

Justin Friedrich Krahé

Legal Services and the European Convention on Human Rights

Securing Private Rights and Public Interests



Nomos

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Justin Friedrich Krahé

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Table of Abbreviations

(dec)	Decision
CCBE	Council of Bars and Law Societies of Europe
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GC	Grand Chamber
IBA	International Bar Association
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration on Human Rights
UIA	Union Internationale des Avocats

Summary

Protection of legal services by means of human rights instruments is a complex matter. Legal representation and advice advance the private interests of clients and lawyers. Simultaneously, they further the general public interest in the rule of law. Since traditional understandings of human rights focus primarily on human rights as protecting the interests of the rights holder, this can lead to tensions: Here, human rights instruments protect not only private, but also public interests, arguably going beyond the ambit of individual rights to regulate questions of State organisation and adding a further dimension of ‘constitutional’ significance to human rights law.

This study assesses how the European Court of Human Rights has dealt with this interplay of private and public interests. It aims to answer two research questions:

What obligations securing the private and public interests in legal services does the Court’s case law impose on States?

Does the Court’s approach to cases involving legal services comprehensively reflect the private and public interests involved while maintaining consistency with the rest of its case law, or are there other ways of reflecting these interests which are both more comprehensive and consistent?

In a first, doctrinal part (Chapter Two to Chapter Five), the study determines States’ obligations by setting out the Court’s case law on legal services. While the Court emphasises the public interest in legal services rhetorically, highlighting the ‘special status of lawyers’¹ as ‘part of the very heart of the Convention system’², it does not assign this public interest a clear normative status. Instead, it takes only the private interests of individuals as its point of departure, modifying these in light of their relationship with the public interest in legal services. This leads to inconsistent and incomplete case law, which at times elevates the level of protection applicants will enjoy, but at other times limits their rights without clear justification.

1 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.

2 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

In a second, conceptual part (Chapter Six to Chapter Ten), the study then examines whether this analysis focused exclusively on obligations owed to individuals can convincingly explain the case law. It begins by comparing the case law on legal services to the case law on the media, since in both areas the exercise of private rights also serves public interests (pluralism/democracy for the media). It is then argued that the Court's difficulties flow from the fact that it focuses only on rights and the corresponding directed duties and ignores undirected duties under the Convention. The use of rights to protect public interests is problematic because most of the Court's general doctrines, particularly as regards the scope of the Convention rights and proportionality analysis, have been developed on an individualistic vision of human rights as protecting the rights bearer regardless of whether their activities further any public interest.

The study then proposes an alternative analysis which recognises that the Convention has the capacity not only to impose on States directed duties with corresponding individual rights protecting private interests, but also undirected duties protecting public interests. One of these is the obligation to ensure that legal services exist. Using this second category, the Court's case law can be understood as the result of the relationship between the obligation to protect the applicant's private interests and the public-interest obligation to protect legal services. Where a case touches on both of these obligations, the obligations can be in harmony or conflict, which explains the variations in the level of human rights protection the Court accords. However, clearly separating into two different obligations has the advantage of providing a clearer standard because the impact on the applicant's private interests and on the public interest in legal services can be determined separately.

The study thus establishes that the Court's case law imposes on States certain obligations in the public interest which cannot be reduced to individual rights. While the main focus here is on legal services, similar obligations exist in a number of other areas of the Court's case law, including on judicial organisation, democratic procedures, separation of powers or the rule of law. This finding indicates that beyond protection of individual rights, the Convention also regulates elements of the internal organisation of the State and therefore exhibits 'constitutional' features in a broader sense than previously assumed.