



## Article

# The Death of Democracy and the Forces of Power and Control: The Case of Europe

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Academic Editors: Christine M. Robinson and Sue Spivey

Received: 24 March 2016; Accepted: 8 August 2016; Published: 11 August 2016

**Abstract:** At the time of writing, the United Kingdom is grabbling with its decision to abandon its European Union membership. As the country is divided and hate incidents are increased by almost 50%, this think-piece presents a critical analysis of Europe's missed opportunity for social justice. The paper presents evidence by analysing the civil and political rights jurisprudence of the European Court of Human Rights in order to explore the potential of what it calls the "human rights project" for a regional democracy. The paper shows that a key objective of the European Convention of Human Rights was the development of case law that would construct a regional democracy for bringing consistency in the enjoyment of civil and political rights across the continent. This "human rights project" was well underway, but is now hampered by contemporary forces of power and control that are ridiculing the work and status of the Council of Europe. The paper identifies three levers that move these forces, namely: financial and security terror as well as nationalism. The paper warns that if these forces are not managed, the backlash in social justice will continue while the human rights project for a regional democracy will come to its demise.

**Keywords:** human rights; economic crisis; terrorism; European Convention on Human Rights; human rights law

## 1. Introduction

Following the atrocities of two World Wars, on 10 December 1948, Eleanor Roosevelt noted in her speech before the UN General Assembly: "Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person." [1]. On that day, the Universal Declaration of Human Rights (UDHR) was signed in the hope that the shame and horror that the two World Wars waged on humanity would not be repeated. The UDHR inspired nations across the globe to adopt their own human rights legislation, while many regions introduced its underlying principles into regional conventions.

For example, in America, in 1948 the Organization of American States (OAS) was established leading to the adoption of the American Convention on Human Rights in 1969 (entered into force in 1978). In Africa, the Assembly of Heads of States and Government of the Organisation of African Unity adopted the African Charter on Human and People's Rights. It was ratified in 1981 and it entered into force in 1986. In Europe, a year after the establishment of the Council of Europe (CoE) in 1949, the European Convention on Human Rights (ECHR) was ratified introducing justiciable human rights into the domestic order of what has now grown to be a 47-state membership covering 820 million citizens.

The key intention of all these treaties was the introduction of basic legal tools that would bring consistency in the protection of ordinary people's dignity and respect. Therefore, why this intention renewed hope for oppressed and marginalized peoples around the world is not surprising.

However, this article questions whether this intention can indeed endure. The paper uses the case of Europe by focusing on the role of the Council of Europe (Council) and civil and political rights. While on the one hand the paper illustrates the potential of building the human rights project for a regional democracy, on the other it identifies reactionary forces of power and control that not only reverse social progress, but also hamper this regional plan. The paper argues that the social progress that was to be backed by the legal tools and institutions of the Council as well as social movements and civil society are now compromised.

As the United Kingdom voted to leave the European Union, questions of nationalism, hate crime, immigration and social integration are being raised in Europe. The UK, France, Belgium and many other European countries are experiencing an unprecedented spike in hate incidents. For instance, following the EU referendum, reports to the UK police forces increased by 42% in the week before and after the vote. The decision to leave the EU seems to have given to some groups "the license to behave in a racist or other discriminatory way," the chief constable of the Police Service of Northern Ireland said [2].

The rise of nationalist and far-right parties in Greece, the Netherlands, the UK, France and so on bear evidence that progress to social justice is being hampered while the widening gap between the powerful and the powerless in many areas of civil rights protection has brought a significant backlash in how we accept what is normal and what is not. This decline is gradually being accepted as justifiable due to the convincing nature of these reactionary forces which I aim to unpack.

The paper has been divided into four parts. The first conceptualizes the "human rights project for a European regional democracy." The second part explains how this project was to be materialized by looking at selected civil and political rights cases that were adjudicated by the European Court of Human Rights (ECtHR). These selected cases are meant to be illustrative of the potential of this European plan. Against this promising backdrop, the subsequent part of the paper identifies and discusses the three levers that move the impeding forces of power and control. My examples are used as mere case studies to contextualize these powers and thus they should not be read in isolation. The final section aims to instil hope by concluding with some thoughts and suggestions for reversing the discussed backlash.

A methodological caveat that must be accepted from the outset relates to the manner in which evidence was gathered to construct the arguments of this paper. The research is exclusively based on literature review and a critical analysis of case law derived from the archives of the European Court of Human Rights. None of the highlighted cases nor the case studies that are used must be read in isolation while the paper must not be read as presenting evidence as universal truths. Furthermore, it must be pointed out that the limited scope and length of the paper allowed the review of cases against certain member States only. History and the ECtHR's archives show that no nation is without shame in the way it manifests its power onto the weak, whether that be those locked in prisons, children in schools, older ladies in hospitals or disabled people in care homes. Admittedly, a more thorough and long-term project would have allowed a descriptive and analytic account of all member States' compliance history, while a comparative analysis would have illustrated a better argument. Therefore, the paper must be read as the think-piece that it was intended to be.

## 2. The Human Rights Project for a European Regional Democracy

In its preamble, the ECHR stated that the aim of the Council is "the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms." Furthermore, the Convention declares that the signatories reaffirm "their profound attachment to the fundamental liberties which constitute the very foundation of justice and peace in the world, and which, in order to

maintain it, rest essentially on a truly democratic political regime, on the one hand, and, on the other, on a common conception of and respect for human rights.”

The special character of the ECHR is evident in its many peculiarities. For example, it established a regional judicial authority that was bestowed with powers of a constitutional human rights court. This is the European Court of Human Rights (EcrtHR), which sits in Strasbourg. The Court’s conventional powers of holding states to account for violation of individuals’ human rights (Protocol 11) were extended through its jurisprudence, which *inter alia* introduced the notion of *drittwirkung*, allowing the application of the ECHR to legal relations between private parties. Moreover, the Court acquired powers that allow it to declare incompatibilities of national law with the ECHR, calling CoE member states for immediate legislative and policy amendments. Even the very text of the ECHR often refers expressly to the internal legal order (e.g., “in accordance with the law”).<sup>1</sup> This meant that if a state was found guilty by the EcrtHR not only it would have to rectify the specific act for which it was convicted, but also it would be required to bring about national legal and policy changes so that no further similar breaches are carried out.

Through this legal tool and these institutions, it was hoped that a regional democratic society would be created bearing minimum standards for the protection of everyone. In this regional democracy, a “culture of human rights” [3] would be created whereby social movements and change would flourish. In fact, the notion of “democratic society” reappears four times in the Convention (Articles 8.2, 9.2, 10.2 and 11.2). Some have even argued that the Court, through the application of the Convention, could little by little fine-tune a democratic rationale [4]. Through the establishment of minimum standards (e.g., Article 3, 4 and 7), and their implementation through the Court’s jurisprudence, the CoE was given the potential to introduce *regional ethical-legal* guarantees of a democracy that would be consistently enjoyed by the 820 million European citizens and the many others who pass by Europe.

To give some examples, in *Guzzardi v Italy* ((1980) 3 EHRR 333), the Court firmly repeated that the “Convention is interpreted in light of the conception prevalent in democratic countries,” while in *Ireland v UK* ((1978) 2 EHRR 25), after condemning a behaviour which was deemed to be inhuman and degrading, it said that this created “feelings of fear, anxiety and humiliation to debase and eventually to break physical and moral resistance.” Furthermore, in the notorious *Dudgeon v UK* ((1981) 4 EHRR 149), the Court defended the substance of this democracy which it named “tolerance and the spirit of openness.” In *Handyside v UK* ((1976) 1 EHRR 737), the Court reaffirmed its commitment to promote and maintain this democracy by stating, “freedom of expression constitutes one of the essential bases of a democratic society, one of the first prerequisites to progress an individual development.” It continued, saying that this applies equally to the expression of information and ideas “which strike, shock or upset the State or some segments of the population. Thus, the requirements of pluralism, tolerance and the spirit of openness, without which it is not a democratic society.”

It seems that, “human rights,” “fundamental freedoms,” “respect for the individual” and the “rule of law” were reconciled under the singular banner of “democracy.” This political system soon became the new culture that the Council aspired to build for the whole of Europe. Through the promotion of a common understanding and respect for human rights standards, the Council aimed to create a single human rights platform for all 47 European States. It is on this platform that this “democracy” would be laid.

### 3. Building the Human Rights Project in Europe

The construction of social justice and a regional democracy that is equally enjoyed by 47 states was an ambitious project. Here, I provide some evidence that this project was well under way. Its potential for the uniform enjoyment of human rights are also illustrated using the EcrtHR case law.

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<sup>1</sup> See, for example, Article 8(2) and *Malone v UK*, 8671/79 (1985).

### 3.1. Article 2 and 3

Article 2 together with 3 “enshrines one of the basic values of the democratic societies making up the Council of Europe.”<sup>2</sup> Article 2 obliges States to make the adequate provisions in their laws for the protection of human life. This extends liability for taking a person’s life not only to State agents, but also to private individuals [5]. The Article’s relevance to the criminal process resides in para. 2(b) and its impact on the use of force in arrest or the prevention of escape. This was confirmed in a series of cases with Northern Irish connections. One these is *McCann* ((1995) 21 EHRR 97), where British specially trained soldiers in their attempt to arrest suspected Irish Republican Army (IRA) terrorists, with the intention of initiating criminal proceedings against them, used force resulting in their deaths. What is important to point out here is that the Court interpreted the Article so that it can be understood and applied by all member States in the same way. This focused on the term “absolutely necessary,” clarifying that a “stricter and more compelling test of necessity must be employed from that normally applicable when determining whether a State’s action is necessary in a democratic society.” In particular, “the force used must be strictly proportionate to the achievement of the aims set out in 2 para. 2abc.”<sup>3</sup>

The Court pointed out that it would be a breach of conventional obligations if a member did not protect the substance of Article 2. In the *Osman v UK* ((1999) 1 FLR 198), the Court was even clearer with its expectations from member States by stating that the duty that Article 2 imposes includes the obligation of putting in place “...effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery...”.

Article 3 has been invoked for cases relating to serious assaults in custody (e.g., *Tomasi v France* A/241-A (1992) 15 EHRR 1), the application of psychological interrogation techniques (e.g., *Ireland* case), prison conditions (e.g., *McFeeley v UK* (1980) 20 DR 44), suspects in detention, rape while in prison (e.g., *Aksoy v Turkey* (1996) 23 EHRR 553) and extradition or expulsion where torture or ill treatment might be a consequence (e.g., *Cruz Varas v Sweden* (1992) 14 EHRR 1).

For example, in the *Ireland* case, the Court defined the meaning of the terms of the Article, establishing minimum standards to be respected by all members. After the decision, the UK government compensated the victims and ordered the discontinuance of the techniques used, although these were previously officially taught to the members of its security forces<sup>4</sup>.

In the case of *Hurtado v Switzerland* (A/280-A 2 (1994)), the Commission explained that it is inherently difficult to prove allegations of breaches of this Article. Consequently, in *Klass* (A/28 (1978) 2 EHRR 214) and *Ribitsch* ((1995) 21 EHRR 573), the Court set the principles regarding the standard of proof in cases where ill treatment during police detention is alleged. These rules then became obligatory for all contracting parties.

One of the most serious breaches of the Convention was found in *Aksoy v Turkey*, where Article 3, Article 5 (para. 3) and Article 13 were violated, while it became impossible to investigate the death of the applicant, which occurred *after* he had been released from custody and filed his complaint for the treatment suffered by the Turkish police authorities. Equally important is the landmark case of *Soering*. There, the deportation of a prisoner was found to be in breach of Article 3, because it would automatically lead to the so-called “death row phenomenon,” resulting in his death penalty in the requesting State (in this case, the USA). With its judgment, the Court introduced an exception to a rule of public international law, whereby no State could be found responsible for the acts of third States. However, as stated by the Court, “this (rule) cannot exclude State responsibility under the Convention with respect to events taking outside their jurisdiction.” In a series of other cases, it was confirmed that a person’s deportation or extradition might give rise to an issue under Article 3, when there are

<sup>2</sup> *Soering v UK* (1989) 11 EHRR 439, p. 34, para. 88.

<sup>3</sup> See also *Farrell v UK* (1982) 30 DR 96.

<sup>4</sup> Resolution (78) 35 of the Committee of Ministers, acting under A54, adopted on 27 June 1978.

reasons to believe that the individual will be subjected to treatment not permitted under the provisions of the Article. Consequently, the British executive refused the extradition of Mr. Soering and was willing to proceed with it only if the US government had given assurances of not executing him.<sup>5</sup>

As it would be expected, this decision had a major impact on the criminal justice policies of other members. For instance, the civil chamber of the Dutch Supreme Court held the surrender of an American soldier as long as the US government failed to give sufficient assurances that a death sentence imposed by a national court would not be carried out.<sup>6</sup> The decision also affected the members' asylum policies, because, as the Court noted, although States are free to expel foreigners, "the specific importance of preventing torture justifies an exception to that freedom."

Undoubtedly, the way a country treats its prisoners is an important yardstick for the protection of human rights. The Council, recognizing the importance of this right in a democratic Europe, promulgated the European Prison Rules, setting minimum standards for custodial institutions in member States. It also established the Council for the Prevention of Torture (CPT), through the drafting of the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment, which was signed by all members. The CPT is another European institution "that promotes harmonization of criminal justice policy within Europe" ([6], p. 64).

By using its authority, the CPT inspects the prisons and police stations of member States, developing phrases and a common glossary to be used when referring to allegations of physical ill treatment by the police. What is important to mention here is that, although the reports of the commission are confidential, if a party "fails to co-operate or refuses to improve the situation in the light of these recommendations, the CPT may decide to make a public statement on the matter."<sup>7</sup>

### 3.2. Article 5

The Article protects the liberty of the person and is considered the chief guarantee for the rights of the detainees in the pre-trial phase although in the period between charge and the beginning of the trial, Articles 5(1)c, 5(3) and 6(1) are operating all together. In the first case against the Netherlands (*Engel and Others* (1976) 706), the Court defined "arrest" and "detention," outlining two requirements that have to be met in order for a pre-trial detention not to be in breach of the Article. In particular, detention has to be "lawful" and "in accordance with the law." What is important to note here is that this lawfulness gains its meaning through European and not national standards, and can only be evaluated by the Court.<sup>8</sup> On the other hand, the "prescribed by law" requirement mainly refers to the domestic legislation, which again has to meet with "lawful," thus with European standards.

In the *Winterwerp* case ((1979) 2 EHRR 387), the Court stated that between the two requirements there is an overlap, which is caused by the fact that the notion of "prescribed by law" is not exclusively a matter of domestic legislation. In short, national law must itself be in conformity with the ECHR, including the "general principles expressed or implied therein" (para. 45). This can mean two things. First, that domestic law alone is now considered insufficient to carry the exceptions of Article 5(1). Second, that the Court acquires jurisdiction to examine whether the conditions of national law have been fulfilled. Although the Court does not normally review the observance of domestic law *in abstracto*,<sup>9</sup> there are exceptions to this. This is observed especially in cases where the Convention refers back to national law.

After this decision, the Dutch Minister of Justice issued a set of guidelines by way of interim response to the judgment, setting out the consequences for the legal practice. Soon after, the impugned

<sup>5</sup> Resolution DH (90) 8 of the Committee of Ministers, acting under A54, adopted on 12 March 1990.

<sup>6</sup> HR 30 March 1990, (1991) NJ 249.

<sup>7</sup> Article 10 of the ECPTIDT. See public statement on Turkey: CE 1993a and CE 1996e.

<sup>8</sup> *K v Austria A/225-B* (1993) Commission Report.

<sup>9</sup> *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34, para. 45.

legislation was amended.<sup>10</sup> However, as this legislation was tardy (over 13 years), a new wave of successful cases was brought against the Netherlands (e.g., *Van der Leer* (1990) 12 EHRR 567), illustrating in this way that member States cannot escape from their responsibilities which may include adapting their national legislation to conform with the ECHR and the Court's decisions.

The provision that regulates the pre-trial detention is Article 5(3), which requires that everyone arrested under 5(1)c on suspicion of having committed an offence be brought "promptly" before a judge. In *De Jong (A/77)* (1984), the Court ruled that a military prosecutor (*auditeur militaire*) charged with deciding upon detention cannot be considered a "judge," while in two cases against Switzerland (*Schiesser A/34* (1979) 2 EHRR 417 and *Huber A/188* (1990)) the Court listed what elements "an officer" needs to have to fall within the sphere of 5(3). After this, by virtue of an Act in 1989, the Dutch government amended its legislation, directing all criminal cases against members of the armed forces to ordinary criminal courts and not to military tribunals.<sup>11</sup>

Very important is also *Brogan v UK* (A/145-B (1988) 11 EHRR 117). Mr. Brogan and three others were arrested by the British police on suspicion of involvement in IRA terrorist activities. They were released after periods ranging from four to six days, without being brought before a judge. After the Court found that there had been a violation of Article 5(3), it attempted to define the term "promptly." Although it is not always possible to determine exactly this term's meaning, the Court said: "in the member States of the Council of Europe a delay of 48 hours, or even a bit longer, is usually permitted."

As a result, the Court moved on to distinguish between terrorist and conventional criminal cases (para. 61), ruling that the former period of four days and six hours was too long for the purposes of 5(3). Consequently, if that period was too long in "exceptional" circumstances (e.g., terrorism), it will certainly constitute a breach in "normal" cases. These standards, became obligatory for all members, and were later confirmed in *Brannigan* ((1993) 17 EHRR 539), although no violation was found there because the UK had made a valid emergency derogation under Article 15. This allows members to derogate from certain obligations set out in the ECHR.

Both cases gain major significance in today's circumstances, since they show how the EcrtHR dealt with the issue of striking a balance between the protection of individual rights and the need to maintain security for the whole of society. The reasoning followed is particularly relevant to terrorist suspects and detention carried out on the purpose of collecting evidence. The Court held that, although it is not required to examine the impugned legislation *in abstracto*, there are some exceptions to this principle. In fact, on several occasions, the Court found that domestic legislation did not always contain sufficient safeguards against abuse of suspected terrorists' rights, while in many other cases it found incompatibilities of national legislation with the Convention.<sup>12</sup>

*Brannigan* provoked strong reactions in the UK and other member States, since its consequences for pre-trial detention and the way investigations were carried out were considerable. For instance, in 1994 the Dutch government had to adopt a complicated Act that would bring domestic law in line with the Convention's right. The same reaction was also observed after the *Engel* judgment, which brought amendments to domestic legislation with the Act of 12 September 1974.<sup>13</sup>

Equally important for the criminal pre-trial phase is Article 5(4), the *habeas corpus* provision of the Convention. This requires that all detainees have the right to take judicial proceedings to test speedily the lawfulness of their detention. Again, through its jurisprudence, the Court defined the terms "court"<sup>14</sup> and "speedily."<sup>15</sup> The leading cases on this matter are *X v UK* ((1981) A/225-B) and *Winterwerp*. These mainly concerned convicted persons that were ordered to be detained in mental

<sup>10</sup> Resolution DH (82) 2 of the Committee of Ministers, acting under A54, adopted on 24 June 1982.

<sup>11</sup> Resolution DH (84) 7 of the Committee of Ministers, acting under A54, adopted in 1984.

<sup>12</sup> *Funke v France* (1993) 16 HER 297, *Van de Hurk v Netherlands A/288* 91994 18 EHRR 481.

<sup>13</sup> Resolution (77) 10 of the Committee of Ministers, acting under A54, adopted on 2 April 1977.

<sup>14</sup> *Chahal v UK* (1997) 23 EHRR 413; *Winterwerp v Netherlands* (1979) 2 EHRR 387.

<sup>15</sup> *E v Norway* Appl 11701/85 17 EHRR 30 and *Luberti v Italy* (1984) 6 EHRR 441.



hospitals under the power of the Mental Health Act in the UK. These cases were followed by *Weeks* ((1987) 10 EHRR 293), where the ECtHR adjudicated on the matter of prisoners serving discretionary life sentences. The same matter was discussed in *Koendjibihari* (11497/85 13EHRR 820) and *Keus* ((1990) 13 EHRR 666) against the Netherlands. All these judgments were followed by legislative amendments (e.g., the UK introduced the Mental Health Act 1983<sup>16</sup>).

According to the Court, the right of Article 5(4) should be subjected to “the rule of reason,” since national courts “cannot be mandated with an endless stream of identical requests.” Repeated litigation involving mentally ill patients had posed many problems to the Strasbourg authorities. Therefore, in *Golder* ((1970) 1 EHRR 524), the Court decided to introduce the notion of “implied limitations” for the right, noting, however, that mental illness cannot justify impairing the very essence of the rights under 5. The Court added that legal representation should as a rule become available to all detainees challenging the lawfulness of their detention.<sup>17</sup>

Finally, the CPT noting the absence of uniformity in Europe on the matter of legal assistance to the detainees, issued the Sixth General Report,<sup>18</sup> aiming at reaching a common understanding for these rights. Although some very strict provisions were introduced in that report, States have not yet complied fully, principally because police tend to object with the presence of a lawyer whom they believe will persuade the accused to refrain from confession.

### 3.3. Article 6

Article 6 has a position of pre-eminence in the ECHR, mainly due to the great number of applications it has attracted. The need for a homogeneous understanding and application of its text became visible [4]. To this end, the Court issued all member States with a standardized interpretation of the rights protected under 6. For example, through its case-law, the ECtHR clarified what constitutes the “determination of criminal charge.” Bearing in mind the different understandings that the various European legal systems have of this term, and knowing that this could prove to be a problem, the ECtHR developed an autonomous meaning. This was done in the *Engel* case, where the Court laid three criteria (the “Engel criteria”) that are to be used when deciding whether an offence is criminal. The decision also had a lasting and profound impact on Dutch disciplinary military law. In 1989, the law was subjected to a total revision with the Military Disciplinary Act 1989, which *inter alia* created the possibility of an appeal to ordinary criminal courts against the imposition of military disciplinary sanctions. Finally, the Netherlands abolished by statute all disciplinary sanctions depriving a person’s liberty.

The test of the *Engel criteria* was confirmed in *Campbell and Fell*, where prison disciplinary offences were considered as criminal charges and thus attracted the protection of Article 6. This decision resulted in a change in the guidelines followed by British courts in the granting of legal representation, but most importantly concluded with an overhaul of their disciplinary system.<sup>19</sup> In addition, British police’s arrest powers (Emergency Provisions Act 1978) were abolished after an official report which criticized the statute’s incompatibility with Article 5(1)c requesting the enactment of the Emergency Provisions Act 1987.<sup>20</sup>

In the *Ozturk* case ((1983) A73), the Court decided that regulatory offences can fall within the meaning of a “criminal charge,” while many other offences which were not classified as criminal by national laws can now prove to have criminal characteristics under ECHR standards. Some examples are price-fixing regulations (e.g., *Deweert v Belgium* (1980) 2 EHRR 439), customs code (*Salabiaku v France* A/141-A (1988) 13 EHRR 379), police regulations forbidding public demonstrations (*Belilos v*

<sup>16</sup> Resolution DH (83) 2 of the Committee of Ministers, acting under A54, adopted on 23 March 1983.

<sup>17</sup> *Megyeri v Germany* (1993) 15 EHRR 584, *Bouamar v Belgium* (1987) 11 EHRR 1.

<sup>18</sup> Doc. CPT/Inf. (96) 21, p. 7.

<sup>19</sup> Resolution DH (86) 7 of the Committee of Ministers, acting under A54, adopted on 27 June 1986.

<sup>20</sup> Resolution DH (91) 39 of the Committee of Ministers, acting under A54, adopted in 1991.

*Switzerland* (1988) 10 EHRR 466) and rules of competition in tendering for contracts (*Société Stenuit v France* (1992) A 323-A).

The consequences that followed the *Ozturk* case constitute another good example of EcrtHR's jurisprudence influencing not only the accused State's legal order but also that of other members. For example, the decision led Germany to amend the Code of Criminal Procedure and the Court Costs Act,<sup>21</sup> while all members imported into their domestic legal orders the "*de minimis* rule" introduced by the Court. According to this rule, a sanction can be deemed criminal in nature depending on its seriousness. The impact of this case was also apparent in the Dutch legal system, as in 1985 the tax chamber of the Supreme Court held Article 6 to be applicable where fiscal fines might be imposed.

Finally, an autonomous meaning was also given to the term "charge" of the Article. In the *Deweert* case the term was defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or some other act which carries "the implication of such an allegation and which likewise substantially affects the situation of the suspect." Again, the Court pointed out that the term is to be given a "substantive" and not a "formal" meaning, so that it is necessary to "look behind the appearances and investigate the realities of the procedure in question."

Probably the most creative interpretation given to the Convention is the one in *Golder*, the first case brought in Strasbourg against the UK. This involved the question of whether the restrictions on a convicted prisoner's access to a lawyer were contrary to Article 6. The Court found that by preventing resort to legal advice, the right to have access to court was violated. After this decision, the UK government changed the Prison Rules 1964 to permit prisoners' access to a lawyer.<sup>22</sup> The same positive response was observed by the Netherlands after *le Compte v Belgium*, which, along with the Belgian law, made the Dutch reconsider the applicability of 6 in disciplinary proceedings against practicing lawyers and doctors.

Arguably, the right to a fair trial, the core guarantee of 6, has an open-ended residual quality, and this allowed the Court to add further specific rights not listed in the Article. For example, in order for this right to be effective, it has to be exercised "within a reasonable time." The Court had the opportunity on many occasions to specify what this term means, establishing common standards.

For example, in a number of cases against Italy (e.g., *Salesi* (1996) EHRLR 66), the Court laid three principles under which the reasonableness of the length of criminal proceedings is to be assessed. For the Strasbourg authorities, these start from the moment a formal "charge" is brought against the applicant, and end when the "charges are finally determined or the sentence imposed becomes final."<sup>23</sup> What is also important is that the State shows that it had acted with deliberate speed. The saying "justice delays, justice denies" was exercised in *Abdoella v Netherlands* ((1992) A248-A), where the Court found that delays in appellate proceedings were in violation of the Article. The delay did not amount to more than two years and the Court admitted that the proceedings in their totality were not unduly long, but two periods of inactivity were deemed unacceptable. Furthermore, in *Orhin v UK* ((1983) 6 EHRR 391), Britain was found to be in breach and as a result the government increased the number of its judges and set time-limits on the different stages of criminal proceedings with the Prosecution of Offences Act 1985. This example was also followed by other member States [4].

Another core element of the "fair trial" notion is the independence and impartiality of the judiciary. The Court repeatedly emphasized the importance of the application of the English law doctrine: "justice must not only be done, it must also be seen to be done." Through its jurisprudence, it provided member States with two kinds of tests (objective-subjective), which have to be successfully passed so questions of impartiality can be dismissed.

<sup>21</sup> Final Resolution DH (89) 31 of the Comm of Ministers, acting under A54, adopted on 10 November 1989.

<sup>22</sup> Resolution (76) 35 of the Committee of Ministers, acting under A54, adopted on 22 June 1976.

<sup>23</sup> *Eckle v Germany* (1982) 5 EHRR 1, para. 77.



For example, in *De Cubber* ((1984) 7 EHRR 236) and *Oberschlick* ((1991) 19 EHRR 389), a violation was found, because the trial judge had participated in the pre-trial phase. Additionally, the case of *Hauschildt* ((1989) 12 EHRR 266) against Denmark provoked a great debate in the Netherlands, as the Dutch Supreme Court refused to accept that members of Dutch courts should be disqualified from participation in public hearings if they had previously been involved in deciding on pre-trial detention. A few years later, however, the Dutch government adjusted the legislation in fear of being referred to the ECtHR.<sup>24</sup>

The jurisprudence of the Court also showed that in order to secure independence in the judiciary a list of guarantees needs to be attributed to the judicial members. For example, in *Le Compte v Belgium* ((1987) 10 EHRR 29), the presence of legally qualified members was found to be a strong indicator of independence, while in *Sramek v Austria* (9890/79 (1984) A84), the regional authority in land-dispute which was composed of three civil servants from the local government created doubts about their independence. While the *Le Compte* case led to the modification of the Belgian as well as the Dutch law, the *Sramek* case led the example for other member States to adjust legislation that allowed government officials to stand as judges in land-disputes. Finally, in the *Demicoli* case ((1991) A210), Malta was found to be in violation of Article 6(1), because the House of Representatives in a hearing of a matter related to two of its members did not qualify as an “impartial tribunal.” After the Court’s judgment the Maltese House of Representatives Ordinance was amended.<sup>25</sup>

Article 6(2) and the right to be presumed innocent is directly related to the evidentiary burden of proof principles and the way in which courts penalize defendants’ costs or issue qualified acquittals [7]. Arguably, the most important decision regarding this right is *Salabiaku v France*, which concerned presumptions of law and fact. This decision did not only have considerable impact on French law, but also on other members’ legal order. For instance, the Dutch Supreme Court held in a 1988 decision that alterations need to be made to the Dutch fiscal law, because it imposed the burden of proof on the taxpayer, a provision that violated the presumption of innocence under Article 6(2).

Very important in our discussion is the right to call and cross-examine witnesses, because the two families of criminal proceedings differ on the matter considerably. Arguably, the civil law judge, during the trial process, does not put the same weight on witnesses’ testimonies, as he/she relies on the dossier and the pre-trial investigation, which of course is not conducted by the police, as in the common law systems, but by an investigating independent magister. In a research study on the differences between the Dutch and British criminal systems, the three most obvious differences concerned the hearing of witnesses in the trial process and the protection of intimidated and child witnesses [8].

What had contributed largely to this process was the *Kostovski* case ((A/166 (1989) 12 EHRR 435). There, the Netherlands was found in breach of Article 6(3)d, because its national courts, based on the domestic Code of Criminal Procedure, convicted the applicant on the sole basis of a statement made by two anonymous witnesses. Although the use of hearsay evidence may be used during investigation, the Court said the right of the accused to challenge this evidence must be respected at all times. Following the Court’s decision, the Dutch Supreme Court redefined the conditions under which statements of unidentified witnesses may be acceptable as evidence (NJ 1990, No. 692). More importantly, with a 1993 Act, the Netherlands amended its Code of Criminal Procedure, introducing a set of conditions for using statements of anonymous witnesses in evidence.<sup>26</sup>

<sup>24</sup> This view was confirmed in *Sainte-Marie n France, Sainte-Marie v France* (1992) A 253A.

<sup>25</sup> Resolution DH (95) 211 of the Committee of Ministers, acting under A54, adopted on 11 September 1995.

<sup>26</sup> Resolution DH (94) 47 of the Committee of Ministers, acting under A54, adopted on 19 June 1994.

### 3.4. *Summing Up*

The above list of cases, policy adaptations and legislative amendments was not meant to be exhaustive but rather illustrative of the interplay in which they engage in the region of Europe through the judicial activities of the Council. With the interpretation and application of civil and political rights standards that are enshrined in the ECHR, this regional body aspires to bring greater unity among its 47 members and safety to the continent. The ECtHR case law and the implementation of the ECHR consistently across the continent can act as triggers for legislative, policy and institutional changes at the national level.

The cementation of this aspired regional peace was well under way through the promotion of a legalized European democracy that was being built decision after decision on human rights cases that were brought in front of the ECtHR, and which ultimately change what matters to real people in their everyday lives and dealings with their state and the powers that are exercised through it. It is through the prevalence of this culture that the Council and its organs aimed to protect and maintain human rights, marking the era of peace and social justice for all, particularly those who cannot speak for themselves and are vulnerable.

## 4. The Forces of Power and Control and the Three Levers that Move Them

### 4.1. *The Notion of Power and Control*

By definition, civil and political rights were constructed to balance the power of the few and of mighty states against the powerless (let those be minority groups, women, children and so on). Although the term is relatively new, if we look at the individual entitlements that they are protecting, some may date as back as the first traces of human history. For instance, the notion of proportionate punishment and justice can be found in Hammurabi's Code of ancient Babylon (c. 2380 BC).

In fact, according to many, Europe's human rights project which started with the Enlightenment and continues today has evolved from protecting individuals from state brutality to establishing a set of ethical standards essential to creating a decent society [9–11]. These broad ethical standards have traditionally been associated with high level human rights abuses such as torture and genocide, prisoners of war or claims by celebrities and criminals [3]. Some have argued that these standards can be used in our everyday lives and for the reform of public services such as health and social care [3,11,12]. Osler and Starkey also believe that these are the values that can inform human rights education which according to their research can help promote a human rights culture among young people and future generations [13]. As Klug puts it, human rights values "have the capacity to form the basis of a shared ethos without necessarily disturbing all other points of reference in people's lives, whether these be political or religious or neither of these ([10], p. 148). It is with this ethos and within this human rights culture that the Council aimed to build its regional democracy addressing persistent inequalities across Europe. Here, I argue that this process is hampered by three levels that mobilised the counter forces of power and control.

What is "power and control"? Realism defines "power" as a capability to impose, enforce or exercise influence and dominance ([14,15]; [16], pp. 141–47). It views power as a necessary ingredient in the pursuit of goals and aims [17]. It is power that gains results under the realist approach. This view is contrasted with the idealistic or liberal conception of power, which identifies power with law and order [18–23]. According to this perspective, it is the institutions that are mandated to exercise power in maintaining law and order and a state of justice. Power according to this view does not necessarily reside with states, but rather with the international institutions that promote justice such as the United Nations, International Court of Justice and, in the case of Europe, the ECtHR ([24], pp. 514–49; [25], p. 476).

However, both schools do recognize that power undeniably influences global politics and that human rights may construct an appropriate framework that can bring about the balance of power. The flipside of the coin is that abuse of power and the exercise of control through it may hamper the rooting

and development of social movements and civil rights campaigns, particularly those that focus on the most vulnerable (given that indeed human rights are not just for a few but for everyone). Hobbes stressed the importance of controlling forces of power or authorities' control in imposing compliance with treaties or agreed terms. In his view, justice (or injustice) depends on a political force without which nothing can be classified as just or unjust ([26], p. 213; [27], pp. 59–62). His views do find parallels in the reality of Europe's politics. Hadjipavlou noted: "What we live today is the deadlock of injustice, reflected not only in traditional justice systems, but also in the current crisis environment. Colonialism, authority, power structures, and dominant discourses in social institutions, reflect the social crisis we live nowadays in Europe and US" [28]. Here, I identify three levers that move the impeding forces of power and control.

#### *4.2. Power and Control through Financial Terror*

According to many civil rights champions, poverty and the unequal distribution of wealth are the principal consequences of power monopoly [3,11,29,30]. Based on a number of studies, including the first Triennial review of the UK Equality and Human Rights Commission [31], poverty has a direct impact on the equal enjoyment of our basic rights including civil and political rights. In fact, poverty is closely related to poorer outcomes in terms of living conditions, overcrowding, crime in the neighbourhood and destitution—leading to poor health and low life expectancy.

Using the UK as an example, we know that the total net household wealth of the top 10% is £853,000, almost 100 times higher than the net wealth of the poorest 10%, which is £8,800 or below. One person in 5 lives in households with less than 60% median income; this rises to nearly 1 in 3 for Bangladeshi-headed households. Data indicates that two-thirds of Bangladeshi and Pakistani people lack savings and half of pensioners living in Bangladeshi and Pakistani-headed households live below the poverty line (compared to around a sixth of the general population). Nearly three-quarters of Bangladeshi children and half of Black African children in Britain grow up in poverty. Moreover, 1 in 4 of families with disabled people live below 60% median income: 29% of those with a disabled adult, 28% of those with a disabled child and 38% of those with both.

Williams and Collins argue that health disparities between African Americans and Whites are attributable to systemic differences in access to and the quality of medical care, poorer working and residential conditions and the impact of poverty and educational levels on health behaviour [32]. We now have enough evidence to safely claim that a major catalyst of racial disparities in mortality rates and other health indicators is the disproportionate exposure of poor black populations to environmental risks in their residential surroundings [33].

In England and Wales, men and women living in the most deprived areas are twice as likely to commit suicide as those in the least deprived. Black African women who are asylum seekers are estimated to have a mortality rate 7 times higher than for White women, partly due to problems in accessing maternal healthcare. Black Caribbean and Pakistani babies are twice as likely to die in their first year than Bangladeshi or White British babies. Infants under the age of 1 are more likely to be a victim of homicide than any other age group: one child aged under 16 died as a result of cruelty or violence each week in England and Wales in 2008/09—two-thirds of them aged under five. Interestingly, two and a half times more young men (25–34) commit suicide in Scotland than in England. Moreover, the available evidence points to poorer health outcomes for many equality groups, partially but not completely explained by generally worse socio-economic circumstances. Groups vulnerable to pressures such as poverty and victimisation show high rates of mental illness. The risk of having poor mental health scores is higher for certain ethnic groups with high poverty rates. For instance, the risk of mental health problems is nearly twice as likely for Bangladeshi men than for White men.

This is why watchdogs, such as the Equality and Human Rights Commission and the Council of Europe itself asked that the focus of human rights activities and lawyers should first and foremost be on addressing poverty as the determinant of inequality and social injustice. This is also the reason why

the civil rights and legal guarantees enshrined in the ECHR (including that of property and individual life) were hoped to be used as key tools for building the human rights project collapsing the walls of power and marginalization.

Nevertheless, the current reality is somehow different. Habermas poignantly observes that we are living in the crisis of a “post democratic” era, which is characterized by a more capitalist and market-oriented functioning of democracy [34]. I argue that in Europe, this crisis has taken the Council’s intended legalised democracy away from its roots as a form of governance, seeking a more representational and equal political system to one where financial clout increasingly dominates the democratic system and political success. This system has led to a financial calamity and leads to despair in the developed world [29].

The world economic crisis which started with the Great Recession in the US in 2007, made Europeans feel their future in a deadlock with despair replacing hope. Subsequently, the rest of the world’s populations may be considered as living their lives without any prospect of survival considering the deprivation of essential commodities and basic amenities afflicting these populations. In this absolute despair, fear is created and, through this fear, control.

I identify this financial terror as the first lever that motivates the powers that impede the human rights project in Europe. In a society where there is no hope, civil rights whether in their legal or value-based version are seen as luxuries. Survival comes first and in the serving of our basic instincts the vulnerable come last and this includes the refugees and migrants who die in modern Europe at a rate of more than 160 per month.<sup>27</sup>

Take the example of the “Greek depression.” With a debt of over €323bn, it is said that hope has become as rare as gold. Since 2011, over 20,000 Greeks became homeless while in 2015 the unemployment rate reached 26%. The well-known strong traditional Greek family structure and the values that underlie it came under strain, often unable to bear the burden of increasing numbers of unemployed and homeless relatives. Against this backdrop, just in the last 3 months, over 141,149 refugees arrived in Greece (over a million arrived in 2015). In a country of 11 million and with a youth unemployment rate at 60%, help for these refugees and respect of their human rights became someone else’s problem.

The truth is that there are enough resources for everyone in modern Europe. Dorling noted: “It is an established fact that we do have enough for everyone’s needs as we know with some precision how many of us there are on the planet, and we have a good idea of how many us there soon will be” ([29], p. 14). We also know that further increases in our wealth and resources will not necessarily bring us greater happiness, make us better and informed citizens, give us healthy lives or free our minds. The world, and this includes Europe, does have enough for everyone’s needs, but not for our greed. Greed is a privilege of power and it feeds on control. I argue that it is also the primary reason for inequality, community tensions and crime, including the collapse of the human rights project.

Ask any first-year psychology student and they will tell you that for any individual to develop their potential and thrive, first there needs to be a sense of self-pride and a set of personal goals. Remove these and, independently of the social, societal, biological, political factors that may be evoked, we should expect to see a life of underachievement and likely criminality: “We learn best in stimulating environments when we feel sure we can succeed. When we feel happy or confident our brains benefit from the release of dopamine, the reward chemical which also helps with memory, attention and problem solving” ([36], p. 115). In the current climate of financial terror, ask a young person from any European country of origin and they will tell you that they are not special: “Even affluent people know that they are not very special; most know that they are members of what some call ‘the lucky sperm club’, born to the right parents in their turn, or just lucky, or perhaps both lucky and a little ruthless” ([29], p. 61). Wilkinson and Pickett also note: “Inequalities in society and in our schools have a

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<sup>27</sup> According to UNCHR, at the time of writing (March 2016) there have been 464 deaths since 1 January 2016, see [35].

direct effect on our brains, on our learning and educational achievement" ([36], p. 151). As Yiallourides and Anastasiadou noted, "It is the people of the 'developed' countries of the Western world who now feel the threat of the loss of their rights and the way of life that was based on the mass material prosperity of the past decades which they had taken for granted." [37].

#### 4.3. *Power and Control through Security Terror*

The second lever is the war that Western countries have declared against security terror. The events of September 11 and the consequences of the wars in Afghanistan and Iraq made the threat of terrorism more visible than ever. This fear created new and increased obligations on behalf of governments to protect their citizens and enhance security. In fact, a number of experts in terrorist studies have claimed that, post 11 September 2001 (i.e., 9/11), we have witnessed a new era of security policy, legislation and practice internationally (e.g., [38]). At least three new facts drive these policies. Terrorists are no longer understood to be acting alone. The attribution of the New York attacks to a single organization (Al Qaeda) told us that powerful terrorist networks do exist. These are not mere cells in random places, but well-funded, highly organised entities that can stand up against some of the world's most powerful nations (including the US). It is true that most of the time these well-organized entities appear to be one step ahead of national and internationally intelligence. Second, the use of weapons of mass destruction is possible including nuclear and biological weapons [38]. If they can be obtained, then there is no guarantee that they will not be used. Third, terrorism as an act cannot be confined by time, place or nation. For example, what motivated Al Qaeda to carry out the attacks in 2001 was also what they quoted as reasons for carrying out attacks in Europe years later. Their "war" continues without being limited by geography or time, while their own identity is more diverse than the United Nations. The same applies to ISIS (Islamic State of Iraq and the Levant) which has recruits from all over the world including young males and females.

Consequently, over the last few years, new anti-terrorism legislation and executive measures have been introduced in almost all CoE member States in the hope of meeting these obligations. Special powers have been handed over to the executives, and ad hoc procedures have been introduced with the belief that these will increase effectiveness and reduce the risk of terror. However, while doing so, a number of human rights and civil liberties were put in danger or on hold until the "crisis is resolved." This crisis has been live for 15 years and has been exacerbated following the recent terrorist attacks in Paris.

Former American President James Madison once said: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended from abroad" [39]. How true these words sound when considering for example the anti-terrorism legislation in the UK. The Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 have exposed the British government to a number of criticisms mainly coming from international NGOs such as Amnesty International, Human Rights Watch and other national human rights groups such as Justice and Liberty [40–42]. More importantly, however, the exceptions included in these Acts brought the UK in front of the EcrTHR which was called to investigate claims that were primarily concerned with arrest and detention powers, detainees' rights to legal advice and contact with their relatives and entry and staying in the country. The stop-and-search powers under section 44 of the Act have been ruled illegal by the EcrTHR, and the UK was asked to amend them.

To justify the harsh provisions of this legislation, the UK used Article 15 to derogate from certain sections of Article 5 ECHR. Article 15, however, can be used only "in time of war or other public emergency threatening the life of the nation...", while measures can be employed "to the extent strictly required by the exigencies of the situation and provided such measures are not inconsistent with its other obligations under international law." In Section 5(1) of the Special Immigration and Appeals Commission Act, the UK government stated that the justification of the derogation from Article 5 is that "there exists a state of emergency threatening the nation. According to the government, this is due to foreign nationals present in the country who are "suspected of being concerned in the commission,



preparation or instigation of acts of international terrorism.” The Article’s “time of war” and “public emergency” criteria can by definition exist only within a certain period of time and cannot extend infinitely. Consequently, we must assume that the UK government equals the current status quo with a war and in doing so it justifies the removal of basic human rights. This war on terror constitutes the second lever that motivates governmental and institutional powers that control justice, fairness and the equality that we all deserve including our right to be presumed innocent, to be alive and to be treated with dignity.

#### *4.4. Power and Control through Nationalism*

The final power that impedes progress on social justice and the human rights project for a regional democracy relates to the politics of nationalism. In simple terms, Motyl describes nationalism as “the structural conditions of modern society in order to exist” [43]. A closer look reveals that the notion is far more complicated, particularly when put in the context of universal values such as civil rights. Often attached to nationalism are the notions of identity and unified community. History and the extant literature have provided enough evidence to safely state that certain groups in modern society, as these are represented by small and large political parties, believe that the concept of nation and citizenship should be limited to one ethnic or identity group, including one culture or religion. Often, what is perceived to be inconsistencies between the defined social order and the experience of that social order by its members results in a situation of anomie that nationalists seek to resolve [43]. They do so by engaging in acts, policies, structural reforms and politics that aim to remove whatever elements are deemed unacceptable. Some of these acts may even be the result of hate or fear towards certain groups such as migrants, foreign powers or minority communities. In this journey, civil rights are seen as a hindrance to sovereignty and a destruction from pursuing national interests.

Take the UK as an example. Over the last few years, a strong rhetoric has developed around immigration. Led by certain political parties and populist figures, this rhetoric gained ground leading to a strong belief that the country is being taken over by asylum seekers and immigrants. For example, speaking to the BBC, the then-UKIP leader, Farage, said, “I think it’s legitimate to say that if people feel they have lost control completely—and we have lost control of our borders completely as members of the European Union—and if people feel that voting doesn’t change anything, then violence is the next step.” [44]. In the lead up to the UK referendum, statements such as these were not uncommon. The then-Prime Minister said to the European Commission: “It will be argued that freedom of movement is a holy principle—one of the four cardinal principles of the EU, alongside freedom of capital, of services and of goods—and that what we are suggesting is heresy.” He continued: “This is about saying: our welfare system is like a national club. It’s made up of the contribution of hardworking British taxpayers.” [45].

The reality, however, is somehow different. According to the UK government’s 2016 paper “The process for withdrawing from the European Union” [46], there are almost 2 million Britons living in the EU. Reversely, there are just over 3 million EU citizens living in the UK [47], a country with a population of almost 65 million. Recently, the World Economic Forum stated that the UK is currently holding 168,937 refugees while ranking among the world’s six wealthiest nations. This is compared against countries such as South Africa hosting 1,217,708 and Lebanon holding over 1,535,662 refugees while ranking as some of the poorest countries on the globe [48]. A 2015 European Commission study also showed that there is no evidence of “benefits tourism” happening in Europe. The report said that “in most countries, EU migrants represent less than 5% of welfare beneficiaries and these migrants make an overall net contribution to the finances of their host countries because they pay more in taxes than they receive in benefits, the study found.” [49].

And yet, the politics of nationalism have led to a status quo whereby the country is asked to re-define its position towards Europe including its commitment to the ECHR and the values to which it subscribed following the Second World War. The current UK Prime Minister stated that the UK must withdraw from the ECHR as it “can bind the hands of Parliament.”

The UK is not alone in its efforts to minimize the standing of the ECHR and the Council. At the time of writing, Turkey, a member of the Council of Europe and an accession EU member has withdrawn from all its obligations under the ECHR. The country is also considering the return of the death penalty while Amnesty International has just released undeniable evidence of torture, rape and abuse of prisoners [50]. The justification is the punishment of all those involved in the failed coup of 15 July 2016. During the coup, more than 6000 people were arrested in crackdown, 294 were killed and over 2839 soldiers are held in prison while 2745 judges are facing arrest. According to the Turkish Prime Minister, Erdogan, the coup was motivated by Gulen, a cleric who promotes a mystical form of Islam based on democracy, education, interfaith dialogue and science. This is in contradiction with his own Islamist policies and Turkey's intentions for secular policies.

Watching with concern, the European Commissioner, Guenther Oettinger, stated that Turkey is moving away from the core values represented by the EU. He warned the Turkish Prime Minister that in doing so he would "strengthen his position domestically, but he would isolate himself internationally." [50].

## 5. A Way Forward

Where do we go from here? Despite the sense of pessimism underlying the paper, I think we are living in opportune times. Institutions and policies are being reviewed globally (and nationally), and we are slowly becoming a bit more honest about our thoughts and feelings for each other. Public authorities are forced to become more accountable and partnership between states and civil society is encouraged particularly through funding structures and research projects sponsored by the EU (e.g., see FP7, Horizon 2020), the Council of Europe (e.g., Europe for Citizens), and the UN.

It is naïve to believe that the law alone can bring social justice. History has shown that it is through the result of millions of small actions that we change the *status quo*. These are mostly undertaken by people not in government nor with power. Historic examples include: votes for women, civil rights in America, or Indian independence. The role of civil society has long been underestimated and it is now becoming clearer that without the NGOs, movements and campaigns that comprise it, governments and other vessels of power would not be held accountable.

It is also important how we accept "social justice" and "justice" and how much room we allow those in power to manoeuvre. Aristotle and his followers explain that justice is hardly a subjective notion. It is made of ingredients that are pure and easy to identify in nature. It is the theories that have been developed to explain these ingredients that are human constructs and hence subjective. For example, for the advocates of divine command theory, justice is the authoritative command of God. Some, such as Plato, have argued that justice is the interest of the strong, i.e., a name for whatever the powerful or cunning ruler has managed to impose on the people.<sup>28</sup> For Nietzsche, justice is part of the slave-morality of the weak many, rooted in their resentment of the strong few, and intended to keep the noble man down.<sup>29</sup> Thomas Hobbes sees justice as a collection of enforceable, authoritative rules created by the public and hence injustice is whatever those rules forbid, regardless of their relation to morality.<sup>30</sup> Thinkers belonging to the social contract tradition would argue that justice is derived from the mutual agreement of everyone concerned or from what they would agree to under hypothetical conditions. For the Council of Europe, social justice is the state of affairs created through a regional democracy that is enjoyed consistently across the region through the realization of minimum standards. These are to be found in the regional treaty of the ECHR.

Human rights are not panacean and it is not the intention of this paper to present them as the answer to all evils. They are merely a modern construct that through their legal dimension (articles)

<sup>28</sup> See Plato's Republic, esp. Thrasymachus.

<sup>29</sup> Nietzsche said: "Justice (fairness) originates among those who are approximately equally powerful." [51].

<sup>30</sup> See [52,53].

or value-based nature (standards/values) can provide some sort of uniformity in the protection of our dignity and respect. Returning to Roosevelt's reminder "Where do human rights begin?" they are indeed the microcosm of each one of us. Not just legal articles. Gavrielides summarized these value-based entitlements as: human dignity and respect, equality, fairness, justice and the rule of law, liberty and individual empowerment, equity and proportionality, brotherhood and solidarity, effectiveness, transparency and confidentiality, community duty and individual responsibility, and freedom from fear [11]. Who can disagree that these are the core ingredients of our humanity and social justice? The human rights project which started with the Enlightenment and continues today has evolved from protecting individuals from state brutality to establishing a set of ethical standards essential to creating a decent society [9,10]. It has been argued that while all religions, secular traditions and schools of thought prior to the Enlightenment shared basic visions of a common good and championed certain individual standards within the human rights discourse, the collective understanding of the term "human rights" was not captured [11]. Most importantly, they did not perceive all individuals as of equal value. From the New Testament to the Qu'aran, Hammurabi's Code and Plato, one can easily identify a lack of common vision towards certain groups such as women and homosexuals, servants (or slaves), the disabled or the elderly.

This is not to suggest that after the Enlightenment, the French Revolution and the UDHR, the implementation of human rights as a collective and universal vision of dignity, respect and liberty was materialised. For instance, in the European colonies and in America, slavery continued until the early 19th century. In Europe and its extended colonies, women did not enjoy equal rights and were only able to vote equally by the mid-20th century (e.g., in England in 1928). Children's rights continue to be usurped and the equal treatment of gays and lesbians is yet to be enjoyed.

However, what did change post the UDHR was the narrative on human rights which were discussed at intellectual, academic and political levels as an aspirational charter of minimum standards for all. The development of a universal language of human rights that was informed by secular and international treaties started to take place.

Long battles have been fought and many have died setting up the human rights project in Europe and internationally. The three levers that motivate the abuse of power and creation of control are not made of steel. They can be broken. Reversing the backlash of social justice in Europe is not impossible. In fact, this paper illustrated the missed potential of the ECHR and the counter-power that the Court's case law can introduce consistently across Europe. So, the first step for everyone to take, whether with or without power, is to acknowledge the existence of forces of power and control and, post this acknowledgement, believe that the status quo that they create can indeed change.

**Conflicts of Interest:** The author declares no conflict of interest.

## Abbreviations

The following abbreviations are used in this manuscript:

ECHR	European Convention on Human rights
CoE	Council of Europe
UDHR	Universal Declaration of Human Rights
EcrHR	European Court of Human Rights

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