

Grabenwarter

**European Convention
on Human Rights
Commentary**

**C.H. Beck · Hart · Nomos
Helbing Lichtenhahn Verlag**

Grabenwarter
European Convention
on Human Rights
– Commentary –

European Convention on Human Rights

– Commentary –

by

Dr. Dr. Christoph Grabenwarter

Judge at the Austrian Constitutional Court
Professor of Public and International Law
Vienna University of Economics and Business
Institute for European and International Law

C. H. Beck · Hart · Nomos
Helbing Lichtenhahn Verlag
2014

Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, 16C Worcester Place, Oxford, OXI 2JW, United Kingdom,
online at: www.hartpub.co.uk

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5
76530 Baden-Baden, Germany
eMail: www.nomos.de

and

Helbing Lichtenhahn Verlag, Elisabethenstrasse 8, 4051 Basel, Switzerland,
www.helbing.ch

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com

ISBN 978-3-406-60321-1 (Beck)
ISBN 978-1-84946-191-7 (Hart Publishing)
ISBN 978-3-8329-7274-5 (Nomos)
ISBN 978-3-7190-3356-9 (Helbing Lichtenhahn)

© 2014 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München

Printed in Germany by
fgb · freiburger graphische betriebe GmbH & Co. KG
Bebelstraße 11, 79108 Freiburg

Typeset by
Reemers Publishing Services GmbH, Krefeld

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Verlag C. H. Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to C. H. Beck at the address above.

Preface

The European Convention on Human Rights entered into force sixty years ago, on 3 September 1953. Over the decades, it has become the most effective international human rights protection system there is. For a time, there were two separate independent bodies – the Commission and the Court – that developed the case law, one step at a time, and made the Convention increasingly relevant.

Fifteen years ago, on 1 November 1998, a new permanent Court replaced these two judicial organs. This new Court faced a greater number and new types of member states and had to cope with a dramatic increase in its applications. Reform measures brought punctual solutions, but did not solve the problem of the Court's excessive workload. Against this background, it is remarkable that the European Court of Human Rights was capable of maintaining its high-quality reasoning in the majority of its judicial activities: in the Chambers' judgments and in those of the Grand Chamber. However, inconsistency in the case law has appeared, resulting in increasing criticism of the Court. This is not the fault of anyone in particular at the Court. It is the inevitable result of a Court that has reached its quantitative limits. From an external perspective, the Court has done everything in its power to increase its efficiency as well as to maintain the quality of its judgments. Other measures lie in the hands of the member states.

The aim of this commentary is to help in understanding the working of the European Convention on Human Rights and the Court's case law. Over the last decade, the author has published five editions of a textbook in German. To write a commentary in English turned out to be much more difficult, not only for language reasons (native speakers are kindly asked to be considerate with foreign authors), but mainly because it is impossible to find a selection of cases that is adequate for all member states of the Council of Europe. It is a challenge to provide a comprehensive commentary on most of the major legal questions decided and discussed up until today.

The author would like to thank, first of all, *Wilhelm Warth* of the Beck Verlag. He came up with the idea for this book, encouraged me to pursue it and applied the right amount of pressure on me to finish the commentary. My special thanks go to my assistants at the institute, who have provided me with the much-needed support for this project. *Christina Hochhauser*, *Franziska Paefgen*, *Nina Palmstorfer* and *Eva-Maria Tos* were responsible for translating major parts of the text into English and adding recent case law. They have gone so far as to suspend their personal projects on a number of occasions during the last months in order to support me, which I have greatly appreciated. *Anna Katharina Struth*, who joined the team during the last weeks of this project, was also of great help.

Lastly, I hope that this commentary will be useful for those who work with the Convention, be it at universities, in law firms or in a court of law. No publication is

Preface

free of mistakes, therefore should readers find errors or just find that something could be clarified, they are kindly invited to notify this by e-mail to the Institute (sekretariat.grabenwarter@wu.ac.at).

October 2013

Christoph Grabenwarter

Table of Contents

Preface	V
List of Abbreviations	XIII
Index of Country Codes	XVII
Bibliography	XIX
Article 1 – Obligation to respect human rights	1
I. Rights and freedoms defined in the Convention	2
II. Personal scope of the Convention	2
1. Subjects entitled to the rights	2
2. Parties bound by the Convention	3
III. Territorial scope of the Convention	6
1. No accountability for extra-territorial acts of other States	7
2. Accountability for extra-territorial acts	7
a) Effective control over an area	8
b) State agent authority and control	8
c) Exercise of extra-territorial authority in another Member State's territory	9
IV. Temporal scope of the Convention	10
Article 2 – Right to Life	12
I. Introduction	13
II. Scope of protection	14
III. Interferences	15
IV. Justification	17
V. Positive obligations	21
1. Obligation to protect life	21
2. Organisational and procedural obligations	25
Article 3 – Prohibition of torture	31
I. Introduction	32
II. Scope of protection and interferences	32
1. Torture	32
2. Inhuman treatment	34
3. Degrading treatment or punishment	36
III. No justification of an interference with Article 3	38
IV. Positive obligations	40
V. Cases of ill-treatment	41
1. Police operations	41
2. Treatment of detainees	42
3. Expulsion and extradition	45
4. Ill-treatment by private persons	51
Article 4 – Prohibition of slavery and forced labour	53
I. Introduction	54
II. Prohibition of slavery and servitude	54
III. Prohibition on forced or compulsory labour	55
1. The term 'forced or compulsory labour'	55
2. Exceptions to Article 4 (3)	56
a) Work performed during detention	56
b) Military service	57
c) Services exacted in case of emergency	57
d) Normal civic obligations	58

Table of Contents

IV. Prohibition on trafficking in human beings	58
V. Positive obligations	59
Article 5 – Right to liberty and security	61
I. Introduction	63
II. Scope of protection	64
III. Interferences	65
IV. Compatibility of deprivations of liberty with Article 5	67
1. Legal basis	68
2. Compliance with a procedure prescribed by law	69
3. The absence of arbitrariness	70
4. Exceptions to the prohibition of deprivation of liberty	72
a) Detention after conviction	72
b) Arrest or detention for non-compliance with a lawful court order or a legal obligation	75
c) Detention on remand	76
d) Detention of a minor	79
e) Detention for medical or social reasons	80
f) Arrest or detention of foreigners	82
V. The rights of persons deprived of their liberty	85
1. Prompt information	85
2. Speedy proceedings	86
3. The right to review of lawfulness of arrest or detention	92
4. The right to compensation	96
5. Positive obligations	97
Article 6 – Right to a fair trial	98
I. Introduction	100
II. Scope of protection	101
1. Determination of ‘Civil Rights’	101
2. Determination of a ‘Criminal Charge’	108
III. Guarantees of Article 6 in detail	113
1. ‘Tribunals’	113
2. Access to an independent and impartial tribunal	127
3. Fair hearing	134
4. Length of proceedings	141
5. Public hearing	145
6. Special procedural guarantees in criminal proceedings	153
7. Presumption of innocence	166
Article 7 – No punishment without law	171
I. Introduction	172
II. The scope of Article 7	173
III. Scope of protection	174
1. No punishment without law	174
2. Prohibition of retrospective application of criminal law	175
3. The requirement of a sufficiently clear legal basis	178
4. Prohibition of retrospective imposition of heavier penalties	181
Article 8 – Right to family life	183
I. Introduction	184
II. Personal scope	185
1. Natural persons	185
2. Legal entities	186
III. Material scope	186
1. Private life	186
a) Physical and moral integrity	187
b) Protection of privacy	189
c) Personal autonomy	190

2. Family life	193
3. Home	196
4. Correspondence	198
IV. Interferences	198
1. Private life	198
2. Family life	200
3. Home	202
4. Correspondence	203
V. Justification	204
1. Prescribed by law	204
2. Legitimate aim	206
3. Necessary in a democratic society	207
a) Private life	207
b) Family life	211
c) Home	215
d) Correspondence	216
VI. Positive obligations	219
1. Positive obligation to protect against interferences by third parties	219
2. Positive obligations with regard to organisation and procedure	224
3. Obligations to inform	228
VII. Case law on specific cases	229
Article 9 – Freedom of thought, conscience and religion	234
I. Introduction	235
II. Scope of protection	236
1. Personal scope	236
2. Material scope	236
a) Freedom of thought and conscience	236
b) Freedom of religion and belief	237
III. Interferences	241
IV. Justification	243
1. Prescribed by law	244
2. Legitimate aim	244
3. Necessary in a democratic society	245
V. Positive obligations	249
Article 10 – Freedom of expression	251
I. Introduction	252
II. Scope of protection	253
1. Freedom of expression	253
2. Freedom of information	255
3. Freedom of the press	257
4. Freedom of electronic media	258
5. Freedom of artistic expression	258
6. Academic freedom	259
III. Interferences	259
IV. Justification	262
1. Prescribed by law	262
2. Legitimate aim	264
3. Necessary in a democratic society	266
a) Interferences with the freedom of expression and information	267
b) Freedom of the press – special issues	279
c) Interferences with the freedom of broadcasting and other electronic media – special issues	288
d) Interferences with the freedom of artistic expression and academic freedom – special issues	290
4. Restrictions on political activity of aliens	291
V. Positive obligations	292
1. General	292

Table of Contents

2. Positive obligations with respect to organisation and proceedings	293
3. Positive obligation to inform	295
Article 11 – Freedom of assembly and association	297
I. Introduction	298
II. Scope of protection	299
1. Freedom of assembly	299
2. Freedom of association	301
III. Interferences	303
1. Freedom of assembly	303
2. Freedom of association	304
IV. Justification	306
1. General requirements for justification according to Article 11 (2) first sentence	306
a) Freedom of assembly	306
b) Freedom of association	309
2. Limitation clause for State employees	314
3. Restrictions on political activity of aliens	315
V. Positive obligations	316
1. Freedom of assembly	316
2. Freedom of association	316
Article 12 – Right to marry	319
I. Introduction	319
II. Scope of protection	320
III. Interference	322
IV. Justification	322
Article 13 – Right to an effective remedy	327
I. Introduction	328
II. Scope of protection	329
III. The guarantee of Article 13	333
1. Effective remedy	333
2. Rights and freedoms concerned	335
3. National authority	338
4. Cases	339
Article 14 – Prohibition of discrimination	340
I. Introduction	341
II. Scope of protection	343
III. Determination of a discrimination	345
1. Unequal treatment of persons in analogous or relevantly similar situations	345
2. Grounds of discrimination	348
IV. Justification	349
1. Legitimate aim	349
2. The principle of proportionality	352
a) General	352
b) Grounds of sex	352
c) Grounds of race, colour, language or national origin	354
d) Grounds of religion	356
e) Grounds of political or other opinion	356
f) Grounds of birth, social origin and other status	357
g) Grounds of legal status	358
h) Other grounds of discrimination	359
V. Positive obligations	362
Protocol No. 1	359
Article 1 – Protection of property	365
I. Introduction	366
II. Scope of protection	367

1. Personal scope	367
2. Material scope	367
III. Interferences	371
1. Deprivation of possessions	371
2. Control of use of property	372
3. Other interferences with the right to property	374
IV. Justification	375
1. Deprivation of possessions	375
2. Control of the use of property	381
3. Other interferences with the right to property	383
4. Peaceful enjoyment of possessions	385
V. Positive obligations	385
Article 2 – Right to education	389
I. Introduction	389
II. Right to education	390
1. Scope of protection	390
2. Proportionality of interferences	392
3. Positive obligations	394
III. Right of parents to respect for their convictions	394
1. Scope of protection	394
2. Proportionality of interferences	396
IV. Positive obligations	398
Article 3 – Right to free elections	399
I. Introduction	400
II. Scope of protection	401
1. Personal scope	401
2. Material scope	401
a) Elections	401
b) Legislative bodies	402
c) Voting principles	402
d) The right to vote and to stand for elections	403
III. Interferences	403
IV. Justification	404
1. General	404
2. Legitimate aim	404
3. Proportionality	405
Protocol No. 4	410
Article 1 – Prohibition of imprisonment for debt	410
I. Introduction	410
II. Scope of protection	410
Article 2 – Freedom of movement	411
I. Introduction	412
II. Scope of protection	412
1. Freedom to choose one's residence	412
2. Freedom to leave a country	413
III. Interferences	413
IV. Justification	415
Article 3 – Prohibition of expulsion of nationals	418
I. Introduction	418
II. Scope of protection	418
III. Interferences	419
IV. Justification	419

Table of Contents

Article 4 – Prohibition of collective expulsion of aliens	421
I. Introduction	421
II. The guarantee of Article 4 of Protocol No. 4	421
III. Justification	422
Protocol No. 6	423
Article 1 – Abolition of the death penalty	423
Article 2 – Death penalty in time of war	423
Protocol No. 7	424
Article 1 – Procedural safeguards relating to expulsion of aliens	424
I. Introduction	424
II. Scope of protection	425
III. Procedural safeguards under Article 1 of Protocol No. 7	425
IV. Restrictions of the procedural safeguards	426
Article 2 – Right of appeal in criminal matters	428
I. Introduction	428
II. Scope of protection	429
III. The guarantee of Article 2 of Protocol No. 7	429
IV. Exceptions	430
1. Offences of a minor character	430
2. Trial at first instance by the highest tribunal	431
3. Conviction following an appeal against acquittal	431
Article 3 – Compensation for wrongful conviction	432
I. Introduction	432
II. Requirements for claiming compensation	433
III. Right to compensation	433
Article 4 – Right not to be tried or punished twice	435
I. Introduction	436
II. The scope of protection	436
III. The guarantee of Article 4 of Protocol No. 7	438
IV. Exceptions	439
Article 5 – Equality between spouses	441
I. Scope of protection	441
II. Relationship to other Convention guarantees	442
Protocol No. 12	443
Article 1 – General prohibition of discrimination	443
I. Introduction	443
II. The scope of Article 1 of Protocol No. 12	444
Protocol No. 13	446
Article 1 – Abolition of the death penalty	446
Full text of the European Convention on Human Rights (including Protocols Nos. 1, 4, 6, 7, 12 and 13)	447
Rules of Court (1 July 2013)	483
Annex to the Rules of Court (concerning investigations)	528
Practice Directions	532
Index	545

List of Abbreviations

a.....	and
a.o.	and others
ACHR.....	American Convention on Human Rights
AJIL.....	American Journal of International Law
ALB	Albania
AND	Andorra
ARM	Armenia
AUT	Austria
AZE	Azerbaijan
BVerfG	German Constitutional Court
BYIL.....	British Yearbook of International Law
BEL	Belgium
BIH	Bosnia and Herzegovina
BUL	Bulgaria
CISA.....	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the EU
the Convention.....	European Convention on Human Rights
the Court.....	European Court of Human Rights
CRO	Croatia
CFR	Charter of Fundamental Rights of the European Union
CYP	Cyprus
CZE	Czech Republic
DPA	Dayton Peace Agreement
DEN	Denmark
e.g.	exempli gratia/for example
EComHR.....	European Commission of Human Rights
ECtHR	European Court of Human Rights
ed.	Editor
EEA	European Economic Area
EHLRLR	European Human Rights Law Review
EJIL	European Journal of International Law
ELR.....	European Law Review
ESP	Spain
EST	Estonia
et al.....	et alii/and others
et seq.....	et sequens/and the following one(s)
EU.....	European Union
EU.....	Charter Charter of Fundamental Rights of the EU
FIN	Finland
FRA	France
GC	Grand Chamber
GDR.....	German Democratic Republic
GEO	Georgia
GER	Germany
GLJ	German Law Journal

List of Abbreviations

GRE	Greece
HUN	Hungary
HRLJ	Human Rights Law Journal
IACHPR.....	Inter-American Court of Human Rights
ICCPR.....	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IRL	Ireland
ISL	Iceland
ITA	Italy
LAT	Latvia
LIE	Liechtenstein
LTU	Lithuania
LUX	Luxembourg
m.n.	marginal note
MDA	Moldova
MKD	Macedonia
MLT	Malta
MNE	Montenegro
MON	Monaco
NED	Netherlands
No.....	number
NOR	Norway
p.	page
para.	paragraph
paras.....	paragraphs
PJCCM	Police and Judicial Cooperation in Criminal Matters
POL	Poland
POR	Portugal
pp.....	pages
RDH.....	Revue des droits de l'homme
RFDA.....	Revue française de droit administratif
RGDIP	Revue générale de droit international public
ROM	Romania
RTDH	Revue trimestrielle des droits de l'homme
RUDH.....	Revue universelle des droits de l'homme
RUS	Russia
SLO	Slovenia
SMR	San Marino
SRB	Serbia
SUI	Switzerland
SVK	Slovakia
SWE	Sweden
TFEU	Treaty of the functioning of the EU
TUR	Turkey
UDHR.....	Universal Declaration of Human Rights
UK	United Kingdom

List of Abbreviations

UKR	Ukraine
UN.....	United Nations
v	versus
VCLT	Vienna Convention on the Law of Treaties

Index of Country Codes

When quoting ECtHR judgments the Member States of the Convention are abbreviated as follows:

ALB	Albania
AND	Andorra
ARM	Armenia
AUT	Austria
AZE	Azerbaijan
BEL	Belgium
BIH	Bosnia and Herzegovina
BUL	Bulgaria
CRO	Croatia
CYP	Cyprus
CZE	Czech Republic
DEN	Denmark
ESP	Spain
EST	Estonia
FIN	Finland
FRA	France
GEO	Georgia
GER	Germany
GRE	Greece
HUN	Hungary
IRL	Ireland
ISL	Iceland
ITA	Italy
LAT	Latvia
LIE	Liechtenstein
LTU	Lithuania
LUX	Luxembourg
MDA	Moldova
MKD	Macedonia
MLT	Malta
MNE	Montenegro
MON	Monaco
NED	Netherlands
NOR	Norway
POL	Poland
POR	Portugal
ROM	Romania
RUS	Russia
SLO	Slovenia
SMR	San Marino
SRB	Serbia
SUI	Switzerland
SVK	Slovakia
SWE	Sweden
TUR	Turkey
UKR	Ukraine
UK	United Kingdom

Bibliography

Clements/Mole/Simmons

Author, Studies in honour of Jean-Paul Costa

Author, in: van Dijk/van Hoof/van Rijn/Zwaak

Grabenwarter/Pabel

Harris/O'Boyle/Warbrick

Author, Studies in honour of Pierre Lambert

Author, in: vande Lanotte/Haack

Author, in: Macdonald/Matscher/Petzold

Author, in: Pettiti/Dcaux/Imbert

Reid

Author, Studies in memory of Rolv Ryssdal

Author, in: de Salvia/Villiger

Velu/Ergec

Villiger

Author, Studies in honour of Gérard J. Wiarda

Author, Studies in honour of Luzius Wildhaber

Author, Liber Amicorum Luzius Wildhaber

Clements/Mole/Simmons, European Human Rights: Taking a Case under the convention, 2nd ed., 1999. Titun (ed.), La conscience des droits, Mélanges en l'honneur de Jean-Paul Costa, 2011.

van Dijk/van Hoof/van Rijn/Zwaak (ed.), Theory and Practice of the European Convention on Human Rights, 4th ed., 2006.

Grabenwarter/Pabel, Europäische Menschenrechtskonvention, 5th ed., 2012.

Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 2nd ed., 2009.

de Fontbressin a.o. (ed.), Les droits de l'homme au seuil du troisième millénaire, Mélanges en hommage à Pierre Lambert, 2000.

vande Lanotte/Haack (ed.), Handboek EVRM, Deel 1, 2005; Deel 2, 2004.

Macdonald/Matscher/Petzold (ed.), The European System for the Protection of Human Rights, 1993.

Pettiti/Dcaux/Imbert (ed.), La Convention Européenne des Droits de l'Homme. Commentaire article par article, 2nd ed., 1999.

Reid, A Practitioner's Guide to the ECHR, 3rd, 2008.

Mahoney/Matscher/Petzold/Wildhaber (ed.), Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal, 2000.

de Salvia/Villiger (ed.), The Birth of European Human Rights Law, Liber Amicorum Carl Aage Nørgaard, 1998.

Velu/Ergec, La Convention Européenne des Droits de l'Homme, 1990.

Villiger, Handbuch zur Europäischen Menschenrechtskonvention, 2nd ed., 1999.

Matscher/Petzold (ed.), Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda, 1988.

Breitenmoser/Ehrenzeller/Sassòli/Stoffel/Wagner-Pfeifer (ed.), Human Rights, Democracy and the Rule of Law, Liber Amicorum Luzius Wildhaber, 2007.

Cafisch/Callewaert/Liddell/Mahoney/Villiger (ed.), Human Rights – Strasbourg Views, 2007.

