

The case law of the European Court of Human Rights on the protection of Human Rights and freedoms in terms of national security protection

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ABSTRACT

The objective of the study was to analyze the practices of the European Court of Human Rights to resolve disputes related to violations of Human Rights and freedoms and the protection of national security. The chosen topic was extensively studied through empirical and theoretical research methods, as well as comparative analysis. The work of the European Court of Human Rights in the field of the protection of Human Rights and freedoms in terms of national security is related to the resolution of disputes regarding: restrictions on privacy, access to justice, freedom of expression and freedom of peaceful assembly to protect one's interests. The relative provisions of the national legal framework and the Convention for the Protection of Human Rights and Fundamental Freedoms largely determine the role of the European Court of Human Rights in resolving disputes related to the respect of Human Rights and freedoms, as well as the protection of the rights to national security. The jurisprudence of the European Court of Human Rights indicates the current state of the application of legal resources at the international and national levels to guarantee national security, through the application of sanctions and the imposition of restrictions on Human Rights and freedoms.

KEYWORDS: European Court of Human Rights, rights and freedoms, national security, protection, justice.

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La jurisprudencia del Tribunal Europeo de Derechos Humanos sobre la protección de los Derechos Humanos y las libertades en términos de protección de la seguridad nacional

RESUMEN

El objetivo del estudio fue analizar las prácticas del Tribunal Europeo de Derechos Humanos para resolver disputas relacionadas con violaciones de los Derechos Humanos y las libertades y la protección de la seguridad nacional. El tema elegido fue estudiado exhaustivamente a través de los métodos de investigación empíricos y teóricos, así como del análisis comparativo. El trabajo del Tribunal Europeo de Derechos Humanos en el campo de la protección de los Derechos Humanos y las libertades en términos de seguridad nacional está relacionado con la resolución de disputas con respecto a: las restricciones a la privacidad, el acceso a la justicia, la libertad de expresión y la libertad de reunión pacífica para proteger los propios intereses. Las disposiciones relativas del marco jurídico nacional y el Convenio para la Protección de los Derechos Humanos y las Libertades Fundamentales determinan en gran medida el papel del Tribunal Europeo de Derechos Humanos en la resolución de litigios relacionados con el respeto de los Derechos Humanos y las libertades, así como la protección de los derechos a la seguridad nacional. La jurisprudencia del Tribunal Europeo de Derechos Humanos indica el estado actual de la aplicación de recursos legales a nivel internacional y nacional para garantizar la seguridad nacional, mediante la aplicación de sanciones y la imposición de restricciones a los Derechos Humanos y las libertades.

PALABRAS CLAVE: Tribunal Europeo de Derechos Humanos, derechos y libertades, seguridad nacional, protección, justicia.

Introduction

Current transformations that occur in the society significantly expand the scope of protection of individual rights and freedoms. The respect for the latter must be ensured by legal tools. The generally expanding scope of fundamental human rights contributes to the legally enshrined self-identification, self-determination and self-fulfilment of an individual. An expanded content of human rights and freedoms promotes the establishment of their protection at the national and international levels. In the Council of Europe, the European Court of Human Rights (ECHR) deals with the respect of fundamental human rights and freedoms through the application of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, n.d.). The provisions of this Convention provide for the violations and restrictions of fundamental human rights and

freedoms in terms of the protection of national security. However, their practical implementation by public authorities is the subject of an appeal to the ECHR to resolve a dispute over a law enforcement.

The issue of protection of national interests and security of the state is substantial in view of the overall development of the country and the implementation of its national strategies. The specifics of economic, socio-political and spiritual and cultural development of each state separately determine the peculiarities of the protection of security. The concept of national security of any state is the key to the analysis of national security in terms of protection of human rights and freedoms underlies. Understanding the content of national security also allows determining the basic principles of national security policy, the main function of which is to establish the priority interests of the state and its nation, and to manage the development of the basic strategies that identify the main threats to the state and the way to eliminate them.

Over time, the case law related to resolving disputes on human rights violations has become relevant. According to the ECHR, more than 1 million appeals have been filed with the court, 24,511 decisions have been made and 957.3 thousand applications have been examined for 63 years of its existence (European Court of Human Rights, 2022; 2022a). Russia (18.8%), Turkey (12.6%), Ukraine (10.3%), Romania (8.6%) and Poland (7.4%) applied to the ECHR for protection of their rights and freedoms. Almost 40% of decisions were made in relation to three countries: Turkey (15.6%), Russia (12.7%) and Italy (10.1%). The ECHR reports that 84% of the decisions found violated human rights and freedoms under the Convention for the Protection of Human Rights and Fundamental Freedoms. Excessive politicization of the issue of respect for human rights and freedoms in terms of national security and the lack of a clear legal position of the judiciary in this regard significantly complicates the research on the above issues. Although, the analysis of international guarantees of human rights and provisions for the protection of national security and the practice of their application in the current context is necessary for identifying a number of factors that require thorough scientific study.

The aim of the selected study is to determine the effectiveness of the ECHR in respecting human rights and freedoms through the prism of protecting national security.

To aim of the article involved the following research objectives:

- determine and describe European standards for the protection of human rights and fundamental freedoms;
- examine the national security protection system provided by the ECHR;
- identify the main problems of practical application of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and propose the ways to solve them.

1. Literature review

Many researchers have studied the protection of human rights and freedoms through the prism of ECHR case law on national security. Bachmann and Sanden (2017) studied the ECHR interpretation of the provisions of the European Convention on Human Rights from the perspective of national security protection. Hajipour (2020) studied the national security protection in terms of the respect for the right to a fair trial, and concluded that the ECHR exercises this right by deciding to subject cases to retrial at the national level. Chamberlain (2018) examined national security cases and found that the court took into account all the circumstances in order to make a fair decision in such cases.

Bignami and Resta (2018) examined the national security protection by the judicial authorities in terms of violation of the right to privacy and the espionage activities. Christakis and Bouslimani (2019) and Magnus (2020) considered ECHR case law on intelligence and surveillance as part of a threat to national and public security. These scholars consider the European Court not only as a guarantor of human rights, but also the institution that has repeatedly balanced the interests of national security and inviolability of life, taking into account the rule of law and legislation. Grădinaru (2018) studied ECHR case law in terms of technical surveillance at the European level, and found that technical surveillance was a manifestation of the violation of the right to privacy of any European citizen. Natoli (2019) reviewed the trends of ECHR cybersecurity protection case law and found that this judicial authority is a guarantor of privacy and the right to freedom of expression in digital world.

Fabbrini (2018) and Curtin (2018) studied the ECHR case law on the balance of counter-terrorism and national security. Galani (2020) examined ECHR judgments on terrorism from the perspective of national security, and concluded that national security is not a ground for violating human rights and freedoms, and the court undermines the

principles of justice by making decisions on such cases in violation of these rights. Szabó and Năvodariu (2019) and Radu (2018) reviewed the Romania's practice of ECHR judgments on the protection of refugees in the context of national security, and established the refusal of trial in most cases due to their importance for national security. Kudriashova (2017) dealt with the case law on suppression of non-traditional religious associations under the pretext of national security protection, and determined that judicial authorities handle non-traditional religious associations sensitively and consider them as a threat to national security despite the legally established principles of religious freedom.

Nevertheless, despite the wide range of research on this issue, the issues of the effectiveness of ECHR work in the field of protection of human rights and freedoms and national security are partially studied, which determines the topicality of the research.

2. Methods and materials

This study involved three stages. The first stage provided for the search and study of academic literature on justice, research on violations human rights and freedoms to ensure national security, the provisions of international treaties on human rights and freedoms, the practice of application of the legal remedies for national security protection and analysis of ECHR practices of resolving disputes related to the protection of human rights and freedoms and national security. The topic, aim and objectives of the study were identified and established by analysing the said references.

The second stage involved a theoretical and experimental study of the chosen topic conducted by comparing their results and analysing the differences. The theoretical study revealed the essence of the ECHR national security protection system in terms of respect for human rights and freedoms. The tasks and the role of ECHR in protecting human rights and freedoms and national security were determined through the experimental research based on international standards, the legal framework of European justice and generalization of their practical application, as well as theoretical analysis of research papers on problematic issues of ECHR.

The third stage involved the final analysis for achievement of the aim and setting out the research results in writing.

The research topic was studied through the use of empirical and theoretical methods. Empirical research reflects the object of the research — ECHR work on the protection of human rights and freedoms in terms of the national interests — from the standpoint of international legal support of European justice and the importance of ECHR role in the protection of human rights and freedoms and national security for member states of the Council of Europe. Academic, legal, statistical and practical information on the components of the national security system was analysed from the perspective of the protection of human rights and freedoms through the comparative analysis. Theoretical research of European justice reveals the subject of research in terms of the universal internal, essential connections and regularities, which are covered by rational processing of empirical data. The combination of empirical and theoretical methods allowed making an empirical interpretation of the theory and theoretical interpretation of empirical data, as well as revealing the role of ECHR in the system of protection of human rights and freedoms and national security.

The research sample included the following research objects: general characteristics of European justice and its powers in the system of protection of human rights and freedoms and national security, analysis of the ECHR national security protection system and practical recommendations for interpretation of international standards for respect of human rights and freedoms. ECHR case law was conducive in determining systems for the protection of national security, as well as human rights and freedoms. The combined study of these objects revealed the problems of justice in the field of protection of human rights and freedoms. The research was based on information retrieval and scientometric databases.

International legal acts were the core materials of the research: the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the ECHR case law.

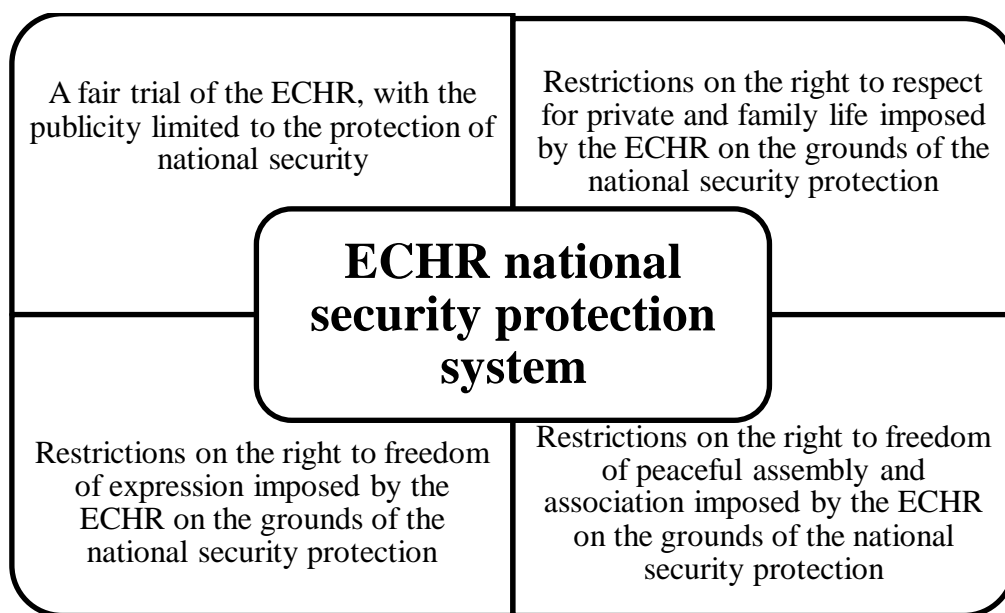
3. Results

The provisions of Section II of the Convention for the Protection of Human Rights and Fundamental Freedoms determine the work of the ECHR as the main international and regional court of justice (United Nations, 2021). According to Article 32 of the Convention, jurisdiction of the ECHR applies to all matters of interpretation and application of the Convention and its Protocols. The Court considers applications filed by individuals who

complain of violations of their rights and freedoms by adhering to the rule of law, the rule of law and justice to restore fundamental human rights and freedoms which are proclaimed not only by the Convention but also by the Universal Declaration of Human Rights.

International control over the observance of national security interests in a democratic society is the most important legal instrument used not only to address issues related to the protection of rights and freedoms of individuals, groups, but also to improve legislation and law enforcement practices of the states in accordance with international standards. The provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulate that the ECHR national security protection system (Figure 1) is established by Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life), Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association).

Figure 1. ECHR national security protection system.



Source: author's development based on (Council of Europe, n.d.).

The Convention for the Protection of Human Rights and Fundamental Freedoms guarantees everyone a fair and public trial of his or her appeal in the ECHR on the violation of his or her civil rights and obligations or the establishment of the propriety of the criminal charges against him or her. The publicity of such cases may be limited by not admitting the media or the public to any part of the trial for the sake of morality, public order or national

security in a democratic society. At the same time, the court decision is announced publicly, despite the said restrictions.

The ECHR practice of trying cases of violation of the right of access to a court to ensure national security is primarily a manifestation of partiality in trying a case on the prohibition of declassifying case materials by a national court. The case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (European Court of Human Rights, 1998) was on the violation of the right to enter into a treaty on religious grounds and refusal to declassify part of the case by a national court during the trial. The ECHR recognized in its decision in this case that consideration of national security interests was a legitimate fact that entails the restriction of access to court and the objectivity of trial.

The ECHR is an international organisation empowered to settle disputes regarding the restriction of the right to respect for private and family life, home and correspondence. The violation of this right is a result of the activities of public authorities aimed at ensuring national and public security, preventing riots or crimes, protecting the health, morals, rights and freedoms of others and the economic well-being of the country as a whole.

ECHR case law on the interception in the interests of national security indicates a violation of privacy rights. In the case of *Klass and Others v. Germany* (European Court of Human Rights, 1978), they challenged the legislation that restricted the right to secrecy of correspondence, mail and telephone conversations by interception without the obligations of special authorities to inform the persons concerned in any case after interception. In this case, the ECHR established that German law provided for a system of the interception of correspondence of any person without notice. The ECHR recognized this system as a violation of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which may target any person even without documentary evidence of interception.

In its decision on *Weber and Saravia v. Germany* (European Court of Human Rights, 2006), the ECHR notes that although surveillance and interception of communications is lawful, they violate Article 8 of this Convention, regardless of the circumstances, the interests of national security including. In *Kennedy v. The United Kingdom* (European Court of Human Rights, 2010), the ECHR noted that surveillance should not be used excessively by public authorities, as such actions may be of public concern. So, having tried such cases, the ECHR recognizes that a person who has been subjected to an invasion of privacy has the

right to identify himself or herself as a victim of action undertaken by the state — a surveillance, or the legislation that allows such action. When filing a statement of claim, the victim is not obliged to indicate the facts of the use of surveillance.

The ECHR case law on violation of the right to privacy not only indicates a violation of this a right provided by Article 8 of the Convention, but also recognizes such a violation a crime for the settlement of disputed public relations. ECHR made such a decision in *Buturugă v. Romania* (European Court of Human Rights, 2020), where it identified cyberbullying as a form of domestic violence against women. The ECHR recognizes the monitoring, access to or retention of correspondence of one of the spouses without the right to do it of another one to be the domestic violence. In this case, the ECHR also recognizes cyberbullying as a form of violence and harassment on the Internet.

The ECHR tries cases on restricted right to freedom of expression to resolve disputes related to national security protection in a democratic society. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that this right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Violation of the said freedoms result from the application of certain restrictions or sanctions by public authorities approved by law. Public authorities apply these measures in the interests of national and public security, for protection of territorial integrity, to prevent riots or offenses, to protect the health, morals, reputation, rights and freedoms of others, and to prevent the disclosure of confidential information.

ECHR practices of resolving disputes over violations of freedom of expression and national security point to the legitimacy of prosecution established by law to protect a democratic society. The case of *Church v. Spain*, where the senator accused the government of killing nationalists, reflects the legitimacy of the restriction of freedom of opinion (European Court of Human Rights, 1992). The national court refused senator to accept the evidence of his statements, which reflected his view of the case, referring to the protection of national security. In its decision in the case, the ECHR established a violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Court of Human Rights, 2013).

The ECHR resolves disputes arising from violations of the right to freedom of peaceful assembly and association, including the establishment of trade unions and joining them for the purpose of protection of one's own interests to ensure national security in a democratic society. The actions of public authorities that impose certain restrictions with the purpose of protecting national and public security, preventing riots and disorder, as well as protecting the health, morals, rights and freedoms of others are violations of the said freedoms. Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides the exception of the necessary legal restrictions on such rights in relation to law enforcement and public authorities.

An increasing year-to-year trend of appeals to the ECHR for protection of rights and freedoms is observed. Table 1 presents the distribution of the number of appeals submitted to the ECHR from European countries in 2021 and 1959-2021.

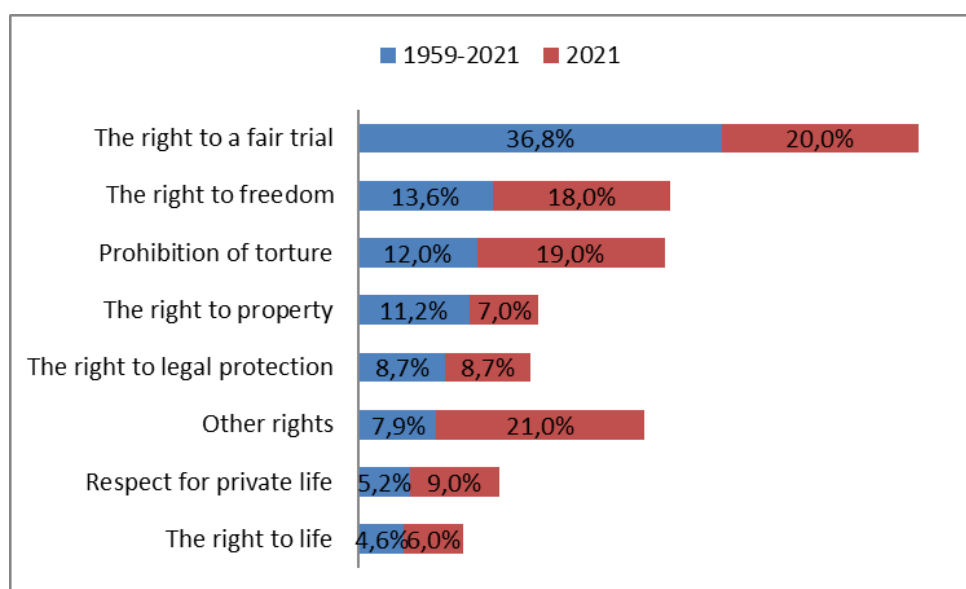
Table 1. Number of appeals submitted to the ECHR from European countries in 2021 and 1959-2021

Country	Years		Country	Years	
	1959-2021	2021		1959-2021	2021
TOTAL	1,019,471	44,257	Switzerland	7,908	273
Russia	191,965	9,432	Lithuania	7,624	429
Turkey	129,040	9,548	Azerbaijan	6,978	425
Ukraine	104,783	3,721	Macedonia	6,518	394
Romania	87,964	2,971	Georgia	6,489	120
Poland	75,599	2,889	Finland	5,890	91
Italy	50,538	1,610	Latvia	5,496	268
France	35,258	764	Belgium	4,884	155
Serbia	34,858	1,993	Portugal	4,668	260
Germany	27,755	574	Armenia	4,078	134
Hungary	25,352	1,086	Estonia	3,807	113
Great Britain	23,197	210	Montenegro	3,594	381
Bulgaria	18,515	623	Norway	2,131	116
Croatia	17,491	698	Denmark	1,925	67
Moldova	15,940	630	Albania	1,591	75
Spain	14,099	614	Cyprus	1,348	52
Czech Republic	14,016	331	Ireland	1,085	35
Bosnia	13,212	784	Luxembourg	724	30
Netherlands	11,593	248	Malta	534	62
Greece	10,892	912	Iceland	359	21
Sweden	10,554	157	Liechtenstein	184	8
Slovenia	10,136	234	San Marino	136	18
Slovakia	9,576	460	Monaco	120	8
Austria	8,958	222	Andorra	109	11

Source: author's development based on European Court of Human Rights (2022; 2022a)

The history of the ECHR evidences that every third case concerned a violation of the right to a fair trial provided by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Figure 2 demonstrates the distribution of the remaining cases on violation of the rights under the Convention.

Figure 2. Distribution of appeals to the ECHR in 2021 and 1959-2021. Source: author's development based on European Court of Human Rights (2022; 2022a).



In 2021, almost 50% of cases were filed in the interests of national security in order to ensure national security protection in cases of the violation of the right to a fair trial (Article 6), respect for private and family life (Article 8), the restriction of freedom of expression (Article 10), as well as assembly and association (Article 11). Similarly, every second ECHR case in 1959-2021 concerned the protection of public and national security. The issue of protection of national interests has always been a priority for every state.

4. Discussion

The practice of applying the national legal framework for the protection of human rights and the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms mainly determine the effectiveness of the ECHR in resolving disputes related to respect for human rights and freedoms and national security protection. ECHR case law demonstrates the state of the application of legal remedies in the interests of

national security through the imposition of sanctions and restrictions on human rights and freedoms, both at the national and international levels.

According to Szabó and Năvodariu (2019, p. 375-377) and Majić (2021, p. 198-204), protection of national security is the ground for try cases in the ECHR. Kudriashova (2017) and Ulfstein (2020, p. 917-919) share this opinion and argue that the judicial authorities can make decisions which contain certain restrictions on human rights because of conflicts of law, despite the legally enshrined human rights and freedoms, in order to protect national security. As Natoli (2019, p. 145-150) and Radu (2018, p. 69-71) noted, the ECHR case law is important for the system of international guarantees of respect for human rights. They maintain that the adoption of a similar ECHR regulation on cybersecurity, which is identical to the text of the European Convention on Human Rights, further led to ambiguous interpretation of human right to privacy and freedom of expression by the ECHR in cybersecurity cases. Moreover, the digitalization process requires the adaptation of the legal system for its protection.

Turner (2020, p. 201-203) and Dickinson (2021) state that restrictions on human rights, including the prohibition of free expression about terrorist organizations and terrorism in the media and the Internet as a significant threat to public and national security, are a violation of human rights and freedoms proclaimed by international law. According to Prabhat (2020), the case law on national security shows that citizens convicted of terrorism have been deprived of their citizenship. Chlebny (2018, p. 115-117) notes that when committing crimes related to migration and national security, the courts decide on the deportation of such criminals or denial of visas and entry, ban on entry and deprivation of rights and temporary residence. He emphasizes that such measures violate international guarantees of human rights, despite the degree of guilt for crimes against national security, although they are necessary for protecting national security.

Hajipour (2020, p. 90-93) found that ECHR practices to return cases to the national level for retrial in order to eliminate violations of the right to a fair trial and national security protection. Chamberlain (2018, p. 496-498) maintains that doing justice in making decisions by the court, in trying cases on national security including, is the basis of the judicial system.

As Bignami and Resta (2018) and Vasile and Timiș (2010, 224-226) noted about court decisions in cases on the violations by spy agencies that keep a person's private life under

surveillance, the courts, although they must respect the right to privacy, may also impose certain restrictions on human rights from the perspective of national security protection. Having assessed the ECHR case law on intelligence and surveillance practices as part of a threat to national and public security, Christakis and Bouslimani (2019) and Magnus (2020) found a trend towards digitalization of such cases in the ECHR. The digital transformation of intelligence requires an urgent adjustment of the legal framework for the legality of the use of digital technologies in intelligence, face recognition technology including.

Analysing the ECHR cases on counter-terrorism and national security cases Fabbrini (2018, p. 869-874) and Curtin (2018, p. 846-850) identified that the ECHR, in contrast to national courts, studies the case more widely, requiring the study of materials containing state secret among other things. Researchers explain this position of the ECHR by a number of reasons, including location, time, and institutional structure. So, the ECHR case law on the non-disclosure of state secrets and national security is a tool of external oversight of the practical observance of human rights in European countries. Galani (2020, p. 97-100) believes that the court strikes the principles of justice by making decisions in terrorism cases from the perspective of protecting national security in violation of human rights, as national security is not a basis for violation of human rights and freedoms.

Grădinaru (2018, p. 5-7) and Simen (2020, p. 5-7) argue that the ECHR shall recognize the use of technical surveillance tools a violation of the right to privacy as a result of increased public attention. But the scholars emphasize that the public should not misuse such control, as ignoring the right to a fair trial entails biased proceedings.

As Karvatska and Zamorska (2018, p. 2-4) and Bachmann and Sanden (2017) point that the ECHR is the most effective system of human rights protection among the existing regional and national systems. Pădurariu (2020, p. 274-276) and Sychenko and Chernyaeva (2019, p. 171-174) state that ECHR is an effective tool in solving problems of social, political and economic regulation. The theoretical analysis of these issues of protection of human rights and freedoms and national security by ECHR revealed the need for further study of the effectiveness of ECHR on observance of international guarantees of human rights and the ECHR case law in this area, which would adjust the development of justice in general.

Conclusions

Public control over the observance of the national security interests of a democratic society at the international level is an effective legal tool for resolving disputes arising from violations of rights and freedoms committed in order to ensure national security. The ECHR practices of resolving these disputes promote further improvement of legislation and law enforcement practices of states in accordance with international standards.

The ECHR national security protection system consists of the following elements: publicity of the fair trial limited by the ECHR because of the protection of national security in a democratic society; the right to respect for private and family life restricted by the ECHR because of the protection of national security in a democratic society; the right to freedom of expression restricted by the ECHR because of the protection of national security in a democratic society; the right to freedom of peaceful assembly and association restricted by the ECHR in order to protect national security in a democratic society.

The prospects of further research involve the development of practical recommendations based on ECHR practices of resolving disputes related to respect for human rights and freedoms, as well as the national security protection. This is why we found further prospect in empirical study, as well as theoretical and methodological grounding of effective mechanisms for implementing international guarantees of human rights and freedoms at the national level, including a system of legal tools that ensure lawful activities of public authorities with the purpose of national security protection, which are necessary to ensure the development of the individual.

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