

# THE STANDARD APPROACH UNDER ARTICLES 8 – 11 ECHR AND ARTICLE 2 ECHR

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## THE STANDARD APPROACH:

In assessing cases under the European Convention on Human Rights, the European Court of Human Rights has developed a standard approach, in particular as concerns cases under Articles 8 – 11 of the Convention, which are similarly structured. Indeed, the approach is based on the structure of these articles, which consist of two paragraphs: a first paragraph defining the right, and a second paragraph setting out the permissible restrictions. To take Article 8 as the example (there are some complications in some other articles:

### **Article 8 . Right to respect for private and family life**

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court has held that, given the fundamental nature of the Convention rights, the first paragraph should be widely interpreted, and the second one narrowly. Rights must therefore be “stretched”, and limitations limited. Also, individuals need only show that there was an interference with a right protected by the Convention in their case; the State then bears the onus to prove that that interference was lawful and justified in Convention terms.

It is also important to note that the Court sees its overall function - and indeed the function of the Convention - as ensuring respect for the rule of law, and providing protection against the opposite of the rule of law: arbitrary power (or unfettered discretion). These very basic considerations inform the thinking of the Court throughout its standard assessments.

Under the standard approach, the Court asks the questions set out under the next heading, in the order given; if an answer to one of the questions leads to the conclusion that there has been a violation of the Convention, or that there has been no violation (as indicated), the Court usually does not pursue the subsequent questions.

Many elements of this standard approach - e.g., the questions listed below relating to “law”, “legitimate aim”, “necessity” and “proportionality”, and the importance of procedural safeguards in the latter assessments - are also apparent in the Court’s case-law under other articles, including Article 2 on the Right to Life, as discussed later.

THE STANDARD QUESTIONS:

**1. Does the issue fall within the scope of one of the substantive articles of the Convention?**

Note: As noted above, the Court usually interprets the right widely. Thus, the right to respect for one's "correspondence" under Article 8 ECHR has been held to extend to all types of communications, including faxes and emails (and presumably also includes SMS/texts).

YES: continue with Q2 ? → NO: *no issue under the ECHR*

**2. Was there an "interference" with the right?**

Note: Any "formality", "condition", "restriction" or "penalty" constitutes an "interference. Thus, e.g., even a simple requirement that a permit be obtained constitutes an interference, even if the permit is not denied. Sometimes, the very existence of a law may constitute an interference, even if it has not been (or cannot be proven to have been) applied in the particular case.

YES: continue with Q3 ? → NO: *no violation*

NB: from now the onus of proof switches to the State.

**3. Was the interference based on (authorised or prescribed by) "law"?**

Note: The word "law" encompasses not only primary legislation, but also subsidiary rules and judicial case-law: it covers all the domestic legal rules that allow for interferences with fundamental rights. However, the word does not merely refer back to domestic law in the sense of leaving it completely up to the domestic law-making authorities (including courts) to make up the rules as they see fit. Rather, the Court examines the "quality of the law": legal rules that do not have the relevant quality are not "law" in terms of the Convention - not even if they serve a "legitimate aim". Specifically, the Convention requires that any domestic law authorising (or invoked as justification for) an interference with individual rights must be "compatible with the rule of law" and, in particular, accessible (that usually means, published) and sufficiently clear and precise to be "foreseeable" in its application.

The Court recognises that laws (and subsidiary rules) cannot always be phrased with absolute precision, leaving no room for interpretation or discretion, and that the law may evolve. The bottom line is that the law must protect against "arbitrary interferences by public authorities" with the right in question. To the extent that the law grants certain bodies a certain discretion it must therefore also provide procedural protection against arbitrary use of that discretion. A relatively vaguely-worded legal rule can therefore be "rescued" - be held to be still compatible with the Convention - provided that sound procedural safeguards are in place to ensure that the rule is not arbitrarily applied. To that extent, the question of "law" therefore relates to the question of procedural protection, addressed in Question 5.B, below.

YES: continue with Q4 ? → NO: *there has been a violation*

*Note the importance of the above question of "law" and its place in the sequence of questions. If a restriction is not based on "law" - i.e. on a legal rule that meets the "quality" requirements developed by the Court - the Convention has been violated. It does not matter that the interference or the impugned rule was aimed at serving a "legitimate aim" (as discussed next); the interference imposed under the rule might even, considered on its own, be "necessary" to achieve that aim. Yet the system is still not compatible with the Convention. The Court will in fact usually refuse to examine those further issues.*

#### 4. Did the interference pursue a “legitimate aim”?

Note: The State cannot invoke just any aim to justify an interference with a Convention right. On the contrary, the Convention spells out the legitimate aims in pursuit of which those rights may be limited. However, it does so in quite sweeping terms (e.g., national security, public safety, public order, health or morals, the protection of the rights and freedom of others), and the State usually does not find it too difficult to point to a “legitimate aim” for which an interference was imposed. Suffice it to note that in different articles, the relevant aims are listed in somewhat varying terms, and the State must justify any interference with a particular Convention right with reference to one of the specific legitimate aims listed in the (second paragraph of) the article dealing with that right. For instance, national security is not mentioned as a legitimate aim in Article 9 of the Convention, which protects the right to freedom of thought, conscience and religion; States may therefore not interfere with that right on that ground. It may also be noted that restrictions on rights which the State claims serve a particular (legitimate) purpose must indeed have been imposed for that purpose, and should not serve as an excuse to impose them for different ends; that would contravene Article 18 of the Convention.

YES: continue with Q5 ? → NO: *there has been a violation*

#### 5. A. Was the interference “necessary in a democratic society” to achieve the legitimate aim in question in the particular case and “proportionate” to that aim, taking into account the “margin of appreciation” accorded to the State in question?

Note: This is, in a way, the most complex and open-ended, and potentially the most subjective test, but there are a number of pointers. First of all, the text of Articles 8 to 11 only expressly refers to the requirement that any interference or restriction must be “necessary in a democratic society”; it does not expressly mention proportionality. The word “necessary” itself implies that there must be no lesser means available, that the legitimate aim that is pursued by the interference cannot be achieved by less restrictive measures. In practice, the Court examines whether there was a “pressing social need” for the interference and, if so, whether the interference was reasonably proportionate to the fulfilment of that need. Finally, the words “in a democratic society” allow the Court to examine the interference in a particular country in the light of what such a society requires. The Court takes the standards set by the Council of Europe and its Member States as the main measure. In practice, this means that the Court can look at COE Conventions other than the ECHR (such as the Oviedo Convention on Bio-Ethics), at COE PACE and COM Recommendations, and at law and practice in the Member States. If there is a large measure of agreement on an issue, as reflected in such other Conventions, Recommendations and/or State practice, this will be a strong indication of what a “democratic society” requires.

The question ties in with the next main issue: the so-called “margin of appreciation” accorded to States. This was described by the Court in its 1979 *Sunday Times* judgment in the following terms (with reference to its earlier *Handyside* judgment):

[T]he Court has underlined that the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States. Accordingly, “Article 10 (2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ... and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force”.

“Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation”: “The Court ... is empowered to give the final ruling on whether a ‘restriction’ ... is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision” which “covers not only the basic legislation but also the decision applying it, even one given by an independent court”.

(*Sunday Times v. the United Kingdom*, judgment of 26 April 1979, para. 59, quoting the *Handyside v. the United Kingdom* judgment of 7 December 1976, paras. 48 and 49).

If there is a large measure of agreement on an issue, of the kind just mentioned, States will have a narrow margin of appreciation, corresponding to a quite in-depth examination by the Court of the necessity of the interference. Conversely, if there are no special Conventions or Recommendations, and there is considerable disagreement and difference in law and practice, the margin will be wide, and the Court will leave it mainly up to each State how to regulate the manner in question. On some issues, moreover, such as moral questions, the Court tends to find that States are generally to be granted a wide margin.

**B. Are there appropriate and effective procedural guarantees against abuse?**

In addressing the questions of “necessity” and “proportionality” the Court also, increasingly, takes into account procedural matters, in particular if it accepts that the issues require the striking of a delicate balance between competing (in particular private/public) interests. In such cases, it will also, in this context, consider the question posed below, at B.

NB: This is so even though, in the Convention, the question of “effective remedy” also arises separately, under Article 13, which requires that anyone who has an arguable case that his or her rights under the Convention have been violated, must be given an “effective remedy under domestic law”. In cases in which the Court addresses the procedural issues in the context of its assessment of compliance with a particular substantive issue - i.e., usual in the context of its assessment of the “necessity” and “proportionality” of an interference with the right concerned - the Court will usually decline to then also examine the issue under Article 13, holding instead that “no separate issue” arises under that article.

If the answer to Question 5.A, and where appropriate to 5.B is:

YES: *there has been no violation*

(i.e., Yes, although there was an interference, that interference was necessary, and there are adequate procedural safeguards against abuse)

NO: *there has been a violation*

(i.e., No, the interference was not necessary, or there were insufficient guarantees against abuse)

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**ELEMENTS OF THE STANDARD APPROACH AND ARTICLE 2 ECHR:**

(From D Korff, The Right to Life: A Guide to the Interpretation of Article 2 of the European Convention on Human Rights, Human Rights Handbooks No. 8, Council of Europe, 2006.)

The first substantive right proclaimed by the Convention is the right to life, set out in Article 2 in the following terms:

**Article 2**  
***Right to Life***

1. *Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
  - (a) *in defence of any person from unlawful violence;*
  - (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

The right to life is listed first because it is the most basic human right of all: if one could be arbitrarily deprived of one's right to life, all other rights would become illusory. The fundamental nature of the right is also clear from the fact that it is "non-derogable": it may not be denied even in "time of war or other public emergency threatening the life of the nation" - although, as discussed later, "deaths resulting from lawful acts of war" do not constitute violations of the right to life (Article 15(2)). As the Court put it in its Grand Chamber (GC) judgment in the case of McCann and Others v. the United Kingdom:

Article 2 ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention [the prohibition of torture], it also enshrines one of the basic values of the democratic societies making up the Council of Europe.<sup>1</sup>

Because of this, the Court said, "its provisions must be strictly construed."<sup>2</sup>

The second sentence of Article 2(1) concerns the death penalty, which will not be discussed here.

That question aside, Article 2 contains two fundamental elements, reflected in its two paragraphs: a general obligation to protect the right to life "by law" (para. 1), and a prohibition of deprivation of life, delimited by a list of exceptions (para. 2). This is similar to the structure of Articles 8 to 11 of the Convention. As explained in Human Rights Handbooks Nos. 1 and 2, with reference to Articles 8 and 10 respectively, the European Commission and Court of Human Rights have derived certain important concepts and tests

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<sup>1</sup> *McCann and Others v. the United Kingdom*, GC judgment of 5 September 1995, para. 147, with reference to *Soering v. the United Kingdom*, judgment of 7 July 1989, para 88.

<sup>2</sup> *McCann* GC judgment, para. 147.

from this structure. These are also important in the context of Article 2, although there are some differences, which mainly strengthen the right and limit the exceptions.

Specifically, Articles 8 to 11 stipulate that restrictions on the rights they guarantee must be provided for “by law”, but under Article 2 the right itself must be “protected by law”. This gives additional weight to the right: While States are not generally required to incorporate the Convention into their domestic law,<sup>3</sup> as far as the right to life is concerned, they must still at least have laws in place which, in various contexts, protect that right to an extent and in a manner that substantively reflect the Convention standards of Article 2.<sup>4</sup>

The concept of “law” must here, moreover, be interpreted in the same way as in those other articles (and in the Convention generally), that is, as requiring rules that are accessible, and reasonably precise and foreseeable in their application.<sup>5</sup> This has implications, e.g., for the rules on the use of lethal force in law enforcement, as discussed later.

As far as the second paragraph is concerned, Article 2 allows for exceptions to the right to life only when this is “absolutely necessary” for one of the aims set out in sub-paragraphs (2)(a) – (c). Again, this denotes a stricter test than under the provisions of the Convention that allow restrictions on rights when this is simply “necessary in a democratic society” for the “legitimate aims” listed in them. As the Court put it in McCann:

In this respect the use of the term “absolutely necessary” in Article 2 para. 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.<sup>6</sup>

Finally, the Court has held that Article 2 imposes a “positive obligation” on States to investigate deaths that may have occurred in violation of this article. This procedural requirement was first stated in the case of McCann, concerning killings by agents of the State, in the following terms:

The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “*secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention*”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.<sup>7</sup>

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<sup>3</sup> E.g., *James and Others v. the United Kingdom*, judgment of 21 February 1986, para. 84; *Holy Monasteries v. Greece*, judgment of 9 December 1994, para. 90.

<sup>4</sup> Cf. the discussion of domestic law in the *McCann GC judgment*, paras. 151 – 155.

<sup>5</sup> *Sunday Times v. the United Kingdom (I)*, judgment of 29 March 1979, para. 49, repeated in many cases since.

<sup>6</sup> *McCann GC judgment*, para. 149.

<sup>7</sup> *McCann GC judgment*, para. 161.