15 14, 15, 16... Reforms of the European Court of Human Rights

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15.1 Introduction

Since the Strasbourg-based European Court of Human Rights has started its operation in 1959 – as a second pillar of European human rights protection, accompanying the Commission – states party to the European Convention on Human Rights (1950)[1] have adopted a series of protocols aiming to develop a stronger and more effective supervisory mechanism.[2] This has not only served the interests of the people of Europe, but also a wider European political goal: to set the standards worldwide in international human rights protection. It is fair to say that the system created in the framework of the Council of Europe has been a leading example to both the similar Inter-American and African systems.[3]

The problem of the high number of cases has arisen already during the 1980s, before the Court became a single institution. The European Commission on Human Rights already had to deal with this issue, and the question of reforming the mechanism has been on the table ever since.

This has been become ever so urgent following the accession of the new democracies of Central and Eastern Europe, many of which also faced serious human rights questions. Protocol 11 (adopted in 1998)[4] which has made the Court the single institution of European human rights protection, vested the Court with an enormous extra work burden. By enabling individuals to bring their cases directly before the Court, the latter had to cope with unprecedented problems: an incredible growth in the number of the complaints, with a concurrent fall in overall quality. Previously, the Commission was there to select the

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1 *Convention for the Protection of Human Rights and Fundamental Freedoms.* CETS No. 005 (Convention).

2 For more on the matter, *see inter alia*: D. Shelton: *Remedies in International Human Rights Law*, OUP, Oxford, 2000. pp. 147-160; M.W. Janis et al. (Eds.), *European Human Rights Law*. 3rd edn, OUP, 2008. pp. 24-27, pp. 70-118.

3 Shelton: *op. cit.*, p. 12.

4 *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.* CETS No. 155. (Protocol 11).

cases, with the result that the Court only dealt with 'interesting' and well prepared cases. After Protocol 11 however, it had to face a massive amount of applications, a great proportion of which was either ill-founded or simply inadmissible and the Court had to deal with the selection process itself.[5]

Blueprints to reform the Strasbourg Court responded to the crisis caused by the heavy workload of the European Court of Human Rights,[6] a crisis threatening the effectiveness of the European Convention on the national level. When thousands of human rights cases block the operation of the Strasbourg Court, applicants lose confidence, the mechanism loses its credibility in the eyes of national courts and states may become more confident in committing human rights violations.

Another problem was the high number of inadmissible cases: according to a relevant survey, 90% of the applications submitted during the first ten years of the Court operating as a single institution (1998-2008) were declared inadmissible. This has shown that even victims of violations had problems with fulfilling the necessary criteria or conditions for resorting to Strasbourg. An even more complex problem were those repetitive cases, which reflected systemic and structural problems in certain Member States, usually the ones with the worst human rights record – it seemed that the Court's individual decisions were not really effective.[7]

A major reform was conducted to address the problem of the enormous increase in the number of applications and the Court slowly but steadily drifted towards inoperability under the burden of its workload. The result was Protocol 14 adopted in 2004,[8] which entered into force in 2010, after a long – and politically tense – ratification period. It introduced new rules, aiming to speed up the procedures of the Court.

One of these reforms was the introduction of new judicial formations for the simplest cases and for deciding on admissibility, in order to render the allocation of human resources of the Court more effective. For example, a single judge deciding on the admissibility of a case was a novelty, criticised by some human rights actors and NGOs, but this was not the most important change. The other, more interesting element was the establishment of a new admissibility criterion: from that time on the condition of the presence of a 'significant disadvantage' was also needed to find a case admissible. This gave rise to a number of questions, as the Court itself had already developed its jurisprudence in a way as to reduce its heavy workload.

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5 Janis et al. (Eds.): *op.cit.*, pp. 878-882.

6 *Ibid.*, pp. 878-885.

7 The weight of this problem is clearly shown – and used for criticism toward the Court – *inter alia* in a lecture given by Leonard Hoffmann, a well-known British law lord in 2009. Lord Hoffmann: The Universality of Human Rights. Judicial Studies Board Annual Lecture, 19 March 2009.

8 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. CETS No. 194 (Protocol 14).

But this new criterion introduced into the text of the Convention by the states can also be interpreted as a dangerous attempt by way of which the states may restrict the Court in its activities. It is worth examining – as will be done below – how this new provision influenced the Court's practice. Personally I believe that the effects are still not to be clearly seen. Even though some jurisprudence can be examined, analysed and some conclusions may be drawn, certain elements are still subject to questions.

After 2010, new questions were raised, which were partly related to the limited success of Protocol 14. It is worth noting that there was an important additional political factor in play. Some states found the strong tools of the Court problematic and the general political crisis around the European Union (culminating most visibly around the Lisbon Treaty) also created a somewhat hostile approach towards the Court. It had already experienced serious differences before with non-EU states (Russia or Turkey), and even if from an institutional perspective the Court has nothing to do with the EU, because of some political problems surrounding certain EU Member States, it also became caught up in the crossfire of criticism voiced by these states. In addition, as the Lisbon Treaty obliged the EU to become a party to the Convention and to accept the Court's jurisdiction, the Court inched even closer to the smoking crater of EU domestic political tensions.

During this period of time, three high-level conferences were held to address the future of the Court, and to find solutions to ensure the long-term effectiveness of the Court and the Convention (Interlaken in February 2010, İzmir in April 2011 and Brighton in April 2012). The work of these conferences resulted in the adoption of two additional protocols to the Convention, namely Protocols No. 15 and 16 in 2013.[9] Both of them aim to introduce means to accelerate or at least ease the work of the Court. Although this is a perfectly legitimate goal, I am afraid that the Protocols' provisions may also have a negative effect on the Court's powers.

For example, Protocol No. 15 reduces the timeframe for lodging an application with the Court after the final national decision from six to four months, making it harder to access the Court. It also amends Article 30 of the Convention in a way that parties to the case can no longer object against chambers transferring cases to the Grand Chamber if they it deem necessary in order to avoid a situation where the outcome of the case becomes contrary to the Court's practice. Parallel to these technical elements, the text of the Protocol also inserts a somewhat inopportune reference into the Convention's preamble to the principle of subsidiarity and the doctrine of the margin of appreciation.

Protocol No. 16 is the last modification of the Convention, adopted in June 2013. Contrary to the established practice of protocols touching upon the control mechanism

9 Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS No. 213 (Protocol 15); Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. CETS No. 214 (Protocol 16).

of the Convention, this Protocol is merely optional, meaning that no full consensus is needed from the states and the Protocol may enter into force after ten ratifications. It will create the possibility for the highest domestic courts or tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of human rights protected by the Convention in the context of cases pending before them.

15.2 Evaluation of the Reforms Introduced by Protocol No. 14

The growth in the number of cases following 1998 was the combined result of the existing distrust from the side of national authorities in many Member States, and the growing reputation of the Court. This phenomenon supplied the reform process with an additional political component. The question centred on the access to the court: in case the bar of admissibility were to be raised, the Court's case-oriented activity could shift to a more constitutional role, desirable to some commentators, but less popular with certain states.

At this point, an additional element must be highlighted: in my opinion, a pick-and-choose approach employed by the Court would not help individual justice. This scrutiny has already followed the adoption of Protocol 14. And even though the amendments introduced can be qualified as small and technical, they must be analysed through the prism of the broader question of individual justice, and I believe the same is true for all subsequent amendments.

Most analysts agreed that the high number of cases in front of the Court was the main problem, and several proposals were put forward to solve the situation. At the same time the accessibility of the Court was also at stake, so many observers warned that the possible solution should focus exclusively on the reform of the Court itself or on restricting access to the same. A brief survey of the various solutions proposed shows that suggestions range between giving the Court total freedom in the selection of applications to leaving the selection system unchanged.

Protocol 14 eventually included three reforms:

1. reinforcing the Court's capacity to filter applications (e.g. by a single judge);
2. measures for dealing with repetitive cases;
3. adoption of the new admissibility criterion.

Even though experts and especially human rights NGOs have criticised all reforms, the third one was considered to be the most controversial aspect of the new Protocol, as it seemed capable of seriously limiting access to the court. The menace of the practical application of the principle 'de minimis non curat praetor' threw a shadow on the reform process.

15.2.1 The New Admissibility Criterion

The idea of the new admissibility criterion was included in a 2003 working document prepared by the organ created by the Committee of Ministers (Steering Committee for Human Rights – Comité Directeur pour les Droits de l'Homme, CDDH). It propelled the already ongoing debate about the possible future role of the Court. Two sides emerged: one arguing for a more constitutional role of the Court, and another one, seeing it as an institution serving individual justice. The first one was supported by the majority of the Court's judges and most of the members of the Committee of Ministers. The other side comprised many NGOs, the majority of the members of the Parliamentary Assembly and some states parties, who opposed admissibility thresholds for cases.

I believe that the motivations may easily be explained. Members of the Court strived for an enhanced role of the institution: a European-level constitutional court of human rights. Member state governments – represented in the Committee of Ministers – wanted to curb growing numbers in the Court's statistics, so any raise in the threshold seemed to serve their primal political interests. On the other hand, NGOs, mostly directly involved in individual complaints, perceived such a reform as a direct threat to their activities. Members of the Parliamentary Assembly rejecting the idea usually came from the ranks of political groups in opposition at the domestic level, committed to opposing any idea supported by the Committee of Ministers in their 'business as usual' mode – not necessarily a well-founded professional consideration.

One of the original proposals from the first side of the debate was to give the Court the possibility to freely decide on dismissing cases which – according this side – raised no substantial issue under the Convention. The origins of this concept lie in the above mentioned principle: *de minimis non curat praetor*. This means that in case of certain violations the Court could still decline to deal with the case, if it is not considered to be very important from a human rights perspective. This idea was fervently opposed by supporters of the idea of individual justice, who believe that individual complaints lead to a wider interpretation of the Convention, resulting in stronger protection. As a compromise, the final text of the protocol reformulated this idea to take into consideration the applicant's perspective, yet still maintaining the core of the principle. The result was the reference to the individual's 'significant disadvantage', which led to the Court's interpretative jurisprudence, to be examined later.

The danger inherent in the adopted text is that it may do more harm to potential individual applicants, than good to the structure it wishes to improve. NGOs had criticised the original proposal for sending the wrong signal to state parties: it seemed that less important violations of human rights could escape examination by the Court. Personally I believe that this is a realistic danger: ignoring smaller violations can easily cause a violation-spiral effect, states are left undeterred from such violations. This can cause serious

problems in case of violations deriving from structural reforms of the states, which shall remain under the Court's control.

The Court itself seemed to welcome the new criterion, what's more, signs indicated that some members were not contented with Protocol 14 and pressed for further reforms. The Court already seemed to follow the tendency of 'getting rid of less serious cases' and was willing to move towards a more constitutional role, but as we shall see, such an endeavour is not possible in one or two giant steps.

While state parties to the Convention also seemed satisfied with the new criterion, professional discussion – especially about the dangers it entails – has not ceased. Some commentators criticised it for being subjective, pointing out that the notion of a 'significant disadvantage' is elastic and poses the danger of being varied over time by the Court's actual needs in light of its workload. Another problem would be if 'disadvantage' were to be considered exclusively as a financial problem, not as an intrusion into the individuals' dignity or privacy. The concerns surrounding the uncertainty of the notion 'significant' was widely echoed by human rights NGOs and advocates, who added that the notion will not really help reduce the backlog of the court, it being primarily an organisational and resource-allocation problem. Finally, others argued that the reforms brought about by Protocol 14 are far from being sufficient, for these have not significantly eased the workload of the Court.

After the protocol entered into force, the task of the Court was to silence concerns by developing an interpretation of the new rules.

15.3 Application of the New Criterion by the Court

Nearly four years after Protocol 14 entered into force, it is timely to evaluate how the Court interpreted and applied the new admissibility criterion by examining some of its numerous decisions and judgments on this matter. But before that, it has to be noted that even before the Protocol, the Court already had means at its disposal to deal with cases it deemed unmeritorious or frivolous.

According to its practice (or that of the Commission, which existed until 1998, and was mainly responsible for deciding on admissibility), the relatively low amount of financial damage caused by a violation has not served as basis for dismissing a case. For example, the Court explicitly rejected this argument raised by Greece, where the dispute was over an amount of only € 52.86.[10] It is important to add, that this approach did not changed later. As Judge Javier Borrego Borrego stated 'human rights cannot be reduced to mere figures based on a cost-benefit analysis', but the reader could feel trouble approaching, as

10 Case of *Koumoutsea v. Greece* (Appl. No. 56625/00), Judgment, Strasbourg, 6 March 2003.

he added that in case of Protocol 14 had been in force, the case could easily have been dismissed.[11]

A later Grand Chamber judgment gave rise to a difference of views among the ranks of the Court. The case was related to a matter of seemingly less importance: a neighbour complained about another, who was in the habit of hanging her washed clothes over her yard. Four jointly dissenting judges argued that: 'The disproportion between the triviality of the facts and the extensive use – or rather overuse – of court proceedings is an affront to good sense, especially as serious human-rights violations subsist in a number of State Parties. Is it really the role of our Court to determine cases such as this?'[12] Personally I believe that this question well founded, but I have some doubts about the appropriateness of judges raising this question. The case shed light onto this internal debate within the Court, touching upon its possible future role.

A few months later the Court had a new opportunity to touch upon this question – with a different outcome, when rejecting an application of trivial nature.[13] The dispute was related to the reimbursement for medicines cheaper than € 8, but the Court applied a different admissibility criterion, not only examining the amount of reimbursement. The possibility based on Article 35 § 3 (a) of the Convention may be used in case of an abuse of the right to individual complaints. In such a situation, an individual application may be declared inadmissible by the Court, but this is unrelated to the theoretical possibility of the case bearing no real financial significance. In the case, the Court found the previous element to be more relevant. At the same time, it also pointed out that the case-law on the human rights issue under scrutiny (excessive length of proceedings) was established and clear. On the other hand, it also expressed arguments related to the problem of the extensive use of court proceedings (including turning to international judicial fora), the Court's heavy workload and the large number of pending applications involving more serious human rights issues. The reader could only come to the conclusion that the Court itself is looking for a way to avoid the question, employing certain out-of-the-case arguments. How else could we qualify the problem of the heavy workload of the Court – in relation to an individual complaint? It seems that the Court itself has already been preparing itself for the new rules of Protocol 14.

When these new provisions entered into force on 1 June 2010, the Court was bound to apply them. And it had done so, from the very first day, in a case which related to a dispute with a coach transport company. The applicant's booking for a journey ended up in a debate about available free seats, advertisements of the company and the national proceedings settling the dispute. The Court concluded that the loss of around € 90 did not

11 Case of *Debono v. Malta* (Appl. No. 34539/02), Judgment, Strasbourg, 7 February 2006.
12 Case of *Micallef v. Malta* (Appl. No. 17056/06), Judgment, Strasbourg, 15 October 2009.
13 Case of *Bock v. Germany* (Appl No. 22051/07), Decision on admissibility, Strasbourg, 19 January 2010.

constitute a significant loss or other consequence for the applicant, thus, it already applied the new criterion in respect of this claim.[14] The optimistic interpretation may conclude that the Court made use of the new provisions to avoid becoming a target in cases related to less-important matters and to focus on its most important task, the protection of human rights via relevant 'big' cases, leaving 'smaller' issues to domestic jurisdiction. On the other hand, analysts of the work of the Court have drawn attention to the fact that it has analysed and applied the new criterion carefully:

> This seems to send out the signal that the Court will not too easily apply this criterion to do away with an entire application, but will use it with a caution that respects the various aspects of a complaint. This may assuage the concerns and fears of many, but on the other hand may diminish the efficiency gains of the new criterion.[15]

One month later, the Court had to evaluate and analyse the new criterion in another decision on admissibility.[16] By stating 'a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court', it seemed to accept the applicability of the idea, that no single complaint should see international control. It also indicated that in order to assess whether this level had been reached and the applicant had suffered a significant disadvantage, it shall apply a complex examination in the future. It shall be based on two factors:

1. the applicant's subjective perception – how detrimental is it to the applicant, the effect it has on his life, circumstances, taking into account the individual elements of the case;
2. an objective assessment of the problem, that requires an evaluation of elements beyond the narrow context of the complainant.

Optimally, the two elements must be present at the same time. In the actual case, the Court found the application admissible, as the applicant limited 'his claims solely to pecuniary damage', which in itself was not found significant enough by the Court.

Sometimes it seems difficult to make a distinction between subjective perception and objective assessment. According to the Court's jurisprudence, even subjective perception must be justified on objective grounds. In a case the Court has found that even if the applicant's individual feelings are relevant, these must be justified by some objective reasons as well in order to become a 'significant disadvantage' capable of serving as a basis for an

14 Case of *Ionescu v. Romania* (Appl. No. 36659/04), Decision on admissibility, Strasbourg, 1 June 2010.

15 First Decision on Lack of a Significant Disadvantage, ECHR Blog, 29 June 2010. Available online: http://echrblog.blogspot.hu/2010/06/first-decision-on-lack-of-significant.html (accessed: 10 December 2013).

16 Case of *Korolev v. Russia* (Appl. No. 25551/05), Decision on admissibility, Strasbourg, 1 July 2010.

admissible complaint.[17] For example, the situation evaluated by the Court in the given case failed to meet this requirement: the applicant may have felt unfairly treated for not being granted access to the local court president (before others who also waiting for him), but there were no objective reasons he could demonstrate.

Nevertheless, the subjective perception of a disadvantage can be deemed significant by the Court if the facts of the case so require. In a case, the Court deemed the loss of the Romanian applicant worth around € 350 as significant, as the average Romanian pensions at that time were around only € 50.[18] But even in this case a question of principle had to be evaluated: as the Court correctly pointed out, the legal problem not only touched upon the financial loss, but also the applicant's 'rights to respect for his possessions and for his home'. A logical conclusion from this interpretation would be to establish a connection between subjective perception and the violation of a human right as an objective ground, but personally I believe that this idea may lead to inopportune consequences: a violation of one human right would become the condition for the Court to examine the violation of an other human right. This would not help the work of the Court or the improvement of the human rights situation in the future. On the other hand, in this case it is hard to decide the Court's real intention. It had already concluded before, that the € 350 amount in the case is not insignificant, the application is not inadmissible, therefore, no further substantiation was required. The answer may be unravelled through the examination of later cases.

In October 2011, about one year after the Protocol's entry into force, the Court recognised in a new judgment that its jurisprudence on the matter of significant disadvantages and admissibility is not conclusive and needs clarification.[19] Its previous judgments only partially provided criteria necessary for the creation of a comprehensive system. Therefore, it summarised the following criteria:

1. the nature of the allegedly violated right;
2. the gravity of that alleged violation;
3. the possible consequences of the alleged violation on the personal situation of the applicant.

The elements of these criteria have not been referred to as one 'complete set' in later cases, so the Court's jurisprudence still followed its usual case-to-case approach. I find this less surprising, as any alternative would yet again lead again to disruptions. Minimizing or maximizing any of these could be problematic, but the question of principle also arises. It is hard to argue that even relatively small violations of core rights, or rights not allowing

17 Case of *Ladygin v. Russia* (Appl. No. 35365/05), Decision on admissibility, Strasbourg, 30 August 2011.
18 Case of *Giuran v. Romania* (Appl. No. 24360/04), Judgment, Strasbourg, 21 June 2011.
19 Case of *Giusti v. Italy* (Appl. No. 13175/03), Judgment. Strasbourg, 18 October 2011.

for a derogation, could not be considered significant or worthy of the Court's attention in case of a failure of the state to suppress it. It is logical to say that in cases such as these, the new admissibility criterion should better not to be applied at all.

Depending on the form of remedy or reparation offered by the state, the disadvantage suffered by the applicant can turn out to be 'insignificant'. The Court has come to the conclusion that in case of a violation due to the excessive length of a criminal proceeding 'the reduction of sentence at least compensated for or significantly reduced the damage' which would have normally been taken into consideration.[20] As a consequence, the Court finally decided that the applicant had not suffered a significant disadvantage related to the right to be tried within a reasonable time.

It seems the 'significant' nature of disadvantages suffered by the applicant is the decisive factor. These can be either financial or other kinds of disadvantages.

So far, no precise threshold has been set by the Court for financial disadvantages; the above mentioned cases demonstrate that while the assessment shall not be made in the abstract,[21] the applicant's individual circumstances can also be decisive.[22] As the Court correctly noted, even small financial damages may become significant, depending on the applicant's specific financial conditions and the overall economic situation of the state or region where the applicant resides. According to the interpretation of the Court, amounts under € 500 come under examination, while much higher sums of financial disadvantage are usually a reason for the Court *per se* to reject the application of the new criterion.

But the amount of damages is not everything. Even though it may seem to be an important factor and may draw attention, the Court still evaluates other elements when deciding on the significance of the damage. Maybe the best example for this is the case where the debate centred on an extremely high amount of money (around € 20 million in taxes), but the procedural violation by the state was not considered decisive by the Court. As such, the disadvantage was not found to be 'significant', because the national authorities would have made the same decision without the mistake anyway.[23] This interpretation followed the Court's previous jurisprudence from a number of earlier cases, that irrelevant factual elements not leading to decisive aspects of the national decisions are not to be evaluated – as the domestic court (or other body) had not based its decision upon these elements. The situation is completely different if it can be shown, that these include new information, which could lead to a different decision – but in this case the disadvantage suffered by the applicant cannot be considered 'insignificant'.

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20 Case of *Gagliano Giorgi v. Italy* (Appl. No. 23563/07), Judgment. Strasbourg, 6 March 2012.

21 *See Korolev v. Russia.*

22 *See Giuran v. Romania.*

23 Case of *Liga Portuguesa de Futebol Profissional v. Portugal* (Appl. No. 49639/09), Decision on admissibility, Strasbourg, 3 April 2012.

Sometimes the question whether the disadvantage was significant or not proves to be inseparable from the merits of the given case. For example, a case about interference with property can hardly be separated from the decision on whether the applicant has suffered an excessive burden. This is not a real novelty for the Court, its practice in similar situations is to join the question of admissibility to the merits, and to decide on both in the final judgment.

15.3.1 The Safeguard Clauses

Though aiming at giving the Court a chance to get rid of some of the 'lesser' cases, Protocol 14 has also added two safeguard clauses to the text, applicable when deciding on the admissibility of a complaint.[24] In my opinion these are very important, because they serve as a possible tool of 'checks and balances' to make sure that in some situations the Court has to deal with an individual complaint even without a 'significant' disadvantage.

The first one is related to the importance of the complaint: it has to fulfil a higher threshold, the text stating that it has be in relation to 'respect for human rights as defined in the Convention and the Protocols thereto' and this importance must be such, that it 'requires an examination of the application on the merits'.

This provision makes it possible for the Court to evaluate an individual case before examining it in the merits. This way it can strengthen its constitutional role by deciding about – if it deems necessary – accepting a case, which would seem trivial, instead of rejecting it. This will help the Court maintain its leading role. Presently, the Court seemingly upholds that his control function is applied even to 'questions of a general character' which affect the observance of the Convention. This attitude may be useful when the Court is to assess a structural human rights problem in the respondent state.

From the Court's jurisprudence we can draw up three categories of cases, when this clause is not applicable:

1. if the Court has already created substantial case-law on the issue at hand – in this case the individual examination would add nothing new to the already existing jurisprudence, which the states shall be able and ready to apply;
2. if the Court and the Committee of Ministers have already addressed the problem, and have acknowledged it as systematic; in this case it is doubtful that the judgment would have any specific result;
3. when domestic law or practice related to the subject of the complaint has already been modified – in this case the complaint does not have any relevance any more, especially not from a point of view of general human rights protection.

24 Protocol 14, Art. 12.

The goal of the second clause was to make sure, that cases which have not been 'duly considered by a domestic tribunal' can be brought before the Court. It is also extremely important, for without this possibility there would be a giant gap in the human rights protection structure. It is to be applied, when there is no effective domestic remedy on the domestic level for a given human rights violation serving as a basis for the complaint.

The wording 'duly examined' refers to the respect of relevant principles applied by domestic courts, but not necessarily the result of their activity. So we can say that as long as the domestic judicial system addresses the human rights complaints and gives reasoned judgments, the Court's practice will accept that the case has been duly considered. Any alternative would be problematic, as it could be easily argued that it constitutes an infringement of state sovereignty and general principles of international human rights law, which vest the primal responsibility of providing remedy for human rights violations on state jurisdiction.

When evaluating the application of this criterion, the Court has come to the conclusion, that the second clause has been found relevant in only a very few cases. This raised questions about its expedience, and as we will see, Protocol 15 responds to this issue accordingly.

15.3.2 Conclusions of the Court's Interpretation of the Criterion Introduced by Protocol No. 14

Although since 2010 the new admissibility criterion has been analysed by the Court, it is fair to say that it is far from being exhaustively defined. We can also conclude that so far it has been applied to applications related to right to a fair trial, right to an effective remedy and protection of property cases, following a careful approach route.

Perhaps too careful for the states party to the Convention. In their high level conferences both in Interlaken and Izmir they called upon the Court to give full effect to the new admissibility criterion, 'in accordance with the principle, according to which the Court is not concerned by trivial matters', they emphasized. The Brighton Conference Declaration of 2012 has shed light on even more dissatisfied states, reminding the Court 'to apply strictly and consistently the admissibility criteria', 'to ensure that unnecessary pressure is not placed on its workload'.

15.4 The Pilot-Judgment Procedure, the Court's Own Attempt to Handle Repetitive Cases

The so-called pilot-judgment procedure was developed by Court as a means to deal with larger groups of identical cases rooted in the same problem. The Court referred to them earlier as repetitive cases. High in numbers, these cases represent a vast part of the Court's

workload, seriously contributing to its backlog – while in most cases, they do not represent an important human rights problem after the first of these had been decided.

The Court delivered the very first pilot judgment in 2004 (concerning the so-called Bug River cases from Poland),[25] and used the procedure ever since. Not all repetitive cases are suitable for a pilot-judgment procedure, it is always up to the Court to decide which cases fit the profile – just the same way as the employment of this specific procedure itself is also decided by the Court, when it receives a high number of applications deriving from the same reason. It this case, it may decide to select one or more of them for priority examination. When dealing with these, the Court will seek to work out a judgment that can extend beyond the particular cases. The aim is to cover all similar cases related to the same issue. This first judgment is called the 'pilot judgment'.

In the pilot judgment the Court determines whether there has been a violation of the Convention in the particular case, just like in any other individual case. But the Court also identifies the problem (probably a disfunction which is part of a bigger systematic problem) under domestic law that served as the reason for the violation, and gives indications to the government of the state party on how to eliminate this problem. Additionally, the Court also makes recommendations for the creation of a domestic remedy capable of dealing with all similar cases, including the ones already pending before the Court.

This way, the affected state gets the chance to correct its mistake and escape a high number of nearly identical procedures – and so does the Court. The pilot judgment not only helps domestic authorities to eliminate systematic or structural problems, but also creates a chance for the Court to get rid of a high number of similar – repetitive – cases. In the meantime it also helps the Committee of Ministers in its basic role, which is to ensure that the Court's judgments are properly executed by Member States.

The big advantage of this procedure from the aspect of the Court comes in connection with the other cases touching upon the same problem. In case of a pilot-judgment procedure, the Court may adjourn the examination of all other related cases for a certain period of time. This is also an additional means of forcing national authorities to take the necessary steps – otherwise they will have to cope with these complaints as well. This adjournment may be subject to the condition that the respondent State acts promptly and effectively after the pilot judgment.

In the adjourned cases the Court keeps the applicants informed of every development of the procedure, as the importance of this is fully recognised by the Court. It is also important to stress that the Court may at any time resume its examination of any case if it deems necessary, for example, if the circumstances of the applicant make it unreasonable or unfair to have to wait for a remedy.

25 Case of *Broniowski v. Poland* (Appl. No. 31443/96), Judgment, Strasbourg, 22 June 2004.

This, however, requires a demanding special interest on the applicants' side, in any other case the procedure serves the goal of the Court to speedily examine high numbers of complaints – as the central idea behind this procedure is accelerating remedy: in case of a large number of applications concerning the same problem, effective remedy for applicants is always more easily established at national level. Of course, individual remedy is also available in Strasbourg through cases processed on an individual basis, but it would not help either the Court's heavy workload or the applicants' situation if they would have to wait years for the decision on their complaints.

As the first pilot-judgment procedure was considered successful,[26] this procedure has promised to be a new, more effective way to deal with such cases. Presently, it is hard to decide if this will be an established new type of procedure of the Court, for it is still evaluating and monitoring its operation in other cases to see what further lessons may be drawn. States party to the Convention do not really seem impressed by this method yet, or at least the fact that Protocol 15 and 16 have not followed this direction indicates their reluctance to accept it. Even though the pilot-judgment procedure is probably not the final solution to all the difficulties deriving from the heavy workload of the Court, it has the potential possibility to provide for the elimination of some of the problems of repetitive applications. It is also important to stress that not every pilot judgment will lead to an adjournment of all related cases, especially in a situation where an otherwise systematic problem turns out to touch upon some other fundamental human rights of individuals under the Convention. In these cases the Court can decide to examine the case regardless of the pilot-judgment procedure.

For a long time this procedure lacked a clear legal basis. It seems to have political support from the Committee of Ministers, and there have been heavy arguments in its favour, but as I mentioned above, it was not detailed in any document governing the operation of the Court. Because of this, many questions were left open, among which the most important may have been, when and how the Court would use this method. In 2010, the Interlaken conference called upon the Court to develop clear standards and rules for the procedure, which was echoed by NGOs and academics as well. As a result, the Court included a new provision in its Rules of Court, Rule 61, which entered into force at the end of March 2011.

The new rule provides that the pilot-judgment procedure can be used when facts stated in an application 'reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications'. Although this piece of legislation provides a possible legal basis, it still does not answer many questions that can be raised in relation to the pilot-judgment

26 After the 2004 judment, new legislation was introduced in Poland and all the pending cases related to the original problem were settled. Case of *Broniowski v. Poland* (Appl. No. 31443/96), Judgment (Friendly settlement), Strasbourg, 28 September 2005.

procedure. But since this is a new element in the Court's operation, many questions will have to be answered by the organ itself – or by the states party to the Convention by adopting a new protocol in the future.

15.5 The Future? Protocol No. 15 and No. 16 Adopted in 2013

15.5.1 Speed above All? Protocol 15

A new possible provision was mentioned in the 2012 Brighton Conference declaration, later realized by Protocol 15. It called for the removal of the second safeguard clause from the admissibility criterion – apparently the aim of the states was to declare even more cases inadmissible to ease the Court of its workload.

A draft Protocol 15 was adopted by CDDH in November 2012, which included a provision to delete the clause, and this stayed in the final text.[27] Maybe it is worth mentioning that the Court in its opinion dated February 2013 has not felt it necessary to add a comment to this novelty, only that 'the Court sees no difficulty.'[28] Apparently it felt comfortable with this idea, which I find rather disappointing. In the previous chapter I have elaborated on the importance of the safeguard clauses – I see no reason here to rejoice on the abolishment of any of these deletions. Especially since this new provision may easily result in a wide gap in the human rights protection mechanism in respect of 'lesser' cases.

Nor had the Court any remarks in relation to the reduction of the timeframe opened for lodging an application with the Court after a final national decision, a reduction from six months to four.[29] The only thing the Court was concerned about was the public awareness and the spreading of information about this change. It seems that the Court does not share the idea that this amendment makes it harder for the public to access the Court – what's more, the Court seems to support this idea. Though in general there is a convincing argument about the fact that four months shall suffice for making the decision to turn to Strasbourg just as much as six months did, but practical experience so far seems to indicate differently. The Court itself assists this: the new Rule 47 of the Rules of Court (in force as of 1 January 2014) will introduce important new rules to speed up the complaint procedure within the now existing six months: the most important change concerns the interruption of the period within which an application must be made to the Court. The new rule narrows down the possibility of interruption, effectively hampering the possibility

27 Protocol 15, Art. 5.

28 Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights, adopted on 6 February 2013.

29 Protocol 15, Art. 4.

of submitting 'stop the clock' letters (temporarily incomplete complaints) in the future. For me it is no question, that this makes access to the court more difficult for the future.

The Court has also welcomed the amendment barring parties to the case from objecting to chambers transferring cases to the Grand Chamber if they consider it necessary because of the possible outcome of the case being contrary to the Court's practice.[30] It sees this as 'expediting the examination of important cases by removing one procedural step'. Obviously, the Court sees no problem with this, as the Protocol's amendment widens its own possibilities by limiting possible actions of the parties to a given debate. While the Court's interests are obvious and clearly understood, I would call upon the observance of some even higher interest here, and that is the quality of justice. Though it may be time-consuming, thorough professional-judicial debate on a given important human rights matter can be described with 'the more, the better'. Especially when the question examined has to be analysed in a very complex sociological-cultural context, under sensitive political circumstances. Let me first refer to the *Lautsi* case: the Court's Grand Chamber has revised its judgment rendered by the Chamber, related to crucifixes in public schools.[31] I do not wish to enter into an analysis of the merits of the case, I would only like to draw attention to the immense political-legal debate that swept through Europe after the chamber's judgment. I believe that this case clearly shows that in some cases the possibility of more judicial instances contributes positively to the settlement of human rights problems. Not so well-known, but from a Hungarian (and Central/Eastern European post-communist) perspective the *Vajnai* case is equally important.[32] The fact that the incumbent Hungarian government at the time had not initiated revision against the Court's chamber judgment condemning the state for punishing an individual for publicly wearing the red star symbol may serve as a basis for a lot of criticism. Most of these cases are of political nature, but there is also a professional aspect to them: the lack of revision unfortunately stripped the Court of the possibility of re-examining the case. Again, I do not examine the merit of the case here, I merely refer to the importance of this possibility of the Court. Luckily, the new provision does not introduce an obligation for the Court, but takes away the instrument of the parties to the debate to stop it from happening – so in the end the Court's practice will decide on the usefulness or harmfulness of this element of reform.

The protocol's amendment to the preamble of the Convention, related to the principle of subsidiarity and to the doctrine of the margin of appreciation raises even more questions. Even the Court has elaborated on this matter, and it has also recognised, that the adoption of this text was a result of a political compromise. The Court was careful in its wording, but I believe that it is safe to say that this is a mere political statement, ignoring the most

30 *Ibid.*, Art. 3.

31 Case of *Lautsi and others v. Italy* (Appl. No. 30814/06), Judgment (Grand Chamber), Strasbourg, 18 March 2011.

32 Case of *Vajnai v. Hungary* (Appl. No. 33629/06), Judgment, Strasbourg, 8 July 2008.

basic structural characteristics of the concept of international legal protection of human rights – while perfectly capable of satisfying the political needs of some Member States and governments, while representing a completely wrong and disfunctional response to the legitimate professional criticism towards the Court's operation during the past two decades. From a professional aspect, the provision creates no real legal novelty.

The margin of appreciation has been developed by well-established jurisprudence of the Court. Its practice has not been carved in stone or introduced into legally binding international treaties, but that would be an unrealistic expectation. It would render the system unable to react to sociological, cultural changes or to deal with the actual difference between some European states' interpretations.

The reference to the principle of subsidiarity is a bit strange in a Council of Europe human rights document – to say the least. It has been developed and applied in the context of the European Union, its role is to protect the sovereignty of the Member States against the competences transferred to the Union. Personally I believe that referring to it would be completely wrong in the context of the Strasbourg Court, the latter being an international body, exercising powers that are transferred to it explicitly – unlike the institutions of the EU which have to operate within a shared competences. Subsidiarity is important in those situations, but the European Court of Human Rights does not share any competence: when it receives an application, it handles it on its own, based on the explicit provisions of the Convention. That is why the requirement of exhaustion of domestic remedies is present, state sovereignty is applicable to a given case as long as the domestic judiciary does not deal with it any more – opening the way to the Strasbourg court. After that it is up to the Court to decide on the questions, and states have nothing else to do than to execute these decisions. There is simply no need for subsidiarity after domestic remedies have been exhausted. This argument is supported by a simple search in the HUDOC database: search to the keyword 'subsidiarity' results in only 350 hits,[33] and in most cases it surfaces in governments' arguments, not the Court's reasoning. The Court itself has stated very early and later on, numerous times that the Convention has a subsidiary nature to domestic laws,[34] but it has always used the term separately from its EU interpretational context and made it very clear, that it does not mean that it shall restrict itself in practicing its Convention-based jurisdiction.

Some states party to the Convention seem to try and widen their space of manoeuvre against the Court's activities, and to achieve this goal, they refer to their EU-related political

33 The search engine can be accessed at: http://hudoc.echr.coe.int. The actual search has been executed among judgments and decisions, to the keyword (text search): 'subsidiarity' in English language (10 December 2013). For comparison: a search for 'margin of appreciation' leads to 3152 results.

34 Case of *Handyside v. United Kingdom* (Appl. no. 5493/72), Judgment, Strasbourg, 7 December 1976, Para. 48; case of *Akdivar and others v. Turkey* (Appl. No. 21893/93), Judgment, Strasbourg, 16 September 1996, Para. 65; case of *Schenk v. Germany* (Appl. No. 42541/02). Decision on admissibility. Strasbourg, 9 May 2007.

experience. As I have indicated earlier, personally I see a grave danger in inter EU political tensions poisoning the Council of Europe and the Court's working environment. A first step in this is when some states apply the same criticism and the same communication elements – instead of a very careful and professionally sensitive approach to the Court and its operation.

15.6 New Kind of Advisory Opinions in the Future? Protocol 16

Protocol No. 16, the last amendment to the Convention, was adopted in June 2013. It aims to introduce a new procedure: the advisory opinion procedure. It makes it possible for highest domestic courts or tribunals of states party to the convention to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of human rights protected by the Convention, but only in the context of a case pending before it.

The idea seems capable of assisting a better national application of the rules of the Convention, which may result in fewer applications, which is an important goal. On the other hand, this possibility gives rise to a lot of questions. The Court in its opinion[35] has raised some of these, but altogether seemed to support the idea.

Personally, I do not see the real point in this possibility apart from the theoretical chance of the Court getting rid of cases even before the applicant would turn to it with a complaint. Obviously, the Court tries to avoid becoming an 'extra' level of appeal, and by examining a given case even before the domestic court would decide on it may have the effect that the applicant or the state understands and accepts the domestic decision better. Practically, there is a chance that this method will result in the decline of complaints, as many of the potential applicants may decide not to turn to the Court, if a negative outcome of the case can be foreseen. This is advantageous for the Court, but at the same time there is also a serious threat: the Court's advisory opinions rendered in one specific case will be interpreted in similar domestic cases as well, and possible domestic interpretational mistakes may result in some cases potentially eligible for Strasbourg revision to stay away from the Court. Alternatively, other cases may end up at the Court. The possible consequences of the application of the margin of appreciation principle also seems problematic: it is very hard to imagine how to maintain a unified, single human rights practice, when the Court has the duty to interfere with the domestic judiciary before the final judgment is rendered – which can still be revised afterwards, practically duplicating the Court's workload with that exact case.

35 Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, adopted by the Plenary Court on 6 May 2013.

If we want to create a method by way of which the Court could really help domestic courts or the execution of the Convention's norms, a procedure resembling the preliminary ruling procedure of the Court of Justice of the European Union (the court of the European Union, located in Luxembourg) would be a much more effective way. The fundamental difference is that a preliminary ruling – a legally binding judgment – may be requested on the applicable union law even at the first stage of the domestic procedure, and there is no need for the exhaustion of domestic remedies or a later revision. This way, the Court could consider and evaluate the theoretical human rights problem at an early stage of the domestic proceeding. The problem with this idea is that even though it is efficient, unfortunately its realisation is politically impossible, as it would seem to create a 'federal-like' human rights protection system, something, that reluctant states fear most.

15.7 Conclusion

The study argues that the all the reforms following 2000 may pose a threat to the powers of the Strasbourg court. The reforms introduced by Protocol 14 have mostly been evaded by the institution, and by its careful application, it has managed to use it to its advantage – to some extent at the cost of the efficiency of the Protocol. As a result, states have introduced further reforms in 2013, which are potentially even more problematic.

With the new instruments entering into force, the Court will face a crucially new situation, far from being the most favorable. The future shaped by these Protocols will be very important not only for the Court, but also for the entire European human rights protection mechanism.