights and Fundamental Freedom, 1950.

refer to the Commission "any alleged breach of the provision of the Convention by another High Contracting Party. The Commission which became the competent to entertain Article 24 interstate cases in 1953 heard its first such case in 1955. These involved suits, brought by Greece against the United Kingdom, Complaining about the British administration of Cyprus which was eventually settled in 1959.

The commission became legally competent to receive individual petitions pursuant to Article 25 in 1955.[62] In the year 1994 all 30 state parties of the state then party to the convention had agreed for the individual petition. The core functions of the Commissions which include filtering complaint through admissibility proceeding, mediating dispute through the process called friendly settlement and fact finding all this functions of the commission merged with the European Court of Human rights in 1999 by the reformed European Court of Human Rights.[63]

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[62]Article 25 The European Convention on Human Rights and Fundamental Freedom, 1950.

[63] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and Materials*, (3rd Ed. (2008), at 27, Oxford University press.

2.5.2 European Court of Human Rights

Till 1999 the European Court of Human Rights existed with the European Commission of Human Rights both the commission and the court were established under Article 19 of the previous convention. In 1958 the court became competent to hear the case when around eight states permitted the application of the Article 46 over their nations which grants the competency to the court to entertain all the matters regarding the interpretation and the application of the present convention. With the merger of the court in 1999 under Protocol 11 of the convention the court became the sole authority to determine the complaint under the convention.

The European Court of Human Rights is constituted of the 47 judges of high moral character or either must have the qualification essential for the appointment of the high judicial office.[64] All the 47 judges represent the 47 high contracting signatory to the convention and this judges are elected by the parliamentary assembly of the council of Europe for six year terms and they are eligible for re-election however they must retire at the age of 70 years.[65] The court is popularly known as the plenary court as it elects its own president, two vice presidents, registrar and the one or more Deputy Registrars.[66]The court sits

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[64]Article 21 (1) The European Convention on Human Rights and Fundamental Freedom, 1950.

[65]Article 22 and 23, The European Convention on Human Rights and Fundamental Freedom, 1950.

[66]Article 26 The European Convention on Human Rights and Fundamental Freedom, 1950.

according to the different chambers and there is one grand chamber which constitute of 17 judges including the president and the two vice president and other judges. Presently Guido Raimondi of Italy is the president of the European Court of Human Rights.

Although the ECHR was originally considered to have established minimum and largely minimal standard for basic human rights the Strasbourg court has interpreted Convention rights in a progressive manner. Therefore according to the ECHR the Convention is not static but a living instrument[67] and its content must be read to secure the effective rights protection for individual as European Society evolves[68]

The next part of the chapter will examine the basis on which the court admit the cases and rejects the cases.

[67]Tyrer V. United Kingdom, [1978] ECHR 2.

[68]Soering v. United Kingdom [1989] ECHR 14.

Chapter III

Admissibility Criteria of the Strasbourg Court

This chapter will give the short insight on the procedure of the admissibility criteria to access the European Court Of Human Rights; this procedure is distinct part of the European Convention of Human Rights.

The right of individual petition is rightly considered as the trademark and utmost success of the European Convention on Human Rights. The complaint procedure established by Protocol 11 to the convention has created for the first time in history of international law, a right for individual law human beings to make states accountable before an international court for alleged breaches of their international obligations[69].

No other international instrument procedure has ever permitted individual to have direct access to an international court with the power to deliver judgment which are binding in international law[70]. Besides this the judgment are enforceable by the committee of minister which is the body of the council of Europe.

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[69] Luke Clement, Nuala Mole, Alan Simmons, *European Human rights: Taking a Case Under The Convention,* (2nd Ed. 1999) at 13, Sweet and Maxwell.

[70] *Id*

The system of protection of fundamental rights and freedoms established by the European Convention on Human Rights is based on the principle of subsidiary. It means the role of European Court of Human Rights comes into picture when the applicant has exhausted all the domestic remedies. The right of individual application is now the mandatory provision of the Convention; however it is optional for overseas territories "for whose international relations a state is responsible."

The jurisdiction of the court is not wide. The complaint can only be accepted if they satisfy the admissibility criteria as provided under Article 35 of the Convention.

The distinct part of the Article 34 (1) that it places an obligation upon state to permit individual to bring complaint, it also obliges them not to "hinder in any way the effective exercise of this right"[71] The Court has emphasized on in this case law that it is of utmost importance for the applicant or potential applicant are able to communicate freely with the court without being subjected to any form of pressure from the authorities to withdraw or modify their complaint. This pressure include both the direct and the indirect coercion as in the case of the MC Shane v.UK[72] the court held that even initiation of disciplinary proceeding

[71]Akdivar v. Turkey (1996)EHRR 143.

[72]MC Shane v.UK, [2002] ECHR 465.

against the applicant could have the chilling effect on the exercise of rights of individual petition.

The further part of the study will now analyze the various essential conditions to file an application before the court.

3.1 Ratione Personae: who may complain and about whom?

3.1.1 The complainant

This is the indispensable criteria to apply before the court that who has right to file complaint before the court. The court has power to receive complaints which include person, NGO, or group of individual who claims to be the victim of a violation by one of the High Contracting parties to the convention. This include physical person means human beings, including children and other incapacitated person[73] It is immaterial whether such person is presented by their parents, or group of human beings, legal person such as companies, NGO, Churches and political parties. Many of the key judgment of the Commission and the Court have been the result of litigation by commercial companies about their commercial activities.

[73]X and V v. Netherland [1985] ECHR 4.

3.1.2 Victims: who could be the victim for the purpose of the convention?

The European Court recognizes both the actual victim and the potential victim.

Article 34 says that the applicant must "claim to be the victim of a violation" regarding this the courts have identified three kinds of victim actual, indirect and the potential victim

3.1.2.1 Actual victim

The court has interpreted the term victim autonomously and irrespective of domestic rule. Direct victim: to file an application as per the provision of Article 34 an applicant must be prove that he or she was "directly affected" due to the violation of his right.[74] However the court will not interpret this in a rigid, mechanical and inflexible way. For instance if the victim died during the pendency of proceeding than any person with sufficient legal interest may continue with the proceeding.

In the case of Malone v. UK.[75]In this case the applicant was unable to prove that his telephone had been tapped was not bar to the court accepting him as a victim. The court said here the relevant question is that whether he the victim was able to find out if such surveillance occurring. The court also held that the person cannot claim to be victim of violation of Article 8 until and unless he or

[74]Tnase v. Moldova [2010] ECHR 7/08.

[75] [1984] ECHR 10.

she has received such notification. The court also made it certain when the domestic remedies redressed the person grievance than he is not the victim.

3.1.2.2Potential Victim

This is one of the preventive remedy for the victim in this the person has to establish that he is at risk of being directly affected by a law or administrative act. To claim to be a victim on this ground an applicant must produce reasonable and convincing proof of the likelihood that a violation affecting him or her personally will occur. On the ground of mere suspicion the court will not entertain the case. The most popular cases regarding this are the immigrants who are in continuous threat of being expelled as per the law of the nation.

3.2Who are the respondents?

It is the obligation of the state to comply with the provision of the Convention therefore it is only the state parties who are the member of the European convention against whom the aggrieved person can file the petition in the court. Thus the complaint must be against the state party and the complaint must alleged that the state party failed to respect its obligation which it undertook at the time of the ratifying the convention. In the case where the state is under duty to protect the life and privacy of the individual and the court failed in it than the

victim can file an application against the state party. No compliant shall be admitted against the private person or institution and regarding this court has stated that it is not the court of fourth instance it is not the appellate court from the decision of national court.

3.3Rationaetemporis: six month time limit

Besides who may be the respondent and who may be the applicant another necessary ingredient to lodge a petition before the court is the limitation period. Article 35(1) provides that the court "may only deal with the matter ... within a period of six months from the date on which the final decision was taken". The ratio legis of the rule is the desire of contracting parties to prevent past decision being constantly called into question.[76] The court stated in Alzery v. Sweden[77] that the rule ought also to prevent the authorities and other person concerned from being kept in a state of uncertainty for a long period of time. This provision applies on both the individual petition and the interstate application.

The court also determined that from which period the time would commence and culminate. As per the rules the time limit begins from the final judgment resulting from the exhaustion of the domestic remedies which are sufficient and

[76] X v. France No. 9587/81, 29 DR 228 1982.

[77] (2006) 14 IHRR 341.

effective remedy. Further this time limit has to be evaluated from the date when such judgment by the last appellate court comes in to the knowledge of the applicant. This six month period begins running from the date on which the applicant and hi/her representative has sufficient knowledge of the final domestic judgment[78]

The final date for computing whether the application is within the six month period is the date of the first letter, telex, or fax to the court. The mere submission of certain documents is not in itself; the complaint must be raised in express terms or implicitly.[79]

Regarding this as per the court Rule 47(5) of the Court states that as a general rule the date of introduction of the application will be considered to the date of the first communication from the applicant setting out, even summarily, the object of the application[80]. The application must contain the substance of the case and the kind of violation against the victim. In the case of Khan v. UK. In this case the petitioner sent the letter to thecourt which contains just the "immigration matter" and no other clue as to the nature or object of the intended application nor did it refer to any domestic decision which was challenged nor to

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[78] Isabel Hilton v. United Kingdom, DR 57/108.

[79]Oberschilk v. Austria, 1991] ECHR 30.

[80]D.J Harris M Boyle, E.P. Bates, C.M. Buckley, *Law of the European Convention on Human Rights*, (2nd Ed. 2009), at 777.Oxford University Press.

any convention issue[81]. Further as per rule 45 of the rules of the court the complaint must be in writing

Sometime court with face the problem of application being registered following substantial period of inaction on the part of applicant. Such applications may be rejected on the basis of the six month rule.

3.4Non-exhaustion of the domestic remedies

The exhaustion of the domestic remedies is the indispensable to the procedural aspect of the Convention. As stated under Article 1 of the convention that states are under duty to "secure" its right and freedom to everyone within its jurisdiction. This fundamental duty further embraced by the Article 13 which require that "everyone whose rights and freedom as set forth in this convention are violated shall have effective remedy before a national authority"

This sandwich provision not only holds in place the substance of the convention but underline that the primary responsibility for securing the enjoyment of the right lieswith the state's own institution.[82]Article 35 reveals the general principle of international law that the applicant can take advent to international tribunal only when the applicant has exhausted all the domestic remedy. The burden of

[81][2000] ECHR 194.

[82] Luke Clement, Nuala Mole, and Alan Simmons, *European Human rights: Taking a Case Under the Convention*, (2nd Ed.1999) at 25, Sweet and Maxwell.

proof initially lies on the applicant to prove that he has exhausted all the domestic remedy than this burden shifts over the respondent state to reveal that the complainant had not make use of a domestic relief. The state has to display that applicant failed to exhaust effective remedy available in the domestic legislation. Once the court is satisfied with the argument produced by the respondent state than again the burden of proof shifts on the applicant who has to demonstrate that remedy was exhausted however it was not effective and adequate. This availability of effective remedy is based on the nature of violation.

Besides the admissibility criteria the convention also provide grounds for the inadmissibility of the application

3.5Grounds of inadmissibility of the complaint

The convention specifically expresses that the court cannot consider any petition produced before it that is anonymous or any matter which has already been determined by the court or has been submitted for the purpose of international investigation or settlement and contains no material new

information.[83] The court also has power to reject any complaint which is inconsistent with any part of the convention or the protocols of the convention.[84] The court also rejected the application when the applicant prima facie failed to establish the violation of any part of the convention.

[83]Article 35(2) and (3) The European Convention on Human Rights and Fundamental Freedom, 1950.

[84]Article 34 The European Convention on Human Rights and Fundamental Freedom, 1950.

Chapter IV

Contribution of the European Court Of Human Rights in the development of right to life

Right to life [85] of the European Convention on Human Rights the close interconnection between the life and law is indubitable and significantly embedded in the fundamental rights that all nations guarantee in their respective constitution thus this right to life eventually translated into the positive law. Right to life is the positive law it means that it is the command of sovereign backed by sanction.[86] The first principle right of a human is the right to existence.[87] The question arises that which human being has right to life does it apply only to those person who fight for their right to life. The statutory provision gives the express right to life however the black letter of the statute doesn't convey that what are the tenets of the right to life. Therefore it is always the national courts which interpret the right to life according to the fact and circumstances of each and every case however even sometime the national court failed to interpret the

[85] Article 2, The European Convention on Human Rights and Fundamental Freedom, 1950

[86] John Austin, *Province Of Jurisprudence determined*, (1832) at 4, London John Murray Albe Marle Street. http://www.koeblergerhard.de/Fontes/AustinJohnTheprovinceofjurisprudencedetermined1832.pdf, 25/6/2017.

[87]Cristian Claudiu Teodorescu, *The Right to Life Guaranteed by the European Convention on Human Rights and it's exceptions*, (2010), at 15, Masaryk University Press.

right to life in its true essence and there comes the role of the supranational judicial body. European court of human right interpreted right to life with a very proactive approach. The European Convention enunciates the right to life which says that "everyone right to life shall be protected by law. No one shall be deprived of his life intentionally". The right to life is the right from which all other rights flow without this right all other right are mere illusory. Thus we can say that right to life is the primary right and all other right can be exercised only when this rights is protected. European court of human rights increased the scope of right to life in an unprecedented way the later part of the study will give insight into this interpretation by the court concerning the right to life.

4.1 Challenges before the court in the interpretation of right to life

This part of the study includes the challenges, the European Court of Human Rights confronted while interpreting the right to life.

4.1.1 Principle of Euthanasia

With respect to this the court confronted the following debatable questions first to determine that when life begins and when the protection under the convention culminates. The second issue before the court was whether palliative care can

be accepted and even if accepted whether the consent of patient is material on this matter. Third question was whether convention protects the life of a person who wishes to end his life. The fourth debatable question is whether State can permit the individual to end his life to avoid suffering. With respect to these questions the court determined diverse cases.

In the case of the Pretty v. United Kingdom[88] the court interpreted whether right to life incorporate right to die. In this case the applicant request that the intensity of her disease had increased rapidly as she was suffering from the incurable degenerative disease and therefore she requested her director of public prosecutor that her husband should not be prosecuted, if her husband assist her in ending her life. This request was not accepted. Both the High Court and the House of lords refuse to entertain her pleading. Finally she took recourse to the European Court of Human Rights and challenged the Director of public prosecutor (DPP) judgment on the ground that it is violation of her right to life, right to privacy and right to freedom of thought and expression and prohibition of torture. The applicant contended that everyone's right to life shall be protected by law – protected the right to life, not life itself, and established, "right to choose whether or not to go on living" she also contended that as a corollary of the right to life, the Article "protected her right to die to avoid unavoidable suffering and

[88] (2002) ECHR 427.

undignified life. She further contended that the Para 2 of the Article 2 protect the person from the interference by third party and stated that this third party includes the state and the public authority. She contended that right to life give her right to self determines whether she wants to continue her life or desires to end her life.

Court Assessment: The court analyzed the case and held that this is the demand for the active euthanasia and the court stated that it was not "convinced that right to life which is provided under Article 2 of the Convention also incorporate the negative facet" that is right to choose not to live. Therefore court held that the right to life does not permit the individual to end his/ her life whether with the assistance of some other person or whether with the help of the public authority.

Thus the core ration decedendi of the court here is that Article 2 of the European Convention on Human Rights with certain express exceptions prohibits all intentional killing therefore and individual cannot be killed beyond these expressed exceptions. Therefore for the object of the Convention, the "victim's" willingness or request cannot justify any exception to this rule. Further euthanasia is not enclosed by an exceptions set out under Article 2 Para 2 of the Convention.

Subsequent to this case various other cases came before the court which led to the progress of the European court of Human Rights interpretation which developed the "principle of right to assisted suicide" under the European Convention of Human rights. In the case of Alda Gross v. Switzerland in this case the court denounced the "principle of assisted suicide" on the ground that such action cannot be legalized on the ground of ethical theory it has to be authorized only on the legal standard.[89] This case was referred to the Grand Chamber for retrial the Grand chamber reiterated the Pretty v United Kingdom case[90] and the Hass v Switzerland[91]and held that in an era of "in an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity"[92]

In this case of euthanasia the court found that there is need to scrutinize it under the Article 8 and under Article 3 of the convention. With court widened the scope of personal autonomy specifically with the right to choose when the person is facing severe pain, interpreting it in the context of prohibition on the

[89][2013] ECHR 429.

[90][2002] ECHR 423.

[91][2011] ECHR 2422.

[92] Gross v. Switzerland [2013] ECHR 429.

torture and degrading treatment. However the court scrutinized this principle of personal autonomy with two issues that whether the individual exercising personal autonomy is mentally fit or not. If the person is not mentally fit than he cannot exercise his right o personal autonomy and the right to self determination.

The court therefore held that there is need to make balance between this conflicting issue the European convention confronted challenge in interpreting this debatable issues because firstly there is no consensus between the European nations regarding this assisted suicide and therefore the European Court of Human Rights, grant the margin of appreciation to all the High Contracting States, subject to scrutiny.

4.2Conflict between the Right to life and the Right to privacy

Interpretation by the court regarding the right of unborn child in conflict with the right of the pregnant women

There is overlapping of rights in the cases where the court has to examine the right to life of the fetus and the right to privacy of the pregnant women. The legal issue for consideration is that whether Article 2 of the European Convention considers the fetus as person under the context of the provision of right to life. The question before the Strasbourg legal machinery is that whether unborn fetus are person which like the other natural person enjoys the right to life or

would it be inconsistent with the jurisprudence of the European Human rights system.

In fact the commission made it clear that granting a fetus the status of the person would impose the restriction on the rights of the person already born which would be in contravention of the convention. The commission opined that granting an unborn child the status of person under the law indirectly interfere radically with women's basic human rights.

There is conflict of interest between the rights of foetus and if we recognize the right to life of the foetus than it would cause potential impact on the rights of the pregnant women it directly affect the personal autonomy of the pregnant women.

Analysis of the cases

Bruggemann and Scheuten[93]

This was one of the cases which came before the court in the beginning regarding the rights of the unborn child where the aggrieved woman challenged the violation of Article 8 the West German Federal Constitutional Court's revision of a statute which had the clause that abortion after 12 weeks of

[93]Brüggeman and Scheuten v. Germany (1977) 3 EHRR 244.

pregnancy would be the criminal action and the accused mother would be charged under it.

"The commission though acknowledged the privacy rights of the applicant however the majority upheld the law and made the ratio decidendi that not every restriction on the termination of an unwanted pregnancy constitutes an interference with the right to respect for the private life of the pregnant women". In this case the court also scrutinized the German law and found that the law is not in contravention of the right to privacy of the women as it allows the abortion when the health or the life of the women is at risk. The court also ruled that if any law of any contracting state prohibits abortion absolutely than such interference would amount to violation of the privacy rights. Since the Bruggemann decision the European court of human rights and the Commission acknowledged the pregnant women's right to terminate a pregnancy under Article 8. The brighter side of this judgment led to the liberalization of abortion laws in almost all of Europe in the late 1970s.

In another case of the X v United Kingdom[94] the commission examined that Article 2 of the Convention does not express anywhere about the abortion. Further it even does not expressed in the Article 2 Para 2 of the Convention which are "not to be regarded as inflicted in contravention of this article" the

[94]X v United Kingdom (1982) 4 EHRR 188.

commission after in depth examination came to conclusion that there can be three possibilities either Article 2 does not cover an unborn foetus at all or it recognizes a right to life of the foetus with certain implied limitations or it grants an absolute right to life of the foetus.[95] The commission explicitly ruled out the latter interpretation, the rationality behind this is that the latter interpretation completely disregards the risk of the mother's life it means as per this interpretation the life of unborn child has to save at the instance of the mother's life. This in no way could be the appropriate interpretation as this concept has been disregarded even by all the contracting state. All the state has the legislation that the mother can terminate the pregnancy when this is essential to save the life of the mother

The court analyzed the first option and it also examined the Para 2 of Article 2 of the right to life and conclude that all the limitations of the Para 2 of the Article 2 is regarding the person already born and it is not applicable on the fetus. Thus the term used in the convention "everyone" exclude within its meaning the unborn child.[96]

However the court has not applied the water tight principle in all the cases for instance in the case of H v. Norway the commission considered the second

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[95]Douwe Korff, *A guide to the implementation of Article 2 of the European Convention on Human Rights. Human Rights Handbook No.8, https://rm.coe.int/168007ff4e, at, 10,*11/5/2017.

[96] X v. United Kingdom (1982) 4 EHRR 188.

alternative where it has not excluded the foetus under certain specific circumstances and court held that the fetus may enjoy certain protection under Article 2[97].

The commission moved toward the second option on the basis of its jurisprudence of the German and Constitutional Courts and Norwegian Supreme Court on this matter.

There are differences between the legislation of all the contracting state like the Austria which is the contracting state of the convention disregard unborn life however the German Constitutional court in 1975 held that the term "everyone" in the phrase include "every living human being" and eventually than the right would extend to living unborn human beings. The supreme court of Norway gave more practical judgment in the case of the H v. Norway it ruled in 1979 that "Abortion laws must necessarily be based on a compromise between the respect for the unborn life and other essential and worthy considerations. This compromise has led the legislator to permit self-determined abortion under the circumstances defined by the 1978 Norwegian Act on Termination of Pregnancy"

[97] (1992) 73 DR 155

The court of this contracting state held that it is the duty of the legislator to make the law which reconciles the conflicting interest of both the unborn child and the mother's right.

After the commission was abolished and only court was under the power to take cognizance of cases before it since 1998 no cases came before the court directly connected with the abortion rights. However in 2002 some case came before the court where the issue before the court is that whether the father has right when the wife aborts the child against the wishes of his husband.

In case like Paton v. United Kingdom, and the court held that the consent of the father is not material regarding the termination of pregnancy.[98]

4.4 Necessity principle and the negative obligation of the state

Article 2 Para 2 clearly state that it is the duty of the High Contracting party to ascertain legal rules which prevent the state and the public authority to take the human life outside the provision mentioned in the Article 2 Para 2 of the Convention.

The court in the case of McCann v. United Kingdom briefed its interpretation that the text of Article 2 expresses that within its realm it cover not only the action of intentional killing but include even the circumstances where use of force is

[98](1980) 3 EHRR 408

permitted and eventually result into the deprivation of life. The court examined that the use of lethal force is one of the aspect to be considered in determining the necessity of the use of such force. The use of force must satisfy the principle of the" necessary in a democratic society "under paragraph 2 of the Convention. Therefore the force used by the state and the public authority must be in proportionate to the achievement of the permitted aims. The court also deduce that where in a case there is loss of life without any legitimate aim and action necessary in democratic society than such action will come under the scrutiny of the court.

Mac Cann case[99] In this case the applicants are the parents of the deceased who died in the operation by the United Kingdom special Air service regiment of the British Army. They were shot dead as they were suspects of expecting terrorist attack by the Irish Republican Army.

The Assessment by the court in this case: While determining this case under Article 2 of the Convention the court has to examine the two important issues for consideration at one place that after the authorities of United Kingdom received the information about the terrorist attack in Gibraltar. There was the impasse between as on one hand the court has to see that United Kingdom was under the obligation to protect the lives of the people in the Gibraltar with their soldiers

[99] [2008] ECHR 385.

and on the other hand under the human rights obligation they were prohibited from using the lethal force against those alleged for terrorist attack.

The court had to scrutinize that whether state had the sufficient opportunity to frame their action to counter this suspected terrorist attack in Gibraltar and to ensure that the information is completely true or based on mere suspicion.

After examining all the witnesses in the case the court discovered that all three suspects were without arms further they were not in possession of the detonator device besides this there was also no bomb in the car. The court even considered the contention of the government that the action of the soldiers was extremely necessary in defense of the citizens of the United Kingdom and this necessary defense protected by the Article 2 (2) of the Convention. All the soldiers were under the impression that that the lives of the people in Gibraltar is in immediate danger therefore they openly fired as they suspected that the terrorist have been in the process of detonating a bomb immediately and in this circumstances the soldiers were with no alternative but to shoot them. The court accepted that as the soldiers were forced to open fire because there was the superior order but the question arises here that the government had opportunity to arrest them even before this immediate circumstances.

However the court denied this contention of the government on the ground that the entire operation of the soldiers was based on misconception as the authority who were in responsibility failed to examine the fact that the suspect were without any arms.

Therefore court found that there had been the infringement of the Article 2 of the convention on the ground that if the planning operation failed to the greatest extent possible to minimize the risk of life or the use of lethal force then there is breach of article 2 of the convention.[100] The court held that the authority was under the obligation to execute the prevention of terrorist attack in such a way as to minimize the greatest extent possible the risk to life.

Andreou v. Turkey[101]The court in this case considered the evidence of all the eyewitnesses and the court determined that the haphazard and unnecessary open firing over the crowd the court also rejected the contention of the respondent state that the death of the applicant is unexpected and mere accident. The court held that it is immaterial whether or not the soldiers had

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[100]*Lethal Force, Policing and the ECHR: McCann and Others v UK at Twenty Workshop at Doughty Street Chambers, 25th March 2015 Summary,* University law of Exeter: Law School, available at https://socialsciences.exeter.ac.uk/law/newsandevents/newsarchive/articles/lethalforcepolicingandthee.php, 25/6/2017.

[101][2009] ECHR 1663.

actually intended to kill Ms Andréa she became the victim of the irresponsible conduct of the soldiers and lost her life.

In this case the European Court of Human Rights constructed the negative obligation of the state to not to use force against the individual if the use of force is foreseeable and can be avoided and not necessary in the democratic state.

4.5 Right to life and the state positive obligation

Cyprus v Turkey case[102]

This complaint was against the Turkish Military operations in northern Cyprus In July and August 1974 and regarding the distribution of the merits of the province of Cyprus. This operation led to the restrainment of the movement of the Greek Cypriot and the Maronite communities.

The court examined the facts of the case where the complaint filed the petition before the court on the ground that this operation led to the infringement of the Article 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17 and 18 of the Convention and of Articles 1 and 2 of Protocol No. 1".

Court scrutinized the case on the basis of merit of the case and held that the issue may occur under Article 2 of the convention where the applicant proved

[102][2001] ECHR 331.

that the authorities of a respondent state failed to take appropriate measure to avoid the risk of life of individual. In this case the rejection of health care to the population may come under the right to life as state beside under Article 2 is under obligation to refrain from intentional killing under Article 26 within the perspective of the right to life it is also under obligation to take effective measure to protect the lives of those within their territory. Though commission failed to establish that the medical treatment was not provided consciously however in this case it is established that lives of many person were in risk due to delay in the medical treatment. Due to prohibition of the communities they failed to avail medical care by their own. Therefore the court determined that respondent state violated Article 2 of the Convention as Article 2 also involve the positive obligation on the part of the state to safeguard the lives of the people in their jurisdiction.

In another case of Osman v. United Kingdom[103] In this case the father of a school student killed by the teacher of the school as the teacher who was not mentally sound the court held that the authority has no knowledge about this fact. The criterion of positive obligation applies when the applicant established that the state has sufficient knowledge about the risk of life of a people from

[103] [1998] ECHR 101.

some criminal act or from the state action, however it failed to take steps within their powers.

The Kemaloglu v. Turkey[104] In this case the court held that though every danger to life does not obliged the state to take equipped steps to avert the risk of life however in this case the Turkish municipality authority failed to take efficient steps to avoid the danger to the child life. Kayak v Turkey[105] in this case the court held that the authorities had failed in their responsibility to guarantee safe administration of the school premises.

The principle of positive obligation developed by the Court through its judgment this principle says that states besides avoiding use of lethal force by the state authority without absolute necessity the state is also under the duty to take effective measure to uphold the lives of people within their jurisdiction. This positive obligation includes the efficient criminal law.

[104]ECHR 296 (2012).

[105]ECHR 148 (2012).

Chapter V

Contribution of the European Court of Human Rights in the jurisprudence of Rights to Privacy

5.1 Concept of Personal Autonomy under the Privacy rights

The Strasbourg Court like other rights has not defined the certain and concise definition that what comes under the umbrella of the private life. The distinct part of the European convention of human rights is that it expressly at the time of drafting of the convention recognized this right of privacy however this right was not explicitly mentioned under the constitution of many democratic country like USA recognized the right to privacy only after the advent of the leading Case of the Griswold v. Connecticut[106] where the US Supreme court overturned the Connecticut law that criminalized the use of contraception and held this law as unconstitutional. Justice Douglas held that the Connecticut law is in contravention of the fundamental right to privacy[107].

As per the Strasbourg legal machinery it is difficult to form a exhaustive definition of what is meant by private life. What could be certainly said that the private life.

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[106] 381 U.S. 479

[107] *Id*

To examine whether the act falls under the application of Article 8 the complaint must fall within one of the four regime guaranteed by the Article 8 of the Convention which is private life, family home or correspondence. These four essentials of personal autonomy are not self-evident in fact they are fact sensitive. Further this domain is not mutually exclusive many times they interfere within the sphere of the others.

To determine whether the complaint is under the regime of the Convention there is two stage of testing and both this stage are interlinked

Stage one Article 8(1) - It test whether the complaint fall within the realm of Article 8? For this the court examine the circumstances of each case to locate the violation within any of the four regime if the answer is negative than Article 8 is not applicable however if the court finds the circumstances within the violation of the personal autonomy than comes the second stage. In this stage the court scrutinize whether there is intrusion with the right in the questions and if there is intrusion with the right than it is the intrusion as per the law? Is it for the purpose of legitimate aim? Does such intrusion is indispensable in the democratic country even if the court finds that there is no intrusion with the exercise of the right the scrutiny of the circumstances doesn't ends there. In fact the court will further scrutinize. Is there a duty on the part of the state to ensure the realization of its conventions obligation?

Court has interpreted the scope of private life case by case and therefore there is no water tight definition of the privacy.

5.2 Versatile approach of the court in the interpretation of the right to privacy

The court interpreted the privacy in the versatile manner. Where it has incorporated various categories of relationship this include various relationship the relationship between the natural and the foster parent's relationship between the unmarried couple. Besides this the new emergence of relationship between same sexes partners however this is the controversial issue where the contracting states enjoy the margin of appreciation. The court adopted the wide approach of the privacy and besides including the relationship between the families it also include the relationship which develop outside the world.

5.2.1 Homosexuality and the personal Autonomy of the individual

There are two leading cases which changed the life of homosexual in the European country and recognized their identity without any discrimination on the ground of their sexuality.

In the case of the Smith and Grady[108] and in the case of Lustig-prean and Beckett[109] in these cases all the four applicants Duncan Lustig-Prean, John

[108] Smith and Grady v. United kingdom, [1999] ECHR 72.

Beckett, Jeanette Smith, and Graeme Gradywere expelled from the armed forces when during the military police investigation they disclosed their sexual orientation and admitted that they are homosexual.

The applicants filed petition against this armed forces of United Kingdom that such expulsion violated their right to privacy under Article 8 of the European convention on human rights. in addition to this the applicant also argued that such expulsion beside violating their right to privacy also contrary to the Article 14 of the Convention as they are facing discrimination and besides this their sexual identity is their belief and the armed forces has no right to discharge them on this ground of their belief as hiding their sexual identity forces them to live dual life.

The respondent state United Kingdom contended against the applicant arguments and argued before the court that in both the cases that the efficient military service is indispensable for the nations security and the different sexual orientations led to the discomfort among the armed forces when the service demand that the military personnel have to live in the shared living conditions and effective cohesion. This reduces the operational efficiency of the soldiers in the armed forces and fighting capacity of the armed forces. The United Kingdom also plead for the margin of appreciation before the court on the

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[109]Lustig-Prean and Beckett V. United Kingdom, [1999] ECHR 71.

ground that the state has right to intervene in the private life of the individual if it is the matter of national security.

Court assessment: the court examined that this biased attitude towards the homosexuals is largely based on the habitual attitude of the heterosexuals and this is not the sufficient justification for the respondent state to intervene in the private life of the applicant. The court on the contention of the margin of appreciation determined that state has right to interfere and restrict the individuals right if there is real threat to operational effectiveness of the armed forces the court also admitted that this due to difference in the sexual orientation there is scope of the incoherency between the soldiers however the state has to substantiate the "threat" with specific instances where in practice due to this differences in the sexual identity the armed forces suffered the loss.

United Kingdom failed to convince the court on this practical implication of the different sexual orientations.

Court held that the investigation of the sexual identity is the intrusion over the private life of the individual further the court also criticized the homosexuality policy Assessment Team. In both cases the court held that "neither the investigations conducted into the applicants' sexual orientation, nor their

discharge on the grounds of their homosexuality in pursuance of the Ministry of Defense policy, were justified under Article 8(2) of the Convention".[110]

The court stated that the convention does not allowed the state to violate the "private and family life" unless extremely obligatory.

Dudgeon v. United Kingdom[111] this was the another leading case regarding the right to privacy of homosexuals in this case the applicant filed the complaint against the Acts of the Northern Ireland one the offences against the Person Act 1861 and the other the Criminal Law Amendment Act 1885 and the Common Law on the ground of this Acts he was criminally prosecuted due to his homosexuality and as result he suffered the fear, and mental distress. He also complained that the during police investigation of his house in the year 1976 the police interrogated him about his sexual orientations and this consequently violate his right to private life under Article 8 of the Convention the argument of the applicant was that the sexual activity with consent in private with the another male counterpart is offences in the Northern Ireland and which is violationof his right to private life.

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[110]SameeraDalvi, *Homosexuality and the European Court of Human Rights: Recent judgments Against the United kingdom and their impact on other signatories to the European Convention, at 20, on Human rights*, available at http://archive.palmcenter.org/files/active/1/200412_Dalvi-study.pdf, 15/6/2017.

[111][1981] ECHR 5.

Commission Assessment: the commission unanimously held that the legislation of the Northern Ireland is in contravention of the Article 8 of the convention as it prohibit sexual act between the two consenting adult in private. The court also stated that it is not going to determine this case on the ground of some morality of homosexuality and said that the court would examine that what is the rationality behind prohibiting the private consensual homosexual act.

The court held that prohibition of the sexual activity in the private cannot be admitted as the criminal offences further there is no legitimate aim of the democratic country of Ireland to interfere in the bedroom of the individuals. Though the act is gross indecent and against morality but unless it is committed in the public. Therefore criminal prosecution of such act is not acceptable. The Act of Northern Ireland is distinct from other European nations in this context that this law prohibit the gross indecency between males and buggery whatever the circumstances.

This case is regarding the very essence of the private life. Therefore there should be existence of serious ground for the public authority to intrude in the private life of the applicant.

5.2.2 Surrogacy and personal autonomy[112]

Two leading case before the European Court of Human Rights which develop the liberal approach towards the burning issue worldwide i.e. surrogacy. In the case of the Menesson v. France and Labassee[113] in this case the France refused to grant the legal acknowledgment to parent child relationship which was legally recognized in the United States of America. The applicant challenged the case under the right to privacy of the European Convention of Human rights that this refusal amounts to the interference with their family life.

Court Assessment: the court assessed the case and determines that this application is applicable in both family and private life as there is direct connection between the private life of children born through surrogacy and the legal recognition of their parentage[114] further right to identity was the core part of the private life.

In this case though the court held that the interference by the France authority was necessary in the democratic country however this judgment made the France to set aside its domestic rule of the "*Ordre public* which defines the child's mother the woman who has given birth to it" and this judgment forced the France lawfully acknowledge the personal status of children born by surrogate

[112]GregorPuppinck,*The liberalization of the surrogacy by the ECHR,* European Centre for Law and Justice, available at https://eclj.org/surrogacy/the-liberalisation-of-surrogacy-by-the-echr, 15/7/2017.

[113] ECHR 185 (2014)

[114] *id*

mothers in the United States of Europe. This judgment was also against the margin of appreciation granted to the state with respect to the surrogate child.

Paradiso and Campanelli v. Italy[115]

In this case the Italian authorities denied the transcription right to the child in the Italian Register on the ground of fake information regarding the name of the child's real parents and the child was born through the surrogate mother in Russia.

Court examined the case and held that the Italian authorities violated the right to privacy of the child to take the child away from the "wannabe parents" as the refusal by the Italian authority failed to consider the best interest of the child.

5.2.3 Personal autonomy and the physical integrity

Costello-Roberts v UK[116] in this case the court determined that Section 55 of the police and Criminal Evidence Order 1989, as per this section the police are permitted to take intimate sample of any suspected person. The court held that such law is injurious for the physical integrity of the individual. Therefore such power should be exercised in consonance with the right to privacy under the European Convention on Human Rights

[115][2015] ECHR 76.

[116][1993] ECHR 16.

This principle subsume persons right to freedom of choice concerning control over his own body this also integrate a right to freedom from physical interference for instance corporal punishment the court.

5.2.4 Mass surveillance and Right to Privacy

Case of Szabó and vissy v. Hungary[117] this judgment is determined and final under Article 44 (2) of the Convention.

In this case the applicant challenged the anti terrorism task force act section 7/E (3) on the ground of its constitutional validity that this clause breach the right to privacy of the applicant as in this clause the minister of justice has right to order for the Surveillance of the suspected person and applicant challenged this on the ground that the impugned order was made by the minister of justice without any reason of the respected order. The applicant also argued that when the surveillance order made under section 7/E (2) it has to be by the judicial body and the judiciary has to give reason behind the order and this has not been followed in the case when the minister in charge of justice made the order for the secret surveillance of the applicant electronic communications. The applicant argued that the secret surveillance for national security has the provision which protect the right to privacy and the applicant also contended that

[117][2016] ECHR 579.

surveillance should be for the purpose of tracing the person who is suspect of the criminal action. Further the surveillance order should be with the reason and in this case the Minister in charge has not given any reason.

The applicant exhausted all the domestic remedy and even the highest constitutional court of the Hungary held that the surveillance order was for the purpose of the national security though the court acknowledged absence of reason by the minister in charge but held that national security is supreme importance for the

The petitioner challenged this before the European court of Human Rights under Article 8 of the Convention. The court examined the facts of the case thoroughly and makes this assessment and determined that there is need to make the balance between the two conflicting interest one is where the respondent state protect the national interest through the means of secret surveillance and the another interest of the applicant when such surveillance affect his privacy. Though court gave the margin of appreciation to the state that they have the right of surveillance however they the state has to exercise such action on the legitimate aim for the purpose of protection of national security. Though there is margin of appreciation but this is not the shield to violate the right to privacy of the applicant. The court has to make assessment of such

action of the surveillance on the rational ground that whether such "interference is indispensable in the democratic society."

During the procedure of the assessment the court has found that there is an undue interference under Article 8 (1) with respect to the applicant complaint against the section 7/E (3) "surveillance". The court said that in those matters which affect the human rights like right to privacy is in contravention to the rule of law, which is the core value of any democratic society enshrined in the Convention. The court also determined that the discretion of the national authority must satisfy the principle of the legitimate aim. The court also determined that the Hungarian Law which is vague and has not specified the categories of person and therefore the court notes that the absence of any clarity by the respondent state as to how this provisions would be applied in practice and the contention of the state that it is on the basis of the strict necessity as per Article 53(2) of the National Security Act of the respondent state.

The principle of the strict necessity or extreme urgency must satisfy the condition that the secret surveillance is necessary in the democratic society.

Therefore the court finally held that in the present case the Hungarian government also failed to prove that the surveillance legislation clause section 7/E (3) provides sufficient safeguard for the protection of the privacy rights of the

individual. The court also determined that such order of interception of the electronic communication and the postal communication cover the entire realm without any specific and effective measure which led to the surveillance of even those people who are not menace to the security of the state. With this the court concluded that such secret surveillance is the factor for the destruction of the democratic society. The court made the following order:

That the respondent state is under obligation to pay the applicant jointly within three months from the date on which the decision becomes final as per Article 44(2) of the convention in addition with any tax that may be chargeable to the applicant for the purpose of realizing this monetary relief .

While determining the case the court also referred its decision it gave against the Russian Government where it the court held that the Russian government violated the right to privacy of the Roman Zakhoraov where court found that the Russian government used forced mobile network operators to install equipment to permit unrestricted interference of all the telephonic communication of the applicant.[118]

In the case of Leander v. Sweden[119] where the applicant lodge the complaint against the Northern Ireland Authority where the police noted all the personal information of the applicant in the secret police register the court pronounced

[118]Roman Zakharov v. Russia [2015] ECHR 1065.

[119][1987] ECHR 4.

that any domestic legal system which is applicable over the citizens, should be certain and must contain the sufficient indication about the conditions in which such information has to be collected by the police authority. Therefore European Court of Human Rights held that this secret collection of information without proper grounds is potentially unsafe intervention over the privacy of the individual.

Chapter VI

Contribution of the European Court of Human Rights in Right to Fair Trial

6.1 Origin of the Right to fair trial

"Whenever you visit a country, it's less important to *know which laws they have, than to know if they execute them" – Montesquieu*

In the earlier period this term "fair" means the person who has the white complexion and in today's term its is used to describe some-one who is beautiful however this meaning is now obsolete when we understand it in the context of trial. Fair trial today is a concept that comes from far civilization. The roots of the basic principle of the right to fair trial can be traced all the way back to the *Lex DuodecimTabularum*- the law of the Twelve Tables- which was the first written code of laws in the Roman Republic around 455 B.C.[120] This law contain the right to have all parties present at hearing, the principle of equality amongst citizen and the prohibition. In the modern jurisprudence this is popularly called the right to be heard and to defend oneself, the right to be subject to the rule of law.

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[120] Judge Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, at 1, available at http://bjil.typepad.com/Robinson_macro.pdf. 26/6/2017.

We can also trace the history of the development of fair trial in the Magna Carta. In forcing King John to sign the Magna CartaLibertatum in 1215, the English Nobles ratifies the principle that even King's will could be circumscribed by law.[121] The Magna Carta proclaimed that no freeman shall be taken, imprisoned or outlawed or exiled or in any way harmed-nor will we go upon or send upon him. The Magna Carta –like Twelve table –recorded in writing a set of clearly formulated rights.[122]

Besides this even during the French Revolution under Article 6 and 9 of the French Declaration of the Rights of Man, 1789, which declare that the accused shall be presumed innocent until proved guilty. Even in the code of Hammurabi though this concept of human rights was in its embryonic age this right to fair trial presently is the indispensable matrix of the democratic country and to establish rule of law.

As the saint follows the religion the courts are bound to follow this doctrine as the fundamental prerequisite of any case before it. United Nations while making the Universal Declaration of Human rights declare these human rights under Article 10 of the Convention this incorporation suggest that every democratic country has to follow this principle as it prevent the abuse of rights by the state.

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[121] *Id*

[122] *Id*

As a result the drafting committee of the European Convention also realized the core value of the fair trial and therefore they also incorporated this right under the European Convention of Human Rights under Article 6.

6.2 Interpretations of Article 6 of the European Convention on Human Rights

Article 6 is the omnibus provision, which has been described as a 'pithy epitome of what constitute a fair administration of justice'[123].

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[123] Cremona, *The Public character of Trial and Judgment in the Jurisprudence Of the European Court of Human Rights protecting Human rights: the European Dimension : studies in Honour of Gerard J. Wizard* (1990),at 107. F Matcsher and H. petzold.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights:

a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) To have adequate time and the facilities for the preparation of his defense;
c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) To have free assistance of an interpreter if accused cannot understand or speak the language used in court"[124].

Complaint about court proceeding form a major percentage of the cases before Convention organs, reflecting that it is in court that most likely to come into contact, in a significant manner with the power and authority of the state as it administer civil and criminal justice. However the convention has not used the

[124] The European Convention on Human Rights and Fundamental Freedoms, 1950

word justice. The key principle of Article 6 is fairness[125] paragraph 2 and 3 of the constituent element or specific aspects of the fair trial guaranteed in Paragraph 1.

6.3 General Rules of Fair Trial under Article 6

6.3.1 Procedural Equality

The Right to an equitable process has become the underlying principle of the ECHR and of a democratic state and this jurisprudence is present in the ECtHR since its inception. This is popularly called as the equality of arms which was first mentioned in the Neumeister case.[126] It says that both the process shall have the same probabilities of defending their own interest and given that the guarantee to expose the case in a trial in a condition that are not disadvantageous vis-vis of the counterpart.

This imposes the obligation on the court to perform the effective exam of the means, the arguments and the element of proof offered by both sides, respecting the contradictory and the equality principle. Thus it is evident that the theory of the contradictory and the principle of equality of arms cannot be

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[125] Karen Reid , *Practitioner guide to the European Conventions on Human Rights, (2rd Ed. 2004)*, Thomson Sweet and Maxwell, at- 65

[126]Neumister v. Austria, [1974] ECHR 1.

separated from the notion of equitable process.[127] Further this contradictory principle implies that each part is called to deduce fact and right reason, offer new evidence, control the opponent's evidence and discuss the value given to it.

This harmony between the Contradictory and the Equality principle provide similar opportunities to both the party and thus both the party expects the favorable judicial decision. Further this concept of harmony is present in both at the civil and juridical level.

In the landmark case of Borger the ECTHR not only applied this principle of equitable process but also illustrated the dynamic nature of the Convention[128]. In this case the court reconsidered the concept of fair trial "notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.[129] Thus with this the court made it clear that right to be present is also the part of fair trial and even in civil cases you cannot claim that right to be present is not important and therefore ECtHR has confirmed that such idea cannot be considered in the general way. The presence of both the party plays fundamental role.

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[127] Themis 2008 ECHR category, The Right To a Fair Trial, Analysis of the condemnations of the Portuguese state due to the violation of Article 6 of the European Convention on Human Rights.

[128] Borger v. Belgium, [2001] ECHR 890.

[129] *Id*

6.3.2 Judicial Process

The European court of human rights follows the adversarial trial the classic form of this system is also described as the accusatory. The right to have an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observation filed or evidence adduced by the other party.[130] Thus in this process the judge is mere observer and he has to give judgment after hearing both sides. To ensure the effectiveness of the adversarial process the relevant material should be available to the parties so that at the time of trial the accused can present the evidence in his defense.

6.3.3 Public hearing

This is the important feature of the right to fair trial. Court in the case of Pretto and others held that the "publicity is seen as one of the guarantee of the fairness of trial; it offers protection against the arbitrary decision and builds confidence by allowing the public to see justice being administered"[131]

6.3.4 Reasonable time guarantee

Large number of cases is regarding the violation of this right which provide under the Article 6.

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[130]Ruetz-Mateosv.Spain, [1993] ECHR 27.

[131]Pretto and Others V. Italy [1983] ECHR 15.

In 1999 the Grand Chamber of the Court observed in the case of Ferrari,DImauro and Bottzi v. Italy that the systemic delays in the Italian judicial system constituted an administrative practices that was incompatible with the convention.[132]

The court stated that the object of the reasonable time guarantee is to protect "all parties to court proceeding ...against the excessive procedural delays.[133]The guarantee further underlines the importance of rendering justice without delays which might jeopardize its effectiveness and credibility". [134]

The court even determined the process of calculation of the time it says that the time will commence depends on the nature of the case if it is civil that from the date of the institution of proceeding and in criminal case from the date of the framing of charges. Time would come to an end when the proceedings have been concluded at the highest possible instance, when the determination becomes final and the judgment has been executed. Court has established the guidelines that what factors should be considered while interpreting the reasonable time this include the complexity of the case, the conduct of the

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[132]*Ferrari, A.P., Di Mauro and Bottazi v. Italy [1999] ECHR 63;*

[133]*Stögmüller v. Austria*, [1969] ECHR 2.

[134]Diennet v France (1995) 21 EHRR 554.

applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant.[135]

The complexity of the case involve questions of both legal and the fact issue, the nature of the facts which has to be established, the number of witnesses, and the accused, international element the joinder of the case or the intervention of the other person. In the case of the Boddaert v. Belgium[136] the court has not considered six years and three months the unreasonable delay because the case was of the murder inquiry with this two parallel cases were also there.

Sometime in many cases it is the applicant who causes delay, this ultimately weak his own case.

6.3.5 Dispute or Contestation concerning rights and obligations

This element dispute is adopted from the French text under Article 6 and has not to be construed in the technical sense and it has to given the substantial meaning rather than the formal meaning[137]

A dispute must be "genuine and serious nature"[138] for instance an applicant complained about the amount of child maintenance imposed by the Child support Agency, the commission noted that there was no provision for the costs

[135]*Buchholz v. the Federal Republic of Germany*, 3 EHRR 244 1977.

[136]*Boddaert v. Belgium*, [1992] ECHR 62.

[137]Le Compte, Van Leuven and De Meyere v. Belgium [1981] ECHR 3.

[138]Bentham v. Netherland, [1985] ECHR 11.

of access visit to be taken in to account as the applicant claimed and that he did not deny that the assessment had been correctly made the legislation. Thus there was not dispute of a genuine or serious nature about any civil rights or obligation.

Therefore court would not entertain any case where the civil rights are too remote for instance the court the case challenging the legality of the nuclear power station's operating license did not fall within the scope of Article 6 Para 1 because the link between the extension decision and the right to protection of life, physical integrity and property was too tenuous and remote as the applicant failed to bring that they personally exposed to a danger that was not only specific but above all imminent.[139]

The judgment of the court shows that the court is interpreting the civil dispute according to facts and circumstance of each and every case as in one case the building of dam which would have flooded the applicant's village court construed it under Article 6 Para 1.

6.3.6 Basis in Domestic law: Existence of an arguable right in domestic law

Though Article 6 does not guarantee any particular content for "rights and obligation" in the substantive law of contracting state. However there must at

[139]Balmer –schafroth and others v. Switzerland, [1997] ECHR 46.

least on arguable grounds be basis for the right in domestic law[140], while matters at the total discretion of the authorities may not disclose a "right". While assessing whether a right is at stake the court has stated that the beginning point must be the provision of the relevant domestic law an their interpretation by the domestic court and that where superior national court have conducted the comprehensive and convincing analysis on the basis of relevant convention case law and principle, it would need strong reason to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law.[141]

The court made it clear that whether a person has actionable claim in national law is not only depend on the content, properly speaking of civil right as defined in the domestic law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. When we apply the difference between the substantive

limitations and procedural bars in the light of these criteria, the court for instance recognized as falling under Article 6 Para 1 of civil actions for defense against the police[142]

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[140]Z and others v.The United Kingdom [2001] ECHR 329.

[141]Roche v. The United Kingdom, [2008] ECHR 926.

[142]Osman v. The United Kingdom, [1998] ECHR 101.

Landmark case of the civil dispute: Feldbrugge v. Netherlands[143] the court held that the sickness benefit under the Netherland security system constituted a civil right. It took the view that the private law feature significantly outweighed the public law characteristics. The court identified such private law feature as the contract of employment and its similarities to insurance under the ordinary law, together with the fact that the applicant participated in the financing of the social security by means of a deduction from her salary for that purpose.

6.4 Application of fair trial in criminal Proceeding

Article 6 applies to both to civil and criminal proceeding within its scope, Article 6(2) and (3) contains specific provision applicable in respect of those charged with a criminal offence. The other five rights under Article 6(3) are stated to be minimum rights.

The right to fair trial is seen as holding so prominent a place in democratic society that the court has stated that there is no justification for interpreting Article 6 Para 1 restrictively.[144]

[143][1986] ECHR 4.

[144] Moreira de Azevedo v. Portugal, [1991] ECHR 41.

6.4.1 Concept of Criminal Charge

The right which is guaranteed under the fabric of the Article 6 applies in the context of the criminal proceeding and only to those who have been charged. They entertain any case before the court, the body of the court initially examines the meaning of the terms criminal and charge for the purpose of interpretation. The convention has different meaning of this terms it is not similar to national laws.

Notion of criminal law

With respect to criminal the contracting state has wide margin of appreciation to determine that what action will fall under the criminal offence. According to general practices freedom of speech and expression cannot be understood in the context of criminal offence to constitute the criminal offence the action must carry the criminal sanction. Though states have its own sovereign to determine that what constitute the criminal however the court provided the guideline for the same that is (i) what is the classification in domestic law, the nature of offence, the purpose of the penalty and the nature and the severity of the penalty.[145]

If any charge is classified as criminal conduct in the national law than without any further examination Article 6 will apply automatically to the proceeding however this is not true vice versa. The court held this in the case of the Engel

[145]Nuala Mole and Catharina Harby, *A guide to the implementation of Article 6 of the European Convention Human Rights,(1st Ed. 2006)*, at 14, Council of Europe.

and others v. Netherlands that "*if the Contracting State were able to their discretion to classify an offence as disciplinary instead of criminal or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. Latitude extending thus far might lead to results incompatible with the purpose and object of the Convention*[146]"

The same principle was adopted by the Court in the case of Lauko v. Slovakia where the court found the offence as the criminal however the state party classified it under the administrative rather than criminal in national law[147].

The European Court of Human Rights in the case of the Ozturk v. The Federal Republic of Germany considered the reckless driving under the criminal offence[148].

Article 6 comes into operation as soon as the charges are framed against the accused the convention enunciated the autonomous concept to the term charge irrespective of its concept under the domestic law. Deweer v. Belgium the court stated that the term charge should be given the substantive rather than a formal meaning and it felt to compel to look behind the appearance and investigate the

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[146]*Engel and others v. the Netherlands*, [1976] ECHR 3.

[147] (2001) 33 EHRR 40

[148](1987) 10 EHRR 182.

realities of the procedure in question.[149] The court define the charge as "*the official notification given to an individual by the competent authority of an allegation that he is suspected of having is committed a criminal offence, or, where the situation of the [suspect] has been substantially affected because of that same suspicion*"

6.4.2 Essential of criminal obligation under the convention

6.4.2.1 Presumption of innocence

The major rights available in the case of criminal obligation to the individual is the "presumption of innocence" the court in the case of Tlefner v. Austria[150] held that if the burden of proof lies on the accused than it is the violation of this right.

The court opined that with respect to presumption of innocence the contracting state have to make balance between the importance of what is at stake and the rights of the defense in other terms it should be within the legitimate aim of the contracting state.

The European Court of Human Rights determined that if a judicial decision reflects an opinion that the accused is guilty than it will constitute the infringement of the presumption of innocence.

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[149][1980] ECHR 1.

[150][1992] ECHR 58.

6.4.2.2 Adequate time to prepare for defense

The court in the case of CV v. Italy held that compliance with this provision is indispensable as the accused has to prepare for his defense against the charges framed. The court widened this scope and in the case of Nachova v Bulgaria[151] court set aside the conviction of the applicant as in the trial he was given only a couple of hours to prepare her defense without a lawyer.

The European Court of Human Rights proposed that though there is need of speedy trial however it should not be at the cost of procedural rights held in Nada v. Switzerland[152]

6.4.2.3 Access to evidence

The accused under the criminal rights has also right to have access to evidence and this include the opportunity to accustom him so that accused can prepare his defense with the results of investigation this was held in the case of Husyen and others v. Azerbaijan[153]

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[151] (2006) 42 EHRR 43.

[152][2012] ECHR 1691.

[153] (2011)ECHR 110.

6.5 Application of Fair Trial in Civil Rights and Obligations

The most confounding problem the European Court of Human Rights confronted is the interpretation of the European Convention on Human Rights in the context of non-criminal cases. As per Article 6 it applies over the "Civil rights and obligation" to determine whether the cause falls under the civil rights obligation the European Court Human Rights has to determine first the nature of the rights instead of the nature of the legislation. The court made the difference between the civil and the criminal. To determine the civil rights the court has to test whether the result of the proceeding is critical for private law rights and obligations. The court also determined that to examine this civil rights the legislation of the state can also be taken into consideration. The relations of private person *inter se* falls within the scope of Article 6 however the relationship between the individual and the state may not always fall under the jurisdiction of the European Court of Human Rights for instance the right of nationality and the payment of taxes[154]. Thus European Convention of Human Rights does not provide right to fair trial regarding all the civil rights in the national legislation.

Interpretation on this area is progressive matters which were once considered as outside the scope of article 6 Para 1 such as welfare benefit, now comes under the purview of the "civil rights and the obligations"

[154]Ferazzani v. Italy [2001] ECHR 464.

6.5.1 The right to property under the civil rights obligations

The court determined that right to property which comes under the scope of the pecuniary rights is under the milieu of the civil rights obligations thus in cases like Sporrong and Lonnroth v. Sweden[155] the court held that expropriation of the property by the state comes under the right to fair trial. Court in the case of the Chapman v United Kingdom[156] the court determined that this cause is subject to the right to a fair hearing as it is about the regulation of the use of property.

6.5.2 The right to engage in a commercial activity or to practice a profession

In the case of Bentham v. Netherland the court held that without any reasonable ground withdrawal of the commercial license is violation of the right to fair trial. The court in the case f X v France held that the claim of applicant for damages in the medical negligence fell within the purview of the right to fair trial.

6.6 Access to court

In one of its early judgment in Golder v. United Kingdom[157] the court recognized the existence of an implied right of access to the court. This right was recognized because

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[155](1982) 5 EHRR 35 PC.

[156]UK 2001 33 EHRR 399 GC.

[157] [1975] ECHR 1,

"It would be inconceivable .... That Article 6 Para 1 should describe in detail the procedural guarantee afforded to parties in a pending lawsuits and should not first protect that which alone makes it in fact possible to benefit from such guarantee that is access to court. The fair, public and expeditious characteristics of judicial proceeding ... it follows that the right of access constitute an element which is inherent in the right stated by Article 6 Para 1".

This right of access to court is most significant in the context of the determination of private claims but also arises in the criminal proceeding.

The court gave the distinguished judgment in the case of the Airey v. Ireland[158] where it has held that the right of access to the court would be ineffective is she were no legally represented. However the court also emphasized that, whilst Article 6(1) guarantees an effective right of access to the courts for the determination of their civil rights and obligations the state has free choice to introduce reform to execute this right.

The courtsaid that generally legal aid is required in the civil cases involving family separation or parental rights.[159]

Court held that irrespective of nature of the case right to access to court is inherent in the Article 6.

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[158] (1979) ECHR 3

[159]Munro v. United Kingdom (1987) 52 DR 158.

6.6.1 Limitation on the right to access

The right of access to the court is not absolute and state has margin of appreciation in its regulation will vary depending on the need and resource of the community and individuals.[160]

However this restriction must not impair the essence of the right of access: they must have legitimate aim and the means used must be reasonably proportionate to the aim sought to be achieved[161] the court also through various cases dealer the guideline that what comes under the legitimate aim like where the law prevent the vexatious petition by imposing the period of limitations, the requirement that legal representation be obtained for the lodging of an appeal and payment of security for costs have been held to be permissible limitations. The court in the on the basis of test in the Ashingdon v United Kingdom case where court held that immunity claim come under the limitations of the access to court.[162]

The court interpreted this limitations as per the circumstances of each and every case in the case of the Osman v. United kingdom the court held that public policy immunity from liability in negligence was held to be the breach of the right to access the court.[163] The blanket immunity was considered by the Court to be

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[160] (1975) 1EHRR 524

[161]Ashingdon v United Kingdom, 7 EHRR 528

[162]1985 7 EHRR 528.

[163][1998] ECHR 101.

an unacceptable restriction because of its absolute and unqualified character, going beyond the permissible limits afforded to a State by its margin of appreciation.

6.7 Execution of the judgment of the Court

In the above chapters we have examined that European court of human rights developed the extensive jurisprudence of the right to life, right to fair trial and right to privacy. But this "judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedom to be made effective"[164] In fact even the court stated that right to access to a court or tribunal would be deceptive if a contracting state's domestic legal mechanism is not sufficient enough to bring the judgment into operation.[165] Therefore even under Article 6 also the court recognized that enforcement of judgment is the fundamental part of the "trial" and court infers this right of enforcement of judgment from "the principle of rule of law". This inference made by the court under Article 6 of the

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[164] Elisabeth Lambert Abdelgawad, *The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability*, at 1 http://www.zaoerv.de/69_2009/69_2009_3_a_471_506.pdf, 23/6/2017.

[165] Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights (CNRS)*,at 6 http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf, 23/6/2017.

Convention consequently this principle of execution of judgment equally applies to the judgment of the court without any uncertainty. The convention made it obligatory for the High Contracting Parties undertake to abide by the final judgment of the court in any case to which they are parties than subsequently this final judgment of the court shall be transferred to the Committee of Minister which is under to duty to supervise its execution.[166]

The convention also provide the circumstances under which the judgment of the court becomes final it says that the judgment of the Grand Chamber shall be final and if the judgment is pronounced by the chamber and the parties to the case declare that they will not take recourse to the Grand chamber or if the three months have been elapsed and the parties has not taken recourse to the Grand Chamber than this judgment shall also become final[167] or if the reference of request made to the grand chamber by the parties is dismissed by the Grand chamber. [168] The High contracting party has to enforce this judgment pronounced by the court in good faith as the convention is the international treaty between the 49 aspiring European Nations including the Russia and

[166]Article 46, The European Convention on Human Rights and Fundamental Freedom 1950.

[167]Article 44, The European Convention on Human Rights and Fundamental Freedom 1950.

[168]Article 43, The European Convention on Human Rights and Fundamental Freedom 1950.

Turkey therefore the general principle of state responsibility under the international law applies on the contracting parties.[169]

After the introduction of the protocol 14 of the Convention the execution of the judgment is key factor to develop the European Human Rights system. The group of wise person also reported that the ", "the credibility of the human rights protection system depends to a great extent on execution of the Court's judgments. Full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it"[170]

As per the provision of the Convention, it is the obligation on the part of the Committee of Minister and the parliamentary Assembly which is the part of the Council of Europe to enforce the judgment. The parliamentary Assembly suo moto imposed on the council of minister to inspect consistently the execution of judgment. Unlike the Inter - American court of Human rights in the execution of

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[169] James R Crawford, *State Responsibility*, Oxford public international law Max Planck Encyclopedia of Public International Law (2006) http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=EPIL, 24/6/2017.

[170] *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,* at 29, Steering Committee for Human Rights (CDDH) Council of Europe, (2009).http://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf, 26/6/2017

the judgment the victim and his representative has no role to play in the execution of the judgment of the court. For the purpose of the execution of the judgment the committee in 2001 adopted the new procedure for this which includes the rule of control of payment, just satisfaction, and the adoption of individual and other general measure. With the introduction of the Protocol 14 the committee of Minister started using the two new procedure to execute the judgment the first procedure would be used by the committee of minister if due to some gap in understanding the court judgment than the committee will refer the case to the court for interpretation with the guideline that how this judgment has to be executed as lack of precision in judgment makes it difficult to execute it. This process require the vote of two third of the representative to vote for such proposal.[171] Another procedure allows the committee to refer the matter again to the court if the state failed to enforce the judgment and in fact there are separate proceeding take place against those contracting state however court has always refused to hear such case as there is no express jurisdiction to the court on such matter.

The newly introduced article 46 (4) gives the power to the committee of minister considers that a is high contracting party refuses to comply with the judgment

[171] Protocol 14, Article 46, The European Convention on Human Rights and Fundamental Freedom, 1950.

than the committee of minister would serve the notice to the Party after the resolution of such notice is approved by the two-third of the representative of the committee and then court will accordingly scrutinize that whether party violated the Para 1[172] of the Article 46 or not.

The committee also sometime adopt the coercive measure to execute the judgment where the respondent state objects or delays the enforcement of the judgment under this coercive measure it give warning to the state to expel the member state from council of Europe under Article 8 of the Statute of the council of Europe.

Besides the committee of minister to execute the judgment the European Court also took active role in the enforcement of its decision through various ways.

Just Satisfaction: this is expressly stated under the convention which empowers the court that if the court found that the high contracting party violated the Protocol or the Convention however the party can only enforce the partial reparation than court in its discretion grant just satisfaction to the injured party.

Restitio-in-integrum: this is another ways by which court execute its decision where the court orders the high contracting state to reopen the proceeding again

[172] Article 46, European Convention on Human Rights and Fundamental Freedom,1950

in the domestic court and in this the European court orders the domestic court to take most appropriate proceeding.

General measure this general measure includes the change in the case law and the domestic legislations. Thus it is not only the Council of Europe which enforce the judgment of the European Court of Human Rights, even the court took active role in the execution of the judgment through various procedures like pilot judgment, and just satisfaction measures.

Chapter VII

Conclusion& suggestions

All through study, it has been analyzed that usually it is the domestic legislation in the country which is the ultimate arbiter of every case within their jurisdiction and no other nations can interfere with the sovereignty of the other country but European Court of Human Rights through its various judgment became the final authority to protect the human rights of the individual. Thus Strasbourg case law has led to the formation of new rights which are not expressly stated in the letter of articles but which have transpired due to consequence of the progress of these case laws. The judges of the Strasbourg court pioneered the innovative doctrine and principle and followed the principle of "living instrument" where the court interpreted every case according to the "present day conditions".

We examined the cases regarding the interpretation of right to life where the European Court of Human Rights have confronted diverse forms of challenges due to conflict between the right to life and the right to privacy the European Court on one side has to protect the personal autonomy of the pregnant woman and on the other side right to life of the fetus. In the beginning in the case of X v

the United Kingdom[173] the European Court of Human Rights held that the term "everyone" in the Article 1 does not incorporate the unborn child. However, subsequently in the case of H v Norway[174] the European Court of Human Rights ruled that it cannot exclude the unborn completely from the right to life scope there is need to make equilibrium between the personal autonomy of the pregnant women and the fetus. The European Court of Human Rights observed that this reconciliation is necessary because no High Contracting party negates the life of unborn child in their domestic legislation. Therefore in such cases the High Contracting party enjoys the margin of appreciation. European court of Human rights also developed the principle of the positive and the negative obligation of the state. Through the interpretation of the Mac Can[175] case the Strasbourg Court brought out the most enduring doctrine of "systemic failure" by the state which means that if the state had the opportunity to plan and minimize the lethal force, in spite of that if it failed to prevent the risk to the life than the state violated the negative obligation of the right to life under the European Human Right Convention.

The Strasbourg Court in number of cases pronounced against the respondent state and obliged them to pay adequate compensation to the applicant where

[173] (2001) ECHR 331.
[174] (1992) 73 DR 155.
[175] (2008) ECHR 385.

the state violated the positive obligation for instance in the case of Cyprus v Turkey[176] the court held that it was the obligation upon the state to avail medical facilities to the applicants. Strasbourg court broadly interpreted this obligation and made authority liable to take steps where the student died in the school premises.

Thus with respect to right to life it manifested the jurisprudential aspect of right to life. The Strasbourg Court also embraced the personal autonomy and personal development in the case of the euthanasia where it developed the principle that any person who is mentally sound to exercise his right to choose and if the domestic legislation of the High Contracting party permits for the assisted suicide in the extreme health than this right to die can be exercised. The European Court of Human Rights in the cases of surrogacy pronounced that in such cases the welfare of the children has to be scrutinized and the parents though have child through surrogate mother, has right of citizenship in the High Contracting state. Through various cases the Strasbourg court also recognized the personal autonomy of the homosexual if the sex is between the two consenting adult than the domestic legislation cannot intrude in the bedroom of the individual. Besides this the Strasbourg Court rejected the contention of the state authority to expel the applicant from the military on the ground of their

[176] [1975] ECHR 3.

sexual orientation. The study also reflected that in the cases of surveillance the court determined that the state is under the authority to provide the "definite guideline" to have the secret surveillance further such surveillance must satisfy the doctrine of "necessity in democratic country". In spite of this principle in certain cases the court granted the margin of appreciation to the respondent state and as result there is not specific obligation over the state to avoid violation of right to privacy. Further with regard to right to privacy the court in many cases permitted the state to enforce their own domestic legislation.

In the realm of Right to fair trial the court emanated the different doctrine from its very conscience and determined that this right exists even during investigation procedure and give effect to the principle of the justice delayed is justice denied. Further through cases the court pronounced that immunity from liability in negligence cannot be accepted this amounts to breach of the right to access the court. The Court underpinned the extensive interpretation and created the notion of the civil and criminal obligation over the state authority.

Thus so far as the Right to life and Right to Fair Trial is concerned the European Court underpinned various doctrine and permitted no defense to comply with the judgment of the court and to incorporate this judgment in their national legislations and safeguard the rights of the individuals. However there is need for some reform in the European Court of Human Rights concerning the

progress of the jurisprudence of right to privacy. In many cases the European Court of Human Rights adopted the principle of the margin of appreciation as there was no common European consensus over certain rights like abortion, surrogacy, surveillance, euthanasia, and homosexuality. As a consequence of this the European Court of Human Rights gave enough freedom to the High Contracting Parties to interpret these rights of privacy as per their own national legal and social system. There is requirement to re-examine this principle concerning the right to privacy because this is causing inconsistency in the realization of human rights within European Nations. This also reflects that the European Court of Human Rights is compromising the human rights of the individual. The interpretive technique adopted by the court concerning right to privacy require re-evaluation as in this right the court has not developed the exceptional jurisprudence. The jurisprudence of right to privacy has been compromised by the Court as margin of appreciation is the interpretive method where the respondent state negotiates with the court to allow them to violate the rights of the individual in the name of distinct social and cultural system.

Through analysis of the cases we can conclude that the hypothesis of the study is proved and therefore European Court of Human Rights requires to evolve its jurisprudence in the milieu of right to privacy.

Though, the European Court of Human Rights with its judgments made the European Convention on Human Rights "the living instrument" however there is immediate need to take some reformative steps to develop its legitimacy.

One of the central issues which need to be addressed is the principle of *res judicata* which means that judgment of the court is binding only over the respondent state and applicant. The judgment has no *erga omnes* effect thus it is not binding over the other High Contracting States who might have the same legislation which violate the rights enunciated under the European Convention on Human Rights. This limitation over the authority of the Court has to be addressed than only the Court can play the proactive role like the other national courts. Thus there is need to adopt the principle of *stare decisis* to facilitate the constitutional status of the court.

Besides this if the judgment of the Strasbourg Court gained the strength of *erga-omnes* than it would also reduce the backlog of cases before the Court. Due to this backlog of cases the European Court of Human Right is confronting the challenge of its own success.

The promotion of human rights requires the European Court of Human Rights to move beyond the judicial sphere and to play an active role.

Where the court found the structural violations it can pronounce the pilot judgments and it can direct the respondent state to redress the human rights violation of all potential applicants. This method is effective because than the court has not to adjudicate every individual case. This ultimately will reduce the backlog of the cases.

There is also need to adopt the reformative steps suggested by the Wise person report, the steering Committee appointed by the Council of Europe for the purpose of promotion of human rights in the High Contracting state. The Committee proposed for the adoption of the Protocol 16 popularly known as dialogue protocol which would allow the judges of the national court to take advisory opinion of the European Court of Human Right regarding the interpretation or applications of rights and freedom set out in the European Convention on Human Rights. This protocol will redress the human rights violation at the domestic level itself.

Thus the future of the European Court of Human rights presupposes that the judgment of the courts have to be translated into the legal language of the Contracting State. This reform is vital for the purpose of accomplishment of the aim with which the European Court of Human Rights is established.

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