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## ANALYSIS OF AUTONOMOUS CONCEPTS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

### Abstract

*The European Court of Human Rights, when interpreting the rights guaranteed by the European Convention on Human Rights, develops in its jurisprudence autonomous concepts that serve as the foundation for the effective protection of human rights and fundamental freedoms. Thus, the European Court of Human Rights establishes certain standards that are binding on all Member States of the Council of Europe. Autonomous concepts act as a kind of “safeguard” against the abuse and arbitrariness of national authorities. They also contribute to the unification and harmonization of different legal systems, as well as the progress of a uniform judicial practice in the process of interpretation and application of law.*

*The purpose of this article is to reveal the essence and analyse the content and key components of such autonomous concepts as criminal charge, lawfulness, penalty, person of unsound mind, and peaceful assembly in the practice of the European Court of Human Rights.<sup>1</sup>*

### Keywords

*autonomous concepts – criminal charge – lawfulness – penalty – person of unsound mind – peaceful assembly*

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## INTRODUCTION

The European Court of Human Rights (ECtHR) plays a significant role in the development of the European system for the effective ensuring and protection of human rights. Its practice of interpreting and applying the European Convention on Human Rights (ECHR) promotes the convergence, integration, as well as the consolidation, of the various systems of law and legislation of the Member States of the Council of Europe.<sup>2</sup> In essence, the ECtHR sets minimum generally binding standards, requirements for the proper understanding of key Convention rights. The ECtHR fills human rights with real substantive content in practice, while its jurisprudence establishes certain legal framework for the interaction, implementation, and application of law. Thus, through dynamic and autonomous interpretation of the ECHR, the ECtHR also shapes and evolves contemporary patterns and trends with respect to human rights guaranteed by the ECHR.

It should be emphasized that the decisions by the ECtHR are final and not subject to appeal. Accordingly, the study of the case law of the ECtHR is important and relevant, especially in our time, when Europe and the whole world face many challenges related not only to the development of technologies, especially artificial intelligence, but also to global transformations caused by climate change, the progress of the pandemic, hybrid wars, limited resources, the growing influence of transnational corporations, etc. That is why the main task nowadays is to maintain an effective system for the protection of human rights and freedoms in practice at international and European levels, to find consensus and strike a fair balance between the various interests at stake.

On the basis of the principle of subsidiarity and respect for state sovereignty, as well as the limits of the states' free discretion (margin of appreciation),<sup>3</sup> the ECtHR, however, establishes certain autonomous

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<sup>2</sup> G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, p. 49.

<sup>3</sup> K. Wojtyczek, "The European Court of Human Rights and judicial law-making", in M. Florczak-Wątor, J. Mouchette, N. Palazzo, B. Naleziński, M. Steuer (eds.), *Judicial Law-Making in European Constitutional Courts*, London and New York: Routledge, Taylor & Francis Group, 2020, p. 236.

concepts that are binding and “independent” in their nature. Of course, the content of these concepts is based on the study and analysis of the laws of all states and the search for common approaches, but is not limited to this.<sup>4</sup> Thus, autonomous concepts are a kind of result of the European consensus, on the one hand, but on the other hand, they can also be elaborated on the basis of judicial “activism”, the law-making activity of the ECtHR, given the evolution of the interpretation of general principles of law, understanding of morality<sup>5</sup> and generally recognized legal values. Thereby, in the formation of autonomous concepts and their constituents, the systemic method is of great importance since, when clarifying the essence of any concept and, as a consequence, its appropriate application in practice, these concepts should be interpreted taking into account their place and functions in the unified system of law, as well as in the context of the general principles of law (rule of law, justice, equality, non-discrimination, freedom, humanism, good faith, *etc.*), and branch principles of law (for instance, the principle of the presumption of innocence, which is applied in criminal law). From this perspective, the peculiarities of the legal system of a particular country, and its affiliation to specific legal family, are also of great significance.

At the same time, it should be noted that in legal science there are different approaches to the definition of the method of autonomous interpretation and, as a result, autonomous concepts as such. In particular, S. Greer argues that an autonomous interpretation of the key concepts of the ECHR should be authoritatively determined by the ECtHR, regardless of their understanding by member states, thus significantly limiting the defendant state’s discretion.<sup>6</sup> Some scholars point out that autonomous notions “elude determination through contracting states (at least to a certain extent)”.<sup>7</sup> In its jurisprudence the ECtHR has also

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<sup>4</sup> E. Bjorge, *Domestic application of the ECHR: Courts as faithful trustees*, Oxford University Press, 1st ed., 2015, p. 202, 221.

<sup>5</sup> G. Letsas, “The Truth in Autonomous Concepts: How to Interpret the ECHR?”, *European Journal of International Law*, 2004, Vol. 15, Issue 2, p. 302, available at: <https://doi.org/10.1093/ejil/15.2.279> [last accessed 30.6.2022].

<sup>6</sup> S. Greer, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Strasbourg: Council of Europe Publishing, 2000, p. 18-19.

<sup>7</sup> C. Marti, *Framing a Convention Community. Supranational Aspects of the European Convention on Human Rights*, Cambridge University Press, 2021, p. 76.

repeatedly stressed that “an autonomous concept is independent of any definition contained in domestic legislation”.<sup>8</sup>

Undoubtedly, autonomous concepts in their very nature contain an element of ‘independent’ definition of their content, which is formulated by the ECtHR, thus forming pan-European human rights standards, in order to prevent Contracting States from circumventing Convention guarantees. In this sense, autonomous concepts significantly narrow the margin of appreciation of a state, establish the so-called ‘red lines’ that may not be violated. Nevertheless, at the same time, the ECtHR, in determining the key elements of these concepts, as a rule, is based on an analysis of the legislation of particular Member States. Thus, *autonomous concepts are based on the European consensus*. It should also be emphasized that the specific content, scope, crucial elements, as well as the application of some autonomous concepts in practice, may differ significantly, depending on the context and circumstances, and also change over time, taking into account the dynamics of the development of science, society, and other relevant factors that the ECtHR must take into consideration in order to ensure effective protection of human rights. In some aspects, the ECtHR may show judicial activism, as if imposing a certain vision and shaping some development trends. However, in this case, such ‘imposition’ should be justified and proportionate. In this sense, autonomous concepts cannot be completely divorced from reality.

Thereby, “autonomous concepts are created at the meeting point between legal imagination and common sense. In addition, they are far from being scandalous or from provoking outcries from the member states or the general public”.<sup>9</sup> Herewith, “the tension between the exercise of legal imagination and the consistent application of concepts is solved by the ECtHR by prioritizing the latter. ... Consistency, thus, has been a key ingredient to the successful progressive enlargement of justiciability at the ECtHR”.<sup>10</sup>

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<sup>8</sup> *Ljatif v. the former Yugoslav Republic of Macedonia*, Application no. 19017/16, Judgment of 08.10.2018, para 17.

<sup>9</sup> C. Teleki, “Chapter 6 The Right to a Fair Trial – A Tool for Self-Regulation”, in *Due Process and Fair Trial in EU Competition Law*, Leiden, The Netherlands: Brill Nijhoff, 2021, p. 129, available at: doi: [https://doi.org/10.1163/9789004447493\\_009](https://doi.org/10.1163/9789004447493_009) [last accessed 30.6.2022].

<sup>10</sup> *Ibid.*, p. 130.

Thus, autonomous concepts are not so much ‘independent’ of their understanding by Contracting States (since they are formed on the basis of an analysis of their interpretation and application by the majority), but are such concepts, the content of which the ECtHR establishes autonomously, that is, independently of the will of individual states, and which are binding on all Member States of the Council of Europe. That is why the system of autonomous concepts essentially establishes minimum standards for the effective provision and protection of human rights in practice. Thereby, autonomous concepts also protect the European system of human rights against various abuses by domestic authorities, which in doing so may refer to the principles of state sovereignty and subsidiarity. The ECtHR “has resources to address authoritarian strategies by defending the autonomous application of the Convention. A key challenge for the Court in developing its substantive case law will be to fend off ‘double standard’ charges, as a key argument of authoritarian actors is that they do not benefit from the ‘subsidiarity doctrine,’ which they argue should apply equally to all states”.<sup>11</sup>

At the moment, the ECtHR has formed such autonomous concepts, as rule of law, lawfulness, criminal charge, penalty, civil rights and obligations, private life, family, home, possession, person of unsound mind, peaceful assembly, association, civil service *et al.* For example, in its judgment *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands* (1995) the ECtHR ruled that “the notion ‘possessions’ [emphasis added] (in French: biens) in Article 1 of Protocol No. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’, for the purposes of this provision (P1-1)”.<sup>12</sup> So, this example illustrates a wide latitude in interpretive scope accorded by the ECtHR.

This article presents for your attention an analysis of particular autonomous concepts elaborated, *prima facie*, in the case law of the ECtHR. Accordingly, the research paper is focused primarily on a comprehen-

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<sup>11</sup> B. Çali, “Autocratic Strategies and the European Court of Human Rights”, *European Convention on Human Rights Law Review*, 2021, Vol. 2, Issue 1, p. 18, available at: doi: <https://doi.org/10.1163/26663236-bja10015> [last accessed 30.6.2022].

<sup>12</sup> *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, Application no. 15375/89, Judgment of 23.02.1995, para 53.

sive comparative study of the ECtHR's practice from the perspective of its applied practical value.

The object of the comparative approach is the content and core elements of such autonomous concepts as criminal charge, lawfulness, penalty, person of unsound mind, and peaceful assembly in the jurisprudence of the ECtHR. These concepts were selected for analysis, as they are the most well-established and developed in the case law of the ECtHR. In addition, these concepts are of great importance for the effective protection and ensuring basic human rights and fundamental freedoms in practice, since they are strong indicators of the functioning of a democratic law-governed state based on the principle of the rule of law.

This analysis ties back in to the importance of the subject matter, inasmuch as it clearly demonstrates that autonomous concepts as such *de facto* originate and are based on the study and search for common approaches in their interpretation and application by a consensus majority of the Member States of the Council of Europe. Thus, autonomous concepts essentially form the minimum standards for the effective provision and protection of human rights. The research is aimed at a certain generalization of the updated view of autonomous concepts, taking into account the evolution of the practice of the ECtHR.

In this way study will contribute to the harmonization and approximation of legislation and law enforcement practices in the field of human rights protection of the Member States of the Council of Europe to the European standards. The article will also be of great significance for legal practitioners, in particular, judges of higher courts, as well as constitutional courts.

## I. CRIMINAL CHARGE

The concept of "*criminal charge*" is autonomous.<sup>13</sup> It was elaborated in the case law of the ECtHR in the context of Article 6 of the ECHR.<sup>14</sup> At the moment this concept includes three main components, the so-called "*En-*

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<sup>13</sup> *Mihalache v. Romania*, Application no. 54012/10, Judgment of 08.07.2019, para 54.

<sup>14</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

gel criteria" that must be considered when determining whether or not there was a *criminal charge*.<sup>15</sup> The first criterion is the *legal classification* of the offence under national law, the second is the *nature of the offence* itself, and the third is the *degree of severity* of the punishment to which the person concerned is at risk. Herewith, the second and third criteria are alternative and not necessarily cumulative. However, this does not preclude a cumulative approach, where a separate analysis of each criterion does not lead to a clear conclusion about the existence of a criminal charge.<sup>16</sup>

With regard to the first criterion, it is necessary to know whether the provisions defining the alleged offence, according to the legal system of the respondent State, belong to criminal law, disciplinary law, or both. However, "while it is recognized that States have the right to distinguish between criminal offences and disciplinary offences in domestic law, it does not follow that the classification thus made is decisive from the viewpoint of the Convention".<sup>17</sup> At the same time, the ECtHR emphasizes that the indications thus presented have only a formal and relative value and must be considered in the light of the "common denominator" of the relevant legislation of the various Contracting Parties.<sup>18</sup> In particular, in the context of the relationship between criminal and administrative disciplinary offences, the ECtHR notes that the reference to the "minor" nature of unlawful acts does not in itself preclude their classification as "criminal" in the autonomous sense of the ECHR, since "there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the *Engel* criteria, necessarily requires a certain degree of seriousness...".<sup>19</sup> Herewith, "the fact that an offence is not punishable by imprisonment is not by itself decisive for the purposes of the applicability of the criminal limb of Article 6 of the Convention since, (...), the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character".<sup>20</sup>

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<sup>15</sup> *Engel and Others v. the Netherlands*, Application nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 08.06.1976, para 82, 83.

<sup>16</sup> *Mihalache v. Romania*, *supra* note 13, para 54.

<sup>17</sup> *Demicoli v. Malta*, Application no. 13057/87, Judgment of 27.08.1991, para 31.

<sup>18</sup> *Engel and Others v. the Netherlands*, *supra* note 15, para 82.

<sup>19</sup> *Sergey Zolotukhin v. Russia*, Application no. 14939/03, Judgment of 10.02.2009, para 55.

<sup>20</sup> *Ramos Nunes de Carvalho e Sá v. Portugal*, Application nos. 55391/13, 57728/13 and 74041/13, Judgment of 06.11.2018, para 122.

The ECtHR also points out that the *punitive and deterrent functions of criminal liability* are recognized as characteristic features of precisely criminal penalties.<sup>21</sup>

Moreover, the expression “*in accordance with national law*”/“*under national law*”, including the expressions “*in accordance with the law*”, “*prescribed by law*”, and “*provided for by law*”, refers not only to the existence of a legal basis in domestic law, but also to a *qualitative (substantive) requirement* inherent in the autonomous notion of *lawfulness (legality)*: this notion entails requirements for the *accessibility and foreseeability of the “law”*, as well as the requirement to provide a *measure of protection against arbitrary interference* by public authorities with the rights guaranteed by the ECHR.<sup>22</sup>

These qualitative requirements must be satisfied both with regard to the definition of the offence and the penalty that it entails.<sup>23</sup> In particular, with respect to Article 5 para 1 of the ECHR, the case law of the ECtHR clearly establishes that any deprivation of liberty must not only be based on one of the exceptions listed in subparagraphs (a) to (f), but must also be “*lawful*”.<sup>24</sup> When it comes to the “*lawfulness*” of detention, including the question of whether “*the procedure prescribed by law*” has been observed, the ECHR refers primarily to *national law* and imposes an obligation to comply with the *substantive and procedural rules of national law*. This first of all requires that any arrest or detention have a legal basis in domestic law, but also refers to the quality of the law, requiring it to be compatible with the rule of law. The “*quality of the law*” implies that if a national law permits deprivation of liberty, it must be *sufficiently accessible, precise, and foreseeable* (predictable) in its application to avoid any risk of arbitrariness. The standard of “*lawfulness*” set by the ECHR requires that all laws be sufficiently precise to enable a person – if necessary, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may lead to. With regard to deprivation

<sup>21</sup> *Sergey Zolotukhin v. Russia*, *supra* note 19, para 55.

<sup>22</sup> *Mihalache v. Romania*, *supra* note 13, para 112.

<sup>23</sup> *Del Río Prada v. Spain* (GC), Application no. 42750/09, Judgment of 21.10.2013, para 91.

<sup>24</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 5, para 1.



of liberty, it is important that domestic law clearly defines the conditions of detention.<sup>25</sup>

Given that ‘criminal charge’ is an autonomous notion and having regard to the impact which the procedure for examining an appeal on points of law may have upon the determination of a criminal charge, including the possibility of correcting errors of law, the Court has found that such a procedure is covered by the safeguards of Article 6 (...), even where it is treated as an extraordinary remedy in domestic law and concerns a judgment against which no ordinary appeal lies. By the same token, the Court has held that the safeguards of Article 6 are applicable to criminal proceedings in which the competent court began by examining the admissibility of an application for leave to appeal with a view to having a conviction quashed...<sup>26</sup>

Concerning the nature of the offence, e.g., when a member of the armed forces is accused of an act or omission allegedly contrary to the law governing the activities of the armed forces, the state may in principle apply disciplinary rather than criminal law against him.<sup>27</sup>

As regards the degree of severity of the penalty, the ECtHR reiterates that in a society that adheres to the rule of law, the “criminal” sphere includes deprivations of liberty to be imposed as a punishment, with the exception of those that, “by their nature, duration, or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so...”<sup>28</sup>

The autonomous concept of the criminal charge also includes the *ne bis in idem* rule, – the right not to be tried or punished twice (Article 4 of Protocol No. 7 to the ECHR).<sup>29</sup> Accordingly, the ECtHR considers that

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<sup>25</sup> *Del Río Prada v. Spain (GC)*, *supra* note 23, para 125.

<sup>26</sup> *Moreira Ferreira v. Portugal (No. 2)*, Application no. 19867/12, Judgment of 11.07.2017, para 54.

<sup>27</sup> *Engel and Others v. the Netherlands*, *supra* note 15, para 82.

<sup>28</sup> *Ibid.*, para 82.

<sup>29</sup> *A and B v. Norway*, Application no. 24130/11 and 29758/11, Judgment of 15.11.2016, para 107.

Art. 4 of Protocol No. 7<sup>30</sup> is to be understood “as prohibiting the prosecution or trial of a second ‘offence’ in so far as it arises from *identical facts* [emphasis added] or facts which are *substantially the same* [emphasis added]”.<sup>31</sup>

Thus, at first glance, the criteria for determining a criminal charge established by the ECtHR may seem rather broad and vague. However, an analysis of well-developed jurisprudence indicates that the ECtHR applies the established standards quite consistently. The ECtHR’s assessment of, first of all, the material (*substantive*) aspects of a particular national legal act, action, penalty and real consequences for a person is of primary importance. In particular, the most developed is the first criterion, namely the assessment of the legal classification of the offence under national legislation. It is this criterion that is subject to primary assessment by the ECtHR and is a prerequisite for the application and evaluation of the next two. Having established clear requirements for the quality of the law and the standard of “legality”, the ECtHR analyses whether the norms of domestic law in the context of defining and distinguishing between different types of offences and the corresponding penalties (types of legal liability), conditions of detention and imprisonment, as well as the availability of legal means to counter any arbitrariness of public authority are sufficiently accessible, precise and foreseeable (predictable). Thus, when evaluating the first criterion, the margin of appreciation available to a state is significantly narrow. In turn, when evaluating the second and the third criteria – the nature of the offence and the level of severity of punishment, the ECtHR grants a state more discretion, since such assessment depends on the context and traditions of a particular state, and should be assessed taking into account the national peculiarities of the legal system. Thus, these two criteria are more uncertain in terms of formulating uniform and precise parameters for their assessment in the practice of the ECtHR.

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<sup>30</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 4 of Protocol No. 7.

<sup>31</sup> *Sergey Zolotukhin v. Russia*, *supra* note 19, para 82.

## II. PENALTY

In the case of *Welch v. the United Kingdom* (1995) the ECtHR pointed out that the concept of *penalty*, along with the concepts of *civil rights and obligations* and *criminal charge* in Art. 6 para 1 of the ECHR is autonomous.<sup>32</sup> In order for the protection offered by Article 7<sup>33</sup> to be effective, the ECtHR must be free not to resort to appearances and to judge for itself whether a given measure is in substance a “penalty” within the meaning of that provision.<sup>34</sup>

The wording of Article 7 para 1 of the ECHR indicates that the starting point in any assessment of the existence of a penalty is whether *the measure in question is imposed after a conviction for a “criminal offence”*. In addition, the ECtHR also takes into account other factors that are important in this regard, *inter alia*, the nature and purpose of the measure in question, namely, the punitive and deterrent nature of the impugned measure;<sup>35</sup> its characterization in accordance with national legislation; the procedures involved in the adoption and implementation of the measure, as well as its severity.<sup>36</sup> At the same time, the ECtHR emphasizes that the severity of the order in itself is not decisive, since many non-criminal measures of a preventive nature can have a significant (substantial) impact on the person concerned.<sup>37</sup> Thereby, in the case of *G.I.E.M. S.R.L. and Others v. Italy* (2018) the ECtHR:

concludes that the impugned confiscation measures can be regarded as ‘penalties’ within the meaning of Article 7 of the Convention. This conclusion, which is the result of the autonomous interpretation of the notion of ‘penalty’ (...), entails the applicability of that provision, even in the absence of criminal proceedings within the meaning of Article 6. Nevertheless, (...), it does not rule out the possibility for the domestic authorities to impose

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<sup>32</sup> *Welch v. the United Kingdom*, Application no. 17440/90, Judgment of 09.02.1995, para 27.

<sup>33</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 7.

<sup>34</sup> *Welch v. the United Kingdom*, *supra* note 32, para 27.

<sup>35</sup> *G.I.E.M. S.R.L. and Others v. Italy*, Application no. 1828/06, Judgment of 28.06.2018, para 222, 223.

<sup>36</sup> *Welch v. the United Kingdom*, *supra* note 32, para 28.

<sup>37</sup> *Ibid.*, para 32.

‘penalties’ through procedures other than those classified as criminal under domestic law.<sup>38</sup>

The ECtHR also points out that, depending on the specific situation, the concept of “penalty” may also be equated with such a coercive measure as the preventive detention of a person, which is permitted in the exceptional cases set out in Art. 10 of the ECHR.<sup>39</sup> In particular, the German Penal Code distinguishes between penalty/punishment as such and the measure of preventive detention (in German *Sicherungsverwahrung*), which may have an unlimited period after the completion of an initial sentence. Hence, “in German legal doctrine such preventive detention is not regarded as punishment, or a ‘penalty’, in the sense the term is used in Art. 7 ECHR. It is therefore not subject to the same constraints of sentence proportionality and the prohibition of retrospective imposition as are penalties imposed for criminal offences”<sup>40</sup> (see also the ECtHR judgments of *M. v. Germany*<sup>41</sup> and *Bergmann v. Germany*<sup>42</sup>).

Moreover, in its case law the ECtHR has drawn a “distinction between a measure that constitutes in substance a ‘penalty’ and a measure that concerns the ‘execution’ or ‘enforcement’ of the ‘penalty’”.<sup>43</sup> Therefore, “where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the ‘penalty’ within the meaning of Article 7...”.<sup>44</sup>

The ECtHR “does not rule out the possibility that measures taken by the legislature, the administrative authorities, or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition of the scope of the ‘penalty’ imposed by the trial court”.<sup>45</sup> When this happens, the ECtHR considers that the rel-

<sup>38</sup> *G.I.E.M. S.R.L. and Others v. Italy*, *supra* note 35, para 233.

<sup>39</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 10.

<sup>40</sup> F. Dünkel, C. Morgenstern, “The monitoring of prisons in German law and practice”, *Crime Law Soc Change*, 2018, Vol. 70, Issue 1, p. 104, available at: <https://doi.org/10.1007/s10611-017-9721-3> [last accessed 30.6.2022].

<sup>41</sup> *M. v. Germany*, Application no. 19359/04, Judgment of 10.05.2010.

<sup>42</sup> *Bergmann v. Germany*, Application no. 23279/14, Judgment of 07.04.2016.

<sup>43</sup> *Kafkaris v. Cyprus*, Application no. 21906/04, Judgment of 12.02.2008, para 142.

<sup>44</sup> *Ibid.*, para 142.

<sup>45</sup> *Del Río Prada v. Spain (GC)*, *supra* note 23, para 89.

evant measures should fall within the scope of the *prohibition on retroactive application of penalties* within the meaning of Art. 7 para 1 of the ECHR. Otherwise, states would be free, for example, by amending the law or reinterpreting established rules, to take measures that retroactively change the scope of the penalty imposed to the detriment of the convicted person, when the latter could not imagine such a development of events at the time of the commission of the offence or when the sentence was imposed. In such circumstances, Article 7 para 1 would be deprived of any useful effect for convicted persons whose *scope of punishments* (sentences) was changed *ex post facto* to their detriment. The ECtHR notes that such changes must be distinguished from changes made to the manner in which the sentence is enforced/executed, which do not fall within the scope of Art. 7 para 1 of the ECHR.<sup>46</sup> In order to determine whether the measure taken in the execution of the sentence concerns only the *method (manner) of execution of the sentence* or, conversely, affects its *scope*, the ECtHR must in each case examine what actually entailed the imposed “penalty” under the domestic law in force at that time, or, in other words, what was its *inner nature*. In doing so, it must take into account national law as a whole and how it was applied at the time in question.<sup>47</sup>

A logical consequence of the principle that laws should be of general application is that *the wording of laws is not always precise*. One of the standard methods of regulation through rules is to use *general categories rather than exhaustive lists*. Accordingly, many laws are inevitably formulated in terms that are more or less vague and whose interpretation and application are matters of practice. “However clearly drafted a legal provision may be, in any system of law, including criminal law, there is in an inevitable element of judicial interpretation”.<sup>48</sup> There will always be a need to clarify doubtful points and adapt to changing circumstances. Although *certainty is highly desirable*, it may entail *excessive rigidity*, and

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<sup>46</sup> S. Huerta Tocildo, “The Annulment of the Parot Doctrine by the European Court of Human Rights. ECtHR Judgement of 21 October 2013: Much Ado Over a Legally Awaited Judgement”, in M. Pérez Manzano, J. Lascuraín Sánchez, M. Mínguez Rosique (eds.), *Multilevel Protection of the Principle of Legality in Criminal Law*, Springer, Cham, 2018, p. 144, available at: [https://doi.org/10.1007/978-3-319-63865-2\\_8](https://doi.org/10.1007/978-3-319-63865-2_8) [last accessed 30.6.2022].

<sup>47</sup> *Del Río Prada v. Spain* (GC), *supra* note 23, para 89, 90.

<sup>48</sup> *Ibid.*, para 92.

“the law must be able to keep pace with changing circumstances...”<sup>49</sup> It also suggests that judicial interpretation may change over time. Here-with, some scholars point out that “the right to criminal legality does not include a right to the non-retroactivity of changes in judicial interpretation that may be unfavourable”.<sup>50</sup> However, a thorough analysis of the consolidated case law of the ECtHR on this issue makes it possible to conclude that the inalienable guarantees of the right to legality in criminal law, which are enshrined in Art. 7 of the ECHR, are requirements for the foreseeability and non-retroactivity of unfavourable criminal legislation, including unfavourable legal interpretation, as well as case law.<sup>51</sup>

The role of litigation entrusted to the courts is precisely to dispel the remaining doubts in interpretation. “The progressive development of criminal law through *judicial law-making* [emphasis added] is a well-entrenched and necessary part of legal tradition in the Convention States...”<sup>52</sup> Therefore, Article 7 of the ECHR cannot be interpreted as prohibiting progressive refinement of the rules of criminal liability through judicial interpretation on a case-by-case basis, provided that *the resulting development is consistent with the nature of the offence and can be reasonably foreseen*. The absence of an accessible and reasonably foreseeable judicial interpretation may even lead to the finding of a violation of the rights of the accused under Article 7 of the ECHR. If this were not the case, the object and purpose of this provision, namely that “no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated”.<sup>53</sup>

### III. PERSONS OF UNSOUND MIND

This concept was elaborated by the ECtHR for the purpose of Article 5 para 1 sub-para (e) of the ECHR.<sup>54</sup> In particular, in the case of *Winter-*

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<sup>49</sup> *Ibid.*, para 92.

<sup>50</sup> S. Huerta Tocildo, *supra* note 46, p. 144.

<sup>51</sup> *Ibid.*, p. 156, 157.

<sup>52</sup> *Del R o Prada v. Spain (GC)*, *supra* note 23, para 93.

<sup>53</sup> *Ibid.*, para 93.

<sup>54</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 5, para 1, sub-para (e).

*werp v. the Netherlands* (1979) the ECtHR pointed out: “The term ‘persons of unsound mind’ must further be given an autonomous meaning, without the Court being bound by the interpretation of the same or similar terms in the domestic legal orders”.<sup>55</sup> The ECtHR also stressed that except in cases of emergency, the person concerned should not be deprived of liberty unless it could be reliably proved that this person was of “unsound mind”.<sup>56</sup> The very nature of what must be established by the competent national authority, namely a *true mental disorder*, requires an *objective medical examination*. In addition, the *mental disorder must be of a kind or degree that justifies involuntary confinement*. Moreover, the legitimacy of further detention depends on the *persistence* of such a disorder.<sup>57</sup> “However, as shown by the third minimum condition for the detention of a person for being of unsound mind to be justified, namely that the validity of continued confinement must depend on the persistence of the mental disorder (...), changes, if any, to the mental condition of the detainee following the adoption of the detention order must be taken into account”.<sup>58</sup>

It should also be noted that the term “person of unsound mind” cannot be precisely defined, since its meaning is *constantly evolving* as research in the field of psychiatry develops.<sup>59</sup> “However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms”.<sup>60</sup> On the other hand, autonomous interpretation of the notion of person of unsound mind does not mean “that the person concerned suffered from a condition which would be such as to exclude or diminish his criminal responsibility under domestic criminal law when committing an offence”.<sup>61</sup>

A mental disorder may be considered to be of a *degree requiring compulsory confinement* if it is determined that the confinement of the person concerned is necessary because he needs therapy, medication, or other

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<sup>55</sup> *Winterwerp v. the Netherlands*, Application no. 6301/73, Judgment of 24.10.1979, para 83.

<sup>56</sup> *Ibid.*, para 39.

<sup>57</sup> *Ibid.*, para 39.

<sup>58</sup> *Inseher v. Germany*, Application nos. 10211/012 and 27505/14, Judgment of 04.12.2018, para 134.

<sup>59</sup> *Glien v. Germany*, Application no. 7345/12, Judgment of 28.02.2014, para 72.

<sup>60</sup> *Rakevich v. Russia*, Application no. 58973/00, Judgment of 24.03.2004, para 26.

<sup>61</sup> *Inseher v. Germany*, *supra* note 58, para 149.

clinical treatment in order to cure or alleviate his condition, and also in cases when a person needs control and supervision in order to prevent harm, for instance, to himself or others.<sup>62</sup>

When deciding whether to detain a person as of “unsound mind”, it must be recognized that the national authorities have a certain discretion (*margin of appreciation*), in particular as regards the merits of the clinical diagnosis, since it is in the first place for the national authorities to assess the evidence presented to them in a particular case. So, the task of the ECtHR is to review, in accordance with the ECHR, the decisions of these national bodies. The relevant point at which it must be reliably established that a person is in a state of “unsound mind” (mental disorder) for the requirements of subparagraph (e) of paragraph 1 of Article 5 is the date on which the measure was taken depriving that person of liberty as a result of this condition. In addition, there must be some connection between the grounds for authorized deprivation of liberty and the place and conditions of detention. In principle, the “detention” of a person as mentally ill will only be “lawful” if it is carried out in a hospital, clinic, or other appropriate institution.<sup>63</sup> Furthermore, the ECtHR emphasizes that the permissible grounds for deprivation of liberty listed in Art. 5 para 1 must be interpreted *narrowly*. It therefore considers that a mental disorder must have a *certain degree of severity* in order to be considered a “true” mental disorder for the purposes of Art. 5 para 1 sub-para (e) of the ECHR. This means that the mental disorder must be so serious as to require treatment in specialized medical institutions (hospitals, clinics, etc.).<sup>64</sup> The ECtHR also observes out that “the notion of ‘persons of unsound mind’ (*aliéné* in the French version) in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of ‘mental disorder’”.<sup>65</sup>

When it comes to the requirements to be met by an “*objective medical examination (expertise)*”, the ECtHR generally considers that the national authorities are in a better position than itself to assess the qualifications of the medical expert in question. However, in some specific cases it considered it necessary for the medical experts to have a *specific quali-*

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<sup>62</sup> *Glien v. Germany*, *supra* note 59, para 73.

<sup>63</sup> *Ibid.*, para 74, 75.

<sup>64</sup> *Ibid.*, para 85.

<sup>65</sup> *Ibid.*, para 85.



fication and, *inter alia*, required that a psychiatric expert conduct an assessment if a person was placed in detention as a person of “unsound mind” without any *history of mental disorders* and, sometimes, without an assessment by an *external expert*. Furthermore, the objectivity of the medical examination entails the requirement that it must be *sufficiently recent*. Whether the medical examination was sufficiently recent depends on the particular circumstances of the case.<sup>66</sup>

In order for a mental disorder to be established by the competent authority, *prima facie* by the domestic courts, the ECtHR has emphasized in the context of the preventive detention of dangerous offenders that the domestic courts must sufficiently establish the relevant facts on which to decide whether to detain the person concerned, on the basis of the proper opinion of a medical expert. This requires the national authorities to scrutinize the expert opinions submitted to them and to make their own determination as to whether the person concerned suffered from a mental disorder based on the presented material.<sup>67</sup>

Thus, a state enjoys a wide margin of appreciation in determining a person as of “unsound mind”. Also, a state has broad discretion in deciding whether to detain such a person, on the basis of an assessment of the merits of the clinical diagnosis and the evidence presented in a particular case, as well as the qualifications of the relevant medical expert on this issue. At the same time, it is important to emphasize that any detention, including involuntary (compulsory) confinement of a person of “unsound mind”, is an encroachment on his freedom, therefore, the permissible grounds for restriction and/or deprivation of liberty listed in Art. 5 para 1 of the ECHR should be interpreted narrowly. In Ukraine and in many other democratic countries, compulsory confinement and/or treatment of a person of “unsound mind” is permitted only on the basis of a court decision. The mere opinion of a doctor or medical expert is insufficient for the application of the compulsory detention of a person of “unsound mind”. All the evidence must be assessed as a whole by the appropriate independent public authority. However, the recognition of a person as of “unsound mind” at the time of the commission of a crime

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<sup>66</sup> *Ilseher v. Germany*, *supra* note 58, para 130, 131.

<sup>67</sup> *Ibid.*, para 132.

may not exclude or reduce his criminal liability in accordance with national criminal law.

#### IV. PEACEFUL ASSEMBLY

The ECtHR emphasizes that “the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it *should not be interpreted restrictively* [emphasis added]...”.<sup>68</sup> Thus, to prevent the risk of a restrictive interpretation, the ECtHR has refrained from formulating the concept of an assembly, which it considers an autonomous one, or from an exhaustive enumeration of the criteria that could define it.<sup>69</sup> The right to freedom of assembly extends both to *private meetings*, as well as to *gatherings in public places, whether static or in the form of a procession*; moreover, it *can be enjoyed by individual participants and persons organizing the meeting*.<sup>70</sup>

The ECtHR also stressed that Article 11 of the ECHR<sup>71</sup> protected only the right to “*peaceful assembly*”, a concept that did not cover assemblies whose organizers and participants had violent intentions. Therefore, the guarantees of Art. 11 apply to all assemblies, except those in which the organizers and participants have such intentions, *incite violence, or otherwise reject the foundations of a democratic society*.<sup>72</sup>

The question of whether an assembly falls under the autonomous concept of “*peaceful assembly*” in para 1 of Art. 11, and the scope of the protection afforded by that provision, is independent of whether the assembly was held in accordance with a procedure prescribed by the domestic law. Only once the ECtHR has concluded that an assembly is protected does its classification and regulation under national law matter to

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<sup>68</sup> *Djavit An v. Turkey*, Application no. 20652/92, Judgment of 09.07.2003, para 56.

<sup>69</sup> *Ibid.*, para 56.

<sup>70</sup> *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, Application no. 29221/95 and 29225/95, Judgment of 02.01.2002, para 77.

<sup>71</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 11.

<sup>72</sup> *Navalnyy v. Russia*, Application nos. 29580/12 and 4 others, Judgment of 15.11.2018, para 98.

the ECtHR's assessment. These elements are important for the ensuing question of the *negative obligations of the state*, namely whether the restriction of a protected freedom under para 2 is justified, and for assessing the *positive obligations of the state*, that is whether a fair balance between the competing interests at stake has been struck by the state.<sup>73</sup>

It should be noted that *procedures for notifying and even authorizing a public event* as a whole do not affect the essence of the right under Art. 11 if the purpose of regulating an assembly is to enable the authorities to take reasonable and appropriate measures to guarantee its unimpeded conduct.<sup>74</sup> However, the enforcement of such rules could not be an end in itself. Hence, a peaceful assembly may be of such a nature that permitting it only with prior notice and/or permitting (authorizing) it may itself be considered *disproportionate* for the purposes of Art. 11 of the ECHR.<sup>75</sup>

The ECtHR emphasizes that the *freedom of assembly* provided for in Art. 11 is closely linked to the *freedom of expression*<sup>76</sup> guaranteed by Art. 10,<sup>77</sup> since the protection of personal opinion afforded by the latter is one of the aims of freedom of peaceful assembly. According to well-established jurisprudence, "a complaint about one's arrest in the context of a demonstration falls to be examined under Article 11 of the Convention on the basis that Article 10 is to be regarded as a *lex generalis* in relation to Article 11, which is a *lex specialis*..."<sup>78</sup> One of the distinguishing criteria noted by the ECtHR is that, in exercising the right to freedom of assembly, the participants will not only seek "to express their opinion, but also to do so together with others..."<sup>79</sup>

At the same time, the ECtHR acknowledged that, in the realm of *political debate*, the guarantees of Articles 10 and 11 often *complement* each

<sup>73</sup> *Ibid.*, para 99.

<sup>74</sup> *Bukta and Others v. Hungary*, Application no. 25691/04, Judgment of 17.10.2007, para 35.

<sup>75</sup> *Navalnyy v. Russia*, *supra* note 72, para 100.

<sup>76</sup> W. O. Douglas, "The Right of Association", *Columbia Law Review*, 1963, Vol. 63, No. 8, p. 1363, available at: <https://doi.org/10.2307/1120696> [last accessed 30.6.2022].

<sup>77</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, Art. 10.

<sup>78</sup> *Ezelin v. France*, Application no. 11800/85, Judgment of 26.04.1991, para 35.

<sup>79</sup> *Schwabe and M.G. v. Germany*, Application nos. 8080/08 and 8577/08, Judgment of 01.03.2012, para 101.

other.<sup>80</sup> Despite its autonomous role and special scope, Art. 11 must also be read in the light of Art. 10, where the purpose of the exercise of freedom of assembly is the expression of personal opinions, as well as the need to provide a forum for public debate and open expression of protest.<sup>81</sup> Thus, for example, if a group of persons held a picket in front of the Regional Court and were subsequently held administratively liable and fined for violating the procedure for organizing and holding a public assembly, the ECtHR would consider that the administrative prosecution amounted to an interference with the applicant's right to freedom of assembly, interpreted in the light of his right to freedom of expression.<sup>82</sup> The link between Art. 10 and Art. 11 of the ECHR is particularly important when the authorities interfere with the right to freedom of peaceful assembly in response to opinions or statements made by demonstrators or members of an association.<sup>83</sup>

Herewith, the ECtHR reiterates that "an interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities".<sup>84</sup> The term "restrictions" in Art. 11 para 2 should be interpreted as including both *measures taken before or during an assembly*,<sup>85</sup> as well as *punitive measures taken after it*.<sup>86</sup> For instance, in the case of *Navalnyy v. Russia* (2018) the ECtHR concluded:

the applicant was subject to sanctions which, although classified as administrative under domestic law, were 'criminal' [emphasis added] within the autonomous meaning of Article 6 § 1, thereby attracting the application of this provision under its 'criminal' head (...). However, a peaceful demon-

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<sup>80</sup> *Primov and Others v. Russia*, Application no. 17391/06, Judgment of 13.10.2014, para 92.

<sup>81</sup> *Kudrevičius and Others v. Lithuania*, Application no. 37553/05, Judgment of 15.10.2015, para 86.

<sup>82</sup> *Navalnyy v. Russia*, *supra* note 72, para 102.

<sup>83</sup> *Stankov and the United Macedonian Organization Ilinden v. Bulgaria*, *supra* note 70, para 85.

<sup>84</sup> *Navalnyy v. Russia*, *supra* note 72, para 103.

<sup>85</sup> K. Siegert, "The Police and the Human Right to Peaceful Assembly", in R. Alleweldt, G. Fickenscher (eds), *The Police and International Human Rights Law*, Springer, Cham, 2018, p. 224, available at: [https://doi.org/10.1007/978-3-319-71339-7\\_11](https://doi.org/10.1007/978-3-319-71339-7_11) [last accessed 30.6.2022].

<sup>86</sup> *Ezelin v. France*, *supra* note 78, para 39.

stration should not, in principle, be rendered subject to the threat of a criminal sanction and notably to deprivation of liberty. Where the sanctions imposed on a demonstrator are criminal in nature, they require particular justification (...). The freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act on such an occasion (...).<sup>87</sup>

Hence, the margin of appreciation afforded to a state in the interpretation and application of the right to freedom of peaceful assembly is significantly narrowed. The ECtHR establishes clear criteria for the review of the proper implementation of this right. At the same time, any restrictions on the right to freedom of assembly must be proportionate and convincingly justified by a state, since freedom of expression and peaceful assembly are integral attributes of a modern democratic civil society. Despite the discretion in regulating the procedure for the implementation of this right in national legislation, the ECtHR verifies the compliance with not so much formal as, *prima facie*, substantial aspects of the real provision of the right by a state, as well as the consequences of its restriction for a particular person, achieving a fair balance of the various interests at stake.

## CONCLUSIONS

On the basis of the principle of subsidiarity, the ECtHR shapes autonomous concepts by balancing and weighing various human rights and interests at stake, relying on the national legislation and law enforcement practice of the Member States of the Council of Europe. By doing this, the ECtHR significantly limits the *margin of appreciation* of individual states. At the same time, the boundaries of such freedom depend on many factors, first of all, on the presence of *consensus* among the Member States of the Council of Europe on a particular issue under consid-

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<sup>87</sup> *Navalnyy v. Russia*, *supra* note 72, para 145.

eration, which makes it possible to substantially narrow a state's discretion granted by the ECtHR.

The *dynamic method of interpreting* the ECHR also plays an important role in the development of autonomous concepts, that always leaves some space for changing the practice of the ECtHR and, accordingly, the substantial content of these concepts. Showing judicial activism, the ECtHR states certain patterns and sets trends in the development of law, based on the modern demands and evolution of society. It stipulates the progress of law and law enforcement practice.

Hence, autonomous concepts elaborated by the ECtHR *per se* set the *minimum standards* (requirements) for the effective implementation, provision, and protection of basic human rights and freedoms, since, based on their common *consensus interpretation* and application in the majority of Contracting States, *binding autonomous concepts harmonize, consolidate, and unify, as well as form the foundation of a pan-European integral system for the effective protection of human rights*. Autonomous concepts also contribute to the preservation and continuation of the *European tradition of law, European values, and identity*.

The case law of the ECtHR is constantly evolving and expanding the list of autonomous concepts arising from the ECHR.

The autonomous concept of *criminal charge* includes three main components: legal classification of the offence under national law, the nature of the offence, and the degree of severity of the punishment faced by the person concerned. Among these criteria, it is the first criterion that is the key one in assessment by the ECtHR, while the second and third criteria are, as a rule, alternative ones. They can also be cumulative if the analysis of each criterion does not make it possible to draw an unambiguous conclusion about the existence of criminal charge.

The *legal classification of the offence under national legislation* includes substantive requirements for the quality of the law, that must be sufficiently accessible, precise and foreseeable (predictable). This means that there should be a clear definition and classification of the different types of offences and penalties for committing them in domestic law. At the same time, any deprivation or restriction of liberty must contain an exhaustive list of permissible conditions for the detention of a person. Only if all these requirements are met can the detention of a person be considered as "*lawful*" for the purposes of the ECHR. In assessing the lawfulness

ness of a person's detention, the ECtHR evaluates compliance by national authorities with the *substantive and procedural rules of national law*, which must be compatible with the rule of law. Thus, the integral principle of the rule of law, as it were, expands the Convention guarantees of human rights associated with an alleged violation of the fundamental right to liberty and security of a person (personal integrity), *inter alia*, in the context of para 1 Art. 6 of the ECHR (procedural guarantees of human rights to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law). The concept of *legality* itself also includes the requirement to provide a measure of protection against arbitrary interference by public authorities with the rights guaranteed by the ECHR, i.e. there must be legal and effective remedies. In particular, this concerns the possibility of appealing against the decisions of the authorities, *prima facie*, the court, by filing an appeal.

Thus, the concept of "*lawfulness*" entails the requirements for the *quality of the law*, namely its *accessibility*, *foreseeability* (predictability) and *legal certainty*, as well as the requirement to provide the *measures of protection against arbitrary interference* by public authorities with human rights.

With regard to the *nature of the offence* and the *degree of severity of the punishment*, the ECtHR will assess the purpose and consequences of the punishment for the person, its duration, and manner of execution. So, the characteristic features of criminal charge are the *punitive and deterrent functions of criminal liability*. Accordingly, when defining these criteria, states have a wider margin of appreciation than in the first criterion, where the ECtHR elaborated more precise and more stringent assessment requirements. It is noteworthy that punishments not related to deprivation of liberty do not exclude the criminal nature of the offence. At the same time, the minor nature of the wrongful act does not in itself preclude its classification as "criminal" in the autonomous sense of the ECHR, since the Convention and the case law of the ECtHR do not provide for any specific degree of seriousness of the offence.

The autonomous concept of criminal charge also includes the presumption of innocence and the right not to be tried or punished twice for the same offence.

The necessary elements of the autonomous concept of *penalty* are as follows: the imposition of the measure in question after conviction for a "criminal offence"; the inner nature and the aim of the measure in

question (its deterrent and punitive character); classification of the impugned measure in accordance with national legislation; the procedures related to the adoption and implementation of the measure of punishment, as well as its severity, which, however, in itself is not decisive, inasmuch as certain non-criminal measures of a preventive nature may also have a significant impact on the person concerned. A distinction should be made between a measure that establishes *in substance* a “penalty” and a measure that concerns the “enforcement of the penalty”. On the basis of the principle of legal certainty and the prohibition on the retroactive effect of the law, including retroactive application of punishments, the re-interpretation and redefinition of the essence and the scope of the “penalty” is prohibited. Nevertheless, such changes should be distinguished from changes made to the manner for enforcement (execution) of a sentence, which do not fall within the scope of Art. 7 para 1 of the ECHR.

It should also be taken into account that no law can be formulated absolutely precisely, and therefore its application depends on the *interpretation by the court*. In addition, the law must be flexible and keep pace with the times, so the element of judicial law-making is necessary for the progressive development of law. At the same time, such a judicial interpretation, in order to clarify the legal norms in each specific case, may not change the very essence of the punishment itself, and must also be consistent with the nature of the offence, as well as be reasonably foreseeable and accessible.

The meaning of the autonomous concept of “*a person of unsound mind*” is constantly evolving, taking into account the development of psychiatry. At the same time, the ECtHR grants states a *wide margin of appreciation* for states in determining and assessing a person as a person of “unsound mind” in accordance with their national legislation. Nonetheless, the ECtHR establishes certain requirements and standards that must be observed by domestic authorities when determining, accessing, and involuntarily confining a person as of “unsound mind”.

A person may not be imprisoned as being of “*unsound mind*” unless the following *three minimum conditions are met*: first, it must be reliably proved that he is of unsound mind, that is, *a true mental disorder must be established before a competent authority on the basis of objective independent medical expertise* (a mental disorder must have a *certain degree of severity*, i.e. it must be so severe as to require treatment in specialized medical



facilities; an *objective medical examination* involves the special qualification of an expert, a review of the medical history of mental disorders of the person, an assessment by an external expert, and also the conduct of such an examination relatively recently in time); secondly, the *mental disorder must be of a kind or degree that justifies warranting involuntary (compulsory) confinement* (in cases where such a person needs therapy, medication, or other medical treatment, as well as in cases where a person needs control and supervision in order to prevent harm to himself or others); third, *the lawfulness of continued detention depends on the persistence of such a disorder*.

The concept “*peaceful assembly*” and the right to freedom of assembly should not be interpreted restrictively. It covers both *private gatherings and gatherings in public places, whether static or in procession*; this right can be exercised both by individual participants and by persons organizing the meeting. Any assembly is considered *peaceful*, except for those in which the organizers and participants have the intention of inciting violence, or otherwise reject the foundations of a democratic society. In order to enable the authorities to take reasonable and appropriate measures to ensure its smooth conduct, domestic law may apply prior procedures for notification and even authorization of a public event, which in general should not affect its essence. Accordingly, a state has both *positive* (to ensure law and order and the safety of participants in a peaceful assembly) and *negative* (to ensure the unhindered exercise of freedom of assembly, as well as non-interference in its content, procedure, and forms of realization) *obligations* to effectively guarantee and protect the right to freedom of assembly.

It should be stressed that Article 10 of the ECHR (*freedom of expression*) is regarded as a *general law* in relation to Article 11 (*freedom of assembly and association*), which is a *special law*. These two rights are complementary, since the objective of the exercise of freedom of assembly is usually the expression of personal opinions, and the need to provide a forum for public discussion and open expression of protest. This is especially important when the authorities interfere with the right to freedom of peaceful assembly in response (as a reaction) to the opinions or statements expressed during the demonstration or assembly.

Interference with the right to freedom of assembly may consist in various *restrictions*, in particular, *measures* taken by the authorities before

*or during an assembly, as well as punitive measures taken after it.* It is worth emphasizing that participation in a peaceful, non prohibited demonstration should not be subject to the threat of either criminal or disciplinary sanctions, except in cases where the person himself commits another offence in doing so.