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Flexible Foreseeability

A Human Rights Rule of Law Perspective on Interferences
with the Right to Peaceful Protest through Vague Law

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Summary

Protesting against human rights violations is dangerous. Worldwide, human rights defenders are subject to violations ranging from harassment to murder. One way in which human rights defenders are silenced is through the misuse of the national judicial system where it is employed to punish human rights defenders for their work. Vague laws contribute to making this possible because they obfuscate the scope of the law and enable its arbitrary application. The purpose of this thesis is to investigate what protection there is against this type of abuse of law, with a focus on the ECtHR's jurisprudence. To contextualise the discussion, protest understood both as a right in itself and as a mean to defend other rights, as well as vague national law restricting this right, are used as examples.

The main research question is how the ECHR protects against national law being used as a mean to restrict the right to protest. Even though the thesis focuses on the ECHR, it also engages with the ICCPR. This study is conducted through legal dogmatic method, which is a method for determining the contents of the law by analysing its sources. The theoretical starting points are rule of law understood in its formal sense which stresses the foreseeability of law, and *de facto* criminalisation which provides the conceptual tools to define criminal law in a broader sense than what follows from the national definition.

In this thesis, the requirement that interferences with the right to protest must have a legal basis is considered a rule of law concept derived from human rights law. According to this requirement, there must both be a legal basis as determined by national law, and this law must fulfil the quality requirements posed by international law. These requirements are that the law must be accessible, foreseeable and provide safeguards against arbitrary application. Full foreseeability is an unattainable ideal and it is therefore inescapable that laws are vague to a certain extent. Therefore, foreseeability is a flexible concept.

Accordingly, there is a basis according to the ECHR to determine a national law as an invalid basis to interfere with the right to protest because it is too vague. Nevertheless, the ECtHR is reluctant to assess national legislation both with respect to whether there is a legal basis according to national law and whether the national law is of sufficient quality. Moreover, the requirement on foreseeability is applied inconsistently. In its assessment, the court also defers to the assessment of the national authorities by affording states a margin of appreciation, and often assesses foreseeability as part of an overall proportionality assessment. Given that foreseeability is flexible, the proportionality assessment is used to determine the level of foreseeability required.

Through focusing on proportionality rather than the quality of the law, foreseeability is not developed as a legal standard. Additionally, the level of protection becomes dependant on how the case is conceived and the individual facts of the case. Meanwhile, it follows from the importance of the right to protest in a democratic society that there should be a high

requirement on foreseeability of laws interfering with the right. The principle of legality moreover speaks in favour of that dubious cases should be interpreted in favour of the right to protest.

Sammanfattning

Det är farligt att protestera mot kränkningar av mänskliga rättigheter. Världen över utsätts människorättsförsvarare för olika övergrepp – från trakasserier till mord. Ett sätt som människorättsförsvarare tystas på är genom att det nationella rättssystemet används för att straffa dem för deras arbete. Lagar som är vaga är en faktor som möjliggör detta, eftersom de gör det otydligt vad som rymms inom lagstiftningen och därigenom öppnar upp för godtycklig rättstillämpning. Detta examensarbete syftar till att utreda vilket skydd som finns mot att nationell rätt missbrukas, med fokus på Europadomstolens praxis. Protest som en rättighet i sig själv och som ett medel för att försvara rättigheter, samt vaga nationella lagar som inskränker denna rättighet, utgör fokus för undersökningen och erbjuder en konkret kontext för diskussionen om lagars kvalitet.

Huvudfrågeställningen är hur Europakonventionen skyddar mot att nationell lagstiftning används för att inskränka rätten att protestera. Även om fokus ligger på Europakonventionen görs även utblickar gentemot främst ICCPR. Undersökningen genomförs genom rättsdogmatisk metod, vilket innebär att folkrättens källor analyseras. Som teoretiska utgångspunkter används ett formellt rättssäkerhetsbegrepp som betonar lagars förutsebarhet, samt *de facto* kriminalisering som ger en bredare definition av straffrätt än vad som följer av nationell rätt.

Kravet på att inskränkningar av rätten att protestera fredligt ska ha en rättslig grund anses i detta examensarbete vara ett formellt rättssäkerhetsbegrepp som härleds ur de mänskliga rättigheterna. Detta krav består för det första av om det finns stöd i lag enligt den nationella rättsordningen och för det andra av om lagen uppfyller de kvalitetskrav som ställs av internationell rätt. För att en lag ska vara av tillräcklig kvalitet ska den vara tillgänglig, förutsebar och skydda mot godtycklig tillämpning. Full förutsebarhet är emellertid ett ouppnåeligt ideal och det är därför ofrånkomligt att lagar är vaga till en viss gräns. Förutsebarhet är därför ett flexibelt begrepp.

Även om det således finns förutsättningar enligt Europakonventionen att underkänna nationella lagar som alltför vaga i den mån de inskränker rätten att protestera, är den praktiska tillämpningen inkonsekvent. Det finns en försiktighet vad det gäller att bedöma nationella lagar, både vad det gäller om det finns stöd för inskränkningen enligt inhemsk rätt och om lagen lever upp till kvalitetskraven. Istället görs ofta en proportionalitetsbedömning där det lämnas ett visst skön för statens bedömning genom att staten tillerkänns en *margin of appreciation*.

Eftersom förutsebarhet är ett flexibelt koncept, används proportionalitetsbedömningen för att avgöra vilken grad av förutsebarhet som krävs i varje enskilt fall. Detta innebar att graden av skydd i hög grad blir beroende av hur en situation uppfattas och av sakomständigheter i det enskilda fallet. Vidare medför detta att kraven avseende förutsebarhet inte utvecklas som en rättslig standard. Samtidigt talar både rättighetens betydelse i ett demokratiskt samhälle och de tolkningsprinciper som följer

av legalitetsprincipen för höga krav på förutsebarhet, samt att tveksamma fall bör tolkas till förmån för rätten att protestera fredligt.

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From working as an international accompanier in Guatemala 2012-2013, I got to witness first-hand how national law and the national judicial system was employed to punish and silence dissenting human rights defenders. Although criminalisation of human rights defenders is not limited to the Latin American context, this experience opened my eyes for the phenomenon and sparked my interest in vague laws. First and foremost, I would therefore like to thank the human rights defenders of Guatemala and of the rest of the world. Your courage is inspirational and humbling.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CCPR	Human Rights Committee
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights)
ECtHR	European Court of Human Rights
ECommHR	European Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

Protesting against human rights abuse is a dangerous activity. Worldwide, human rights defenders¹ are intimidated, stigmatised and sometimes even killed because of their work.² Human rights organisations also note that the judicial system is increasingly exploited to silence and punish people defending human rights.³ One way that this is made possible is through legislation that gives the adjudicator a wide margin of discretion by being overly broad and/or vague.⁴ This thesis focuses on laws that are vague and that often are broad because they are vague. For this reason, the term “vague laws” will henceforth be employed in this thesis.

There are many examples throughout Europe of vague domestic laws interfering with the enjoyment of human rights.⁵ A concrete example of the type of laws that this thesis will discuss is a law that criminalise anyone “[...] who organises or provokes a gathering of people to commit public acts of violence, damage property *or otherwise seriously breach public order* [...] [italics added]”⁶. Another example is a law designating the “[...] breach of the peace by conduct likely to cause annoyance [...]”⁷ as an administrative offence. Yet another example is a law permitting police officers to stop and search both vehicles and pedestrians if it is expedient to prevent terrorism.⁸

¹ The term human rights defender has been popularised subsequent to the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, popularly known as the Declaration on Human Rights Defenders (Office of the High Commissioner of Human Rights (2004). *Fact Sheet No. 29: Human Rights Defenders – Protecting the rights to defend Human Rights*. p. 2. footnote 2). The declaration which is a soft law instrument that recognises the right and responsibility of everyone to protect and promote human rights (article 1 Declaration on Human Rights Defenders), as well as the importance of such work (preamble para. 4 Declaration on Human Rights Defenders).

² Sekaggya, Margaret (23 December 2013). *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya*. A/HRC/25/55. Human Rights Council twenty-fifth session agenda item 3. United Nations General Assembly. paras. 58-59.

³ Inter-American Commission on Human rights (2015). *Criminalization of Human Rights Defenders*. OEA/Ser.L/V/IL Doc.49/15. Organisation of American States. para. 11; Sekaggya (23 December 2013). para. 59.

⁴ Inter-American Commission on Human rights (2015). para. 41; Sekaggya, Margaret (10 August 2012). *Report of the Special Rapporteur on the Situation of Human Rights Defenders*. A/67/292. Sixty-seventh session Item 70 (b) of the provisional agenda. United Nations General Assembly. paras. 30, 41.

⁵ Ó Fathaigh, Rónán & Wiersma, Chris (2 December 2011). “Turkish Law Criminalising ‘Denigration of Turkish Nation’ Overbroad and Vague” in *Strasbourg Observers*.

⁶ Article 283 of the Criminal Code, cited in *Kudrevičius and Others v. Lithuania* [GC] (App 37553/05) ECtHR judgment on 15 October 2015. ECHR 2015. para. 62.

⁷ Section IX(1), sub-paragraph 1 of the Law on Administrative Offences cited in *Chorherr v. Austria* (App 13308/87) ECtHR judgment on 25 August 1993. Series A no.266-B. para. 12.

⁸ *Gillan and Quinton v. United Kingdom* (App 4158/05) ECtHR judgment on 12 January 2010. ECHR 2010 (extracts). paras. 28-34.

The right to protest peacefully is in this thesis considered to be both a manner to defend human rights and a right in itself. Here, protest is defined as public forms of expressions such as marches, demonstrations, pickets and sit-ins. It is also a right which exercise presuppose conflict and disturbance to a certain extent given that it both in the past and in the present is an engine of social change,⁹ and that it inevitably causes disturbance to the public.¹⁰

International human rights law both permit that national law restricts the internationally recognised right to protest peacefully and requires that there is a legal basis in national law for the restriction to be justified.¹¹ This thesis focuses on the formal requirements on law that interferes with the right to protest that prevents states from using law as a repressive mean. Formal requirements are understood as requirements on the shape and nature of the law rather than its material contents, which enable review of laws that are considered vague.

1.1 Purpose and Research Question

The purpose of this thesis is to investigate the rule of law requirements on national law interfering with the right to protest peacefully. To achieve its purpose, this thesis will use the issue of laws that are vague as an example and it will also focus especially on protests that are defending human rights. It will therefore first explore the right to peaceful protest generally, as well as protest as a mean to defend human rights. This thesis will moreover fulfil its purpose by employing a formal definition of rule of law to identify the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth ECHR)¹² on national law that could be classified as a rule of law concept. It will also analyse how the concept is applied by the European Court of Human Rights (henceforth ECtHR).

Given the purpose of this thesis, the research question is: *How does the ECHR protect against national law being used as a mean to restrict the right to protest?* In order to answer the research question, a number of sub-questions need to be explored:

1. What conduct falls within the scope of protection of the right to protest peacefully and what is a protest that defends human rights?
2. In what way may laws that are vague interfere with the right to protest peacefully both when they are enforced and when they are not?

⁹ Mead, David. (2010). *The new law of peaceful protest: rights and regulation in the Human Rights Act era*. Oxford: Hart. p. 9; Sekaggya, Margaret (July 2011). *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. United Nations Special Rapporteur on the situation of human rights defenders. p. 71.

¹⁰ Mead (2010). p. 11.

¹¹ See articles for instance Article 11 ACHPR (African Charter on Human and People's Rights (Nairobi 27 June 1981, 1520 UNTS 363)); Article 15 ACHR (American Convention on Human Rights (San José 22 November 1969, OAS Treaty Series No. 36)); Article 11 ECHR; Article 21 ICCPR.

¹² Rome 4 November 1950, ETS No. 5 and ETS No. 155.

3. What are the requirements on national law interfering with the right to protest according to the ECHR?
4. How does the ECtHR determine whether a vague law is a sufficient legal basis according to national law?
5. How does the ECtHR assess the foreseeability of vague laws that interfere with the right to protest peacefully?

While focusing primarily on the ECHR and the ECtHR's jurisprudence, this thesis will also engage with other international human rights instruments, mainly the International Covenant on Civil and Political Rights (henceforth ICCPR)¹³, to highlight the differences and similarities between the European and other contexts.

1.2 Method

The issue of peaceful protest in general and protest defending human rights in particular are used as examples to contextualise the discussion about national law that interferes with international human rights law. While human rights defenders formally have the same human rights as everyone else,¹⁴ focusing on protest as a mean to defend human rights will highlight important choices regarding the proportionality assessment of interferences. Moreover, this thesis focuses especially on laws that are vague because this puts the spotlight on what is required for a law to be foreseeable, which is one of the fundamental requirements on law. To identify the issues raised by vague laws interfering with protest and with human rights defence, reports from the United Nations Special Rapporteur on the situation of human rights defenders and the Inter-American Commission on Human rights have been used.

Because this thesis is concerned with the content of international law, the most suitable method is legal dogmatic method that discerns the content of law through analysing its sources.¹⁵ In this case the sources, as identified by article 38 of the Statute of the International Court of Justice¹⁶ are international conventions, international customary law and general legal principles, whereas judicial decisions and doctrine are subsidiary means to determine the content of the law. According to Brownlie, the article is recognised as a complete statement of the sources of international law.¹⁷

The basic principles for treaty interpretation are laid down in articles 31-33 Vienna Convention on the Law of Treaties (henceforth VCLT)¹⁸, which also reflect customary law.¹⁹ According to these articles, treaties are first and foremost interpreted according to their ordinary meaning. If the

¹³ New York 16 December 1966, 999 UNTS 171.

¹⁴ Office of the High Commissioner of Human Rights (2004). p. 19.

¹⁵ Sandgren, Claes (2015). *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*. Third Edition. Stockholm: Norstedts juridik. pp. 43-44.

¹⁶ San Francisco 26 June 1945, 15 UNCTAD 355.

¹⁷ Brownlie, Ian (2003). *Principles of public international law*. Sixth Edition. Oxford: Oxford University Press. p. 5.

¹⁸ Vienna 22 May 1969, 1155 UNTS 331.

¹⁹ Gardiner, Richard (2012). "The Vienna Convention Rules on Treaty Interpretation" in Hollis, Duncan B. (ed.). *The Oxford guide to treaties*. pp. 475-506. Oxford: Oxford University Press. p. 493.

meaning remains unclear, they are interpreted according to their context, object and purpose before supplementary means of interpretation can be applied.²⁰ Human rights treaties differ from ordinary treaties because they assign rights to individuals.²¹ Çalı argues that while the interpretation of human right treaties belongs to the same regime as treaty interpretation generally, an overarching principle is that they should be interpreted so that the rights set forth are effectively protected.²²

Effective protection is also a guiding principle for interpreting the ECHR. The ECtHR has held that the convention is intended to give effective protection of the rights set forth and that the convention therefore should not be interpreted in a manner that renders the rights illusory.²³ While the VCLT offers a starting point for the interpretation of the ECHR, the ECtHR does not apply a strict hierarchy of rules of interpretation. Instead, it interprets the convention as a whole in the light of its object and purpose.²⁴ Moreover, because the ECHR is interpreted as a living instrument, the *travaux préparatoires* of the ECHR must be used with caution.²⁵ For this reason, this thesis relies on the jurisprudence of the ECtHR rather than the *travaux préparatoires* of the convention.

Brownlie argues that judicial decisions are not sources of law in the strict sense, but are authoritative evidence of the state of the law.²⁶ This thesis focuses to a great extent on the jurisprudence of the ECtHR, which is a regional court. Its jurisprudence is therefore not directly applicable to the international human rights regime generally. Moreover, there is an obvious risk of eurocentrism in trying to draw general conclusions on the basis of a European court operating in a European context. Mindful of these difficulties, jurisprudence and commentary on the ECHR is supplemented by the ICCPR, its *travaux préparatoires* and literature commenting on it. The purpose is to set the discussion on the ECHR in a wider context and to make comparisons taking the different contexts into account where applicable.

Although it would have been interesting to include material from other regional systems, notably the Inter-American Court on Human Rights, and to conduct a more thorough review on decisions and statements by the Human Rights Committee (henceforth CCPR), it is more fruitful to focus the discussion to one system given the scope of the thesis. The ECHR is the oldest legally binding human rights instrument and it is the first instrument

²⁰ Articles 31-32 VCLT. See also Linderfalk, Ulf (2012). "Tolkningen av traktater" in Linderfalk, Ulf (ed.) *Folkrätten i ett nötskal*. pp. 93-106. Second Edition Lund: Studentlitteratur. pp. 95-97.

²¹ Çalı, Başak (2012). "Specialized Rules of Treaty Interpretation: Human Rights" in Hollis, Duncan B. (ed.). *The Oxford guide to treaties*. pp. 525-548. Oxford: Oxford University Press. p. 530.

²² *Ibid.* p. 546-547.

²³ *Airey v. Ireland* (App 6289/73) ECtHR judgment on 9 October 1979. Series A no. 32. para. 24.

²⁴ Rainey, Bernadette, Wicks, Elizabeth & Ovey, Clare (2014). *Jacobs, White and Ovey: the European Convention on Human Rights*. Sixth edition. Oxford: Oxford University Press. pp. 65-69.

²⁵ *Ibid.* p. 67.

²⁶ Brownlie (2003). p. 19.

to be enforced through judicial means.²⁷ Additionally, it offers rich material on the quality of law assessment. A basic premise for human rights philosophy is moreover that human rights are universally applicable.²⁸ The freedom of assembly is safeguarded by the Universal Declaration of Human Rights (henceforth UDHR)²⁹ and the ICCPR³⁰ as well as by the regional human rights conventions³¹. Although their wording differs somewhat, they all require that limitations to the right should have a legal basis in national law.

According to Brownlie, literature may to a certain extent have value as indicating the content of the law and in some cases it is even influential in shaping the law, but its primary value is its commentary.³² Because the purpose of this thesis is not only to describe the law but also to discuss and evaluate it, literature is used towards this end.

1.3 Theory

This thesis employs a formal concept of rule of law, that is used as a perspective from which the requirements on national law imposed by international human rights law are identified and analysed. When discussing rule of law, the distinction between formal and substantive rule of law is often made. Substantive rule of law requires both that laws should adhere to certain formal requirements and that the law should have a certain content.³³ It has been suggested that law should uphold ethical values in a broad sense³⁴ or safeguard human rights generally.³⁵

According to the formal theory of rule of law, laws should be able to guide human action. In order to succeed with that laws must be prospective, clear, accessible and stable.³⁶ If individuals can be struck by the punishment of the law regardless of their actions, their fear of the punishment cannot serve as a guidance for how to behave.³⁷ Barros suggests that laws that divert from rule of law standards by being retroactive, vague or secret are repressive but that they differ from laws that are explicitly draconian. The former type upholds a veneer of legality but are objectionable on formal grounds whereas the latter is objectionable because of its substantive

²⁷ Mead (2010). pp. 29-31.

²⁸ Henkin, Louis (1989). "The Universality of the Concept of Human Rights" in *The Annals of American Academy of Political and Social Science*. Vol. 506. pp. 10-16. Sage Publications, Inc. in association with the American Academy of Political and Social Science. pp. 11-14.

²⁹ Article 20 UDHR (Paris 10 December 1948, UNGA Res 217A(III)). The right is subject to the limitations set forth by article 29 UDHR.

³⁰ Article 21 ICCPR

³¹ Article 11 ACHPR; Article 15 ACHR; Article 11 ECHR.

³² Brownlie (2003). p. 23-24.

³³ Summers, Robert S. (2010). *Essays in legal theory*. Dordrecht: Kluwer. pp. 173-174.

³⁴ Peczenik, Aleksander (1995). *Vad är rätt?: om demokrati, rättssäkerhet, etik och juridisk argumentation*. First Edition. Stockholm: Fritze. pp. 92-95

³⁵ Summers (2010). p. 173.

³⁶ Raz, Joseph. (1979). *The authority of law: essays on law and morality*. Oxford: Clarendon. p. 226.

³⁷ Arendt, Hannah (1973). *The origins of totalitarianism*. New edition with added prefaces. New York: Harcourt Brace Jovanovich. p. 467.

content.³⁸ This view is adopted in this thesis with reference to laws that are vague.

For laws to be able to guide human conduct, the formal rule of law theory emphasise that laws should be foreseeable.³⁹ To be foreseeable, they must, according to Frändberg, be published, applied in good faith and free from unpredictable and sudden changes. Foreseeability is impaired when laws are so unclear that their content cannot be determined or if there is an absence of regulation altogether.⁴⁰ According to Fuller, laws should be general, available, non-retroactive, understandable, coherent, stable and there should be congruence between rules and their application.⁴¹ While it is not possible for a law to fully comply with these standards, complete failure in any of them entails that the law in fact is no law.⁴² Raz supports that it is inescapable that laws are vague to some extent, and hence conformity to rule of law standards is a matter of degree.⁴³

The advantage with using a formal rule of law concept is that it is more specific than the substantive one.⁴⁴ In Raz's view, defining rule of law as the rule of good law would render it a social philosophy rather than a legal theory. The better view, according to him, is to use a definition that recognises that rule of law does not offer a complete defence against all objectionable use of legislation. Rule of law, in its formal definition, is nevertheless a prerequisite for legislation that is clear with respect to what is required by the law and foreseeable with respect to its application. Through these requirements, rule of law sets limitations to the arbitrary exercise of state power.⁴⁵

For laws to be applied in a foreseeable manner, Summers argue that laws should be interpreted literally because this limits the scope of discretion of the adjudicator.⁴⁶ When this is not possible because the law is unclear, other means of interpretation must be employed. In such cases Frändberg argues that extensive interpretation and analogies should be avoided.⁴⁷

This thesis starts from the assumption that defiance of a law or decree prohibiting protest is followed by a sentence or a sanction. Rather than following the national categorisation of whether a sanction is determined as administrative or criminal, this thesis starts from the perspective of *de facto*

³⁸ Barros, Robert (2008). "Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentine (1976-1983)" in Ginsburg, Tom & Moustafa, Tamir (eds.) *Rule by law: the politics of courts in authoritarian regimes*. pp. 156-179. Cambridge: Cambridge Univ. Press. p. 168.

³⁹ See for instance Frändberg, Åke (2005). *Rättsordningens idé: en antologi i allmän rättslära*. Uppsala: Iustus. p.288; Raz (1979). pp. 212-214.

⁴⁰ Frändberg (2005). pp. 283-295.

⁴¹ Fuller, Lon L. (1964). *The morality of law*. New Haven: Yale University Press. p. 39. The eighth requirement that Fuller mentions, that laws should not require the impossible, is in this thesis considered a substantive requirement on the content of the law rather than a formal requirement of what a law should be like. For this reason, it is not considered relevant to the formal concept of rule of law suggested here.

⁴² Fuller (1964). pp. 38-42.

⁴³ Raz (1979). p. 222.

⁴⁴ Frändberg (2005). p. 285.

⁴⁵ Raz (1979). pp. 211-224.

⁴⁶ Summers (2010). pp. 170-171.

⁴⁷ Frändberg (2005). p. 291.

criminalisation. This perspective was originally laid down by the ECtHR's jurisprudence, but is also applicable to the ICCPR.⁴⁸ *De facto* criminalisation focuses on the nature of the act and the nature and purpose of the sanction used to decide whether it is criminal or administrative.⁴⁹ Even minor administrative sanctions, such as fines or loss of permit, may be considered criminal sanctions if their purpose is to deter or to punish.⁵⁰ By considering sanctions from this perspective, the principles of interpretation of criminal law become applicable. A principle that is significant with respect to vague laws and that will be applied in this thesis, is that law should be interpreted in favour of the accused when it is unclear.⁵¹

1.4 Delimitations

This thesis focuses on protection in international human rights law against national law that unduly interferes with the right to protest peacefully. For this reason, both the issue of whether second order national legislation contradicts national constitutions and the extent to which international law limits international human rights law will be omitted. Both article 15.2 ICCPR and article 7.2 ECHR provide for an exception from the principle of legality for acts and omission that are criminal according to the general principles of law recognised by the community of nations⁵². Although the exception is applicable to other cases than those relating to war crimes,⁵³ it

⁴⁸ Nowak, Manfred (2005). U.N. covenant on civil and political rights: CCPR commentary. Second revised edition. Kehl: Engel. p. 363. paras. 11-13.

⁴⁹ Engel and Others v. the Netherlands (App 5100/71; 5101/71; 5102/71; 5354/72; 5370/72) ECtHR judgment 8 June 1976. Series A no. 22. paras. 81-82; Welch v. United Kingdom (App 17440/90) ECtHR judgment on 9 February 1995. Reports 1996-II. para. 28. ECtHR judgment 8 June 1976, para. 82. In *Engel and Others v. the Netherlands*, the ECtHR laid down three criteria to determine whether an offence is a criminal offence. First, the definition in national law is used as a starting point. Secondly, the nature of the offence is considered and thirdly the severity of the penalty is taken into account. Offences that are general and penalties that include deprivation of liberty are more likely to be considered criminal offence. See also the comment in Danelius, Hans (2015). *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*. Fifth Edition. Stockholm: Norstedts juridik. p. 176. *Welch v. UK* concerned the interpretation of “penalty” in article 7 ECHR, where the court held that the starting point to determine whether a sanction is a penalty is if it is imposed subsequent to a criminal conviction. Other relevant factors include the nature and the purpose of the measure in question, its characterisation under national law, the procedures involved in the making and implementation of the measure, and its severity.

⁵⁰ See for example Öztürk v. Germany [GC] (App 8544/79) ECtHR judgement on 21 February 1984. ECHR 1999-VI. para. 53; Lutz v. Germany (App 9912/82) ECtHR judgment on 25 August 1987. Series A no. 123. paras. 51-57; Danelius p. 178-179.

⁵¹ Larouer, Christophe J. (2009). "In the Name of Sovereignty? The Battle Over In Dubio Mitius Inside and Outside the Courts" in *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 22. pp. 1-49. Scholarship@Cornell Law: A Digital Repository. p. 4. The principle *in dubio mitius* (that in doubtful cases the interpretation that is the most beneficial to the accused should be given precedence) dates back to Roman law.

⁵² Article 7.2 ECHR uses the wording “civilised nations” rather than “community of nations”.

⁵³ Bleichrodt, Edwin (2006). “Freedom from Retrospective Effect of Penal Legislation (Article 7)” in Dijk, Pieter van et al (eds.). *Theory and practice of the European Convention*

falls outside the scope of this thesis. Moreover, because this thesis focuses on vague national law interfering with international human rights law, this thesis will not deal with the ambiguity of international law by discussing the conditions under which public order, national security and morals are considered legitimate aims to restrict the right to protest peacefully.

International human rights law permits temporary derogation from the right to protest peacefully subsequent to conditions laid down in article 4 ICCPR and article 15 ECHR. In determining whether a derogation is permissible, states are afforded a margin of appreciation.⁵⁴ Because the concerns raised by derogation from the right to protest peacefully are similar to those raised by the requirement that an interference with the right to protest should have a legal basis, discussing derogation separately does not further the analysis of how international human rights law protect against interferences by national law. Therefore, derogations will not be discussed further in this thesis.

Because this thesis focuses on laws that interfere with the right to peaceful protest by being vague, this thesis will focus on the foreseeability of laws rather than their accessibility. A discussion on the limits of the right to protest with respect to hate speech and the abuse of rights⁵⁵ fall outside of the scope of this thesis given its focus on protest to defend human rights and its focus on the formal precision of laws.

1.5 Previous Research

Most studies relating to how national law is used to punish human rights defence focuses on what nationally is determined as criminal law.⁵⁶ Considering interferences from the perspective of *de facto* criminalisation is therefore a valuable addition to this research as it broadens the scope to include administrative interferences that previously have received little attention.

David Mead has provided extensive commentary on the right to protest peacefully in his book *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*. Geranne Lautenbach has made a significant contribution in investigating rule of law and legality issues relating to the legality principle focusing primarily, but not exclusively, on article 7 ECHR. This thesis position itself in relation to these studies by using peaceful protest with special focus on protest to defend human rights

on Human Rights. Fourth Edition. pp. 651-662. Antwerp: Intersentia. pp. 660-662; Nowak (2005). pp. 367-368. paras. 22-24.

⁵⁴ Flinterman, Cees (2006). "Derogations from the Rights and Freedoms in Case of a Public Emergency" in Dijk, Pieter van et al (eds.). Theory and practice of the European Convention on Human Rights. Fourth Edition. pp. 1053-1075. Antwerp: Intersentia. pp. 1055-1057.

⁵⁵ Article 17 ECHR prohibits that the rights set forth by the ECHR are used to destroy them. In principle, this article has only been applied to cases denying the holocaust (see Rainey, Wicks & Ovey (2014). pp. 122-124).

⁵⁶ See Inter-American Commission on Human rights (2015). paras. 11-12 and Martín, María (2015). *Criminalisation of Human Rights Defenders: Categorisation of the Problem and Measures in Response*. (Edited by Andrea Roca). Brussels: Protection International. p. 4.

as an example to study what protection the ECHR offers against national laws that interfere with the right by being vague.

1.6 Disposition

Chapter two gives a general background to the scope of protection of the right to protest peacefully. It starts by defining what conduct falls within its scope by defining what a protest is in the context of defending human rights and what the condition that a protest must be peaceful actually requires. Thereafter, it discusses the extent to which laws can be interferences with the right to protest, before it sets out the general requirements for an interference to be permissible. The chapter is ended with a summary that recapitulates the most important points of the chapter.

Chapter three contains a detailed discussion of what the human rights requirements on national law are, which in this thesis is considered a human rights concept of rule of law. The chapter first sets out the components of the concept, before turning to the specific issue of what level of foreseeability is required by laws that are vague. This study is first undertaken through a discussion of the application of the quality of law requirement, before turns to the issue of how foreseeability is sometimes considered under a general assessment of whether the interference is necessary in a democratic society. Each of the subchapters finish with an analysis of their findings.

Chapter four brings the discussion one step further by analysing the sub-questions that all contribute to answer the main research question. Finally, in chapter five this thesis concludes by both giving an answer to what protection the ECHR offers against national law interfering with the right to protest.

2 The Right to Peaceful Protest

In order to determine how the ECHR protects against national law being used as a mean to restrict the right to protest peacefully, it is necessary to determine the scope of the right to protest peacefully and under what conditions laws may be considered to interfere with this right. The aim of this chapter is to set out the context in which vague laws are studied by determining these issues. It will also give an overview of the requirements on an interference to be permissible.

2.1 The Scope of Peaceful Protest

To discuss national law as an interference with the right to protest peacefully, it is first necessary to define what is meant by peaceful protest. This subchapter sets out both the scope of the right when considered a right in itself and defines the notion of protest when used as a tool to defend human rights. A prerequisite for a protest to be protected as a human right is moreover that it is peaceful. How peaceful is separated from non-peaceful in the context of protest will also be discussed below.

2.1.1 Definition and scope of the right to protest

The right to protest is a human right in itself. Although there is no express recognition of the right to protest, it is considered a composite right consisting of the freedom of expression, assembly and association.⁵⁷ It is also a right that is considered essential to a democratic society because it is a prerequisite for a plurality of views to be expressed in public.⁵⁸

Cases that concern the right to protest peacefully are primarily considered by the ECtHR under the freedom of assembly⁵⁹, but the cases are examined in the light of the freedom of expression. This means that principles derived from cases considering the freedom of expression also are generally applicable to the freedom of association to the extent that the case deals with the right to protest.⁶⁰ Principles derived from cases regarding the freedom of expression will therefore be discussed in this thesis in relation to the right to protest peacefully.

Nowak notes that the term assembly is not defined by the ICCPR but that it should be interpreted according to its customary meaning in national legal

⁵⁷ Mead (2010) p. 58; Sekaggya (June 2011). p. 70.

⁵⁸ See for example *Rassemblement Jurassien and Unite Jurassienne v. Switzerland* (App 8191/78) ECommHR inadmissibility decision on 10 October 1979. D.R. 17, pp. 93-121. para. 2; Nowak (2005). p. 481. para. 1.

⁵⁹ The freedom of assembly is safeguarded by article 21 ICCPR and article 11 ECHR.

⁶⁰ Rainey, Wicks & Ovey (2014) p. 466. See also *Ezelin v. France* (App 11800/85) ECtHR judgment on 26 April 1991. para. 35; *Galstyan v. Armenia* (App 26986/03) ECtHR on 15 November 2007. paras 95-96.

system, taking its object and purpose into account.⁶¹ In an inadmissibility decision, the European Commission on Human Rights (henceforth ECommHR)⁶² underlines that the freedom of assembly should not be interpreted narrowly given its important democratic function.⁶³ The freedom of assembly covers assemblies irrespective of if they are conducted indoors or outdoors, or if they are mobile or static.⁶⁴ Assemblies conducted under a considerable length of time also fall within the scope of freedom of assembly.⁶⁵ Purely private gatherings are however not considered an assembly. To be an assembly it must be directed towards the public in some manner, although the requirement is not restricted to politics in the narrow sense of party politics.⁶⁶ Moreover, despite being an individual right,⁶⁷ freedom of assembly must be exercised together with others. Both the CCPR and the ECtHR has recognised that a solo demonstration would not be considered an assembly *per se*, although this has little practical significance as the case will be considered under the freedom of expression instead.⁶⁸

Protesting is not only a right in itself, but it is also a tool to defend other human rights. This thesis endorses Eguren Fernández and Patel's view that defending human rights is a matter of actions rather than identity,⁶⁹ and this subchapter sets out to define protest within the context of defending human rights. According to Mead, typical examples of protest include static demonstrations, marches, sit-ins as well as obstructive and disruptive action.⁷⁰ Protest can moreover either be communicative, which refers to

⁶¹ Nowak (2005). p. 484. para. 5.

⁶² Before the entry into force of Protocol 11 the supervisory system of the ECHR consisted of both the ECommHR and the ECtHR. The ECommHR would first decide on the admissibility of the claim and, provided the claim was admissible, issue a report on the merits after which it could be referred to the court. From the entry into force of Protocol 11 in 1998 the dual system was replaced by a permanent court (see Rainey, Wicks & Ovey (2014). pp. 8-9).

⁶³ C.S. v. the Federal Republic of Germany (App 13858/88), ECommHR inadmissibility decision on 6 March 1989, para. 2.

⁶⁴ Joseph, Sarah & Castan, Melissa (2013). *The International Covenant on Civil and Political Rights: cases, materials, and commentary*. 3rd ed. Oxford: Oxford University Press). p. 646. para. 19.03.

⁶⁵ Cisse v. France (App 51346/99) ECtHR judgement on 29 November 2007. ECHR 2002-III (extracts). paras. 35-40. The case concerned an occupation of a church that had been going on for two months.

⁶⁶ Nowak (2005). p. 484-485, para. 6.

⁶⁷ Humphrey, John P (1984). "Political and Related Rights" in Meron, Theodor (ed.) *Human rights in international law: legal and policy issues*. pp. 171-203. Oxford: Clarendon. pp. 171-172.

⁶⁸ See Coleman v. Australia (Communication No. 1157/2003), CCPR adoption of views on 17 July 2006, CCPR/C/87/D/1157/2003, para 2.1; Novikova and Others v. Russia (App 25501/07; 57569/11; 80153/12; 5790/13; 35015/13) ECtHR judgment on 26 April 2016. para. 91.

⁶⁹ Eguren Fernández, Luis Enrique & Patel, Champa (2015). "Towards developing a critical and ethical approach for better recognising and protecting human rights defenders" in *The International Journal of Human Rights*. Vol. 19. No. 7. pp. 896-907. Abingdon: Routledge: Taylor and Francis Group. p. 898.

⁷⁰ Mead, David (2007). "The right to peaceful protest under the European Convention on Human Rights – a content study of the Strasbourg case law" in *European Human Rights Law Review*. Vol. 4, 2007. pp. 345-384. Westlaw: Thomson Reuters. p. 348.

such protest where an opinion is voiced in a public space, or consist of direct action that primarily is aimed at stopping the opposed practice. A concrete example of the latter would be dismantling the warheads of an arms manufacturer.⁷¹

Mead has suggested four general criteria to differentiate protest from assembly generally. They will be combined with the definition of human rights defenders suggested by the Office of the High Commissioner for Human Rights (henceforth OHCHR) in order to propose a definition of protest in the context of human rights defence.

The first criteria that Mead suggests is that protests are politically participative, which means that they are directed towards influencing policy. Second, protests are either directed towards influencing decision-makers or towards public opinion. Because their aim is persuasive, protests need to have a public element. Third, Mead suggests that a protest must go beyond private interests. The test is whether the individual is motivated by self-interest or altruism. Fourth and finally, Mead argues that protests should run outside of formal party structures. Protest is directed towards promoting change and is therefore different from a regular election campaign.⁷²

According to the OHCHR what defines a human rights defender, or rather an act of human rights defence, is first that the act deliberately is set out to defend human rights. If the human rights defence is a by-product of actions that would have been undertaken anyway it is not an act defending human rights. Second, it follows from the very nature of human rights defence that the subject matter of the protest must fall within the scope of a recognised human right. For this criterion to be fulfilled it does not matter whether the protesters are right or wrong regarding the material assessment of the facts of the case that they are protesting. Third, the OHCHR argues that human rights defenders must recognise the universality of human rights, which means that an act defending human rights cannot promote one right while simultaneously denying others. Fourth, human rights defence must be peaceful.⁷³

Drawing on the definitions outlined above, this thesis proposes a definition of peaceful protest within the context of human rights defence consisting of the following criteria. First, the aim of the protest must be to influence on a policy falling within the scope of human rights, but whether to protesters are right or wrong with respect to the assessment of the fact of a case is irrelevant. For example, a protest criticising an alleged incident of torture is no less a human rights protest only because it is later established that the impugned treatment did not qualify as torture. Second, protest must have a public element in that it is directed towards policy-makers or public opinion. This also follows from the requirement that assemblies should not be purely private. Third, it is not required that the protest is driven by altruistic motives, but the views furthered by the protest must accept the universality of human rights. Fourth, the protest is especially directed towards promoting and protecting human rights and is not an unintended effect of another action. Fifth, the protest must be conducted peacefully.

⁷¹ Mead (2010). pp. 9-11 and pp. 75-76.

⁷² Ibid. pp. 349-350.

⁷³ Office of the High Commissioner of Human Rights (2004). pp. 2-10.

What it means that a protest must be peaceful, will be discussed in detail below.

2.1.2 What it means that protests should be peaceful

For a protest to fall within the scope of the freedom of assembly, it must be peaceful. Protests are inherently disruptive as they may interfere with the daily lives of passers-by or by directly taking action to change the practice they oppose.⁷⁴ Moreover, as Nowak points out, there is an inherent conflict to the exercise of freedom of assembly because in order to fill its democratic function it is often staged against the interests of the power holders, while the effective exercise of the right is dependent on state protection.⁷⁵ In order to define the scope of protection for peaceful protests, it is necessary to distinguish what is meant by a non-peaceful protest from a protest that is disruptive.

What then does it mean that a protest must be peaceful? The short answer is that for a protest to be peaceful, it must be free from physical violence. This follows according to Nowak from the ordinary meaning of the word. The term “peaceful” is understood in a broad sense because the implication of a protest falling outside the scope of the definition is that the actions have no protection whatsoever in human rights law.⁷⁶

It follows from the statements made during the drafting process of the ICCPR that what determines whether an assembly is peaceful is the manner in which it is conducted and not the opinions expressed.⁷⁷ Likewise, the ECtHR has held that demonstrations that may annoy or give offence to people opposed to the ideas promoted fall within the scope of the freedom of assembly,⁷⁸ even when the views promoted may be shocking or unacceptable.⁷⁹ Hence, there is agreement between the ECHR and the ICCPR that the views expressed by a protest are irrelevant for whether it is peaceful.

What if a protest promotes something that is unlawful, or is conducted in a way that contradicts domestic law? The ECtHR maintain that “peaceful” is interpreted autonomously. In *Cissé v. France*, the French government argued that the assembly was not peaceful because it aimed to defend and legitimise a deliberate breach of French law. Furthermore, the demonstration itself was unlawful according to national law.⁸⁰ The ECtHR rejected that the legality of an assembly under domestic law would be used as a criterion for determining whether an assembly is peaceful.⁸¹

⁷⁴ Mead (2010). p. 11.

⁷⁵ Nowak (2005). pp. 481-482. para. 1.

⁷⁶ Ibid. p. 487. paras.10-11.

⁷⁷ Ibid. p. 486, para. 9.

⁷⁸ *Stankov. and the United Macedonian Organisation Ilinden v. Bulgaria* (App 29221/95 and 29225/95) ECtHR judgment on 2 October 2001. ECHR 2001-IX. para. 86.

⁷⁹ *Fáber v. Hungary* (App 40721/08) ECtHR judgment on 24 July 2012. para 37.

⁸⁰ *Cisse v. France* (App 51346/99). para. 35. See also comment in Mead (2010). p. 70.

⁸¹ *Cisse v. France* (App 51346/99). para. 37.

What degree of violence is necessary for a protest to reach the threshold of non-peaceful? According to the ECommHR, it is the intentions and actions of the organisers and participants that are important to determine whether a protest is non-peaceful. A demonstration where the organisers and participants have violent intentions which result in public disorder is not covered by the scope of peaceful assembly.⁸² In Mead's analysis, this means that it is not sufficient that the demonstration is meant to be violent if it is not the result.⁸³ In conclusion, there must be both violent intent and result for a protest not to be protected by the freedom of peaceful assembly.

A protest does not cease to be peaceful even if there is a risk of violent counter-demonstrations or if there is a possibility that participant with violent motives, who are not associated with the organising association, join the protest.⁸⁴ On the contrary, the ECtHR has held that states have a positive obligation to ascertain that it is possible to protest peacefully, even if the views furthered are unpopular, without the fear of being subjugated to physical violence by opponents.⁸⁵

What happens in the case where a demonstration that starts peacefully turns violent? The ECtHR has made it clear that if the individual has not conducted a reprehensible act, he or she is exercising his or her right to freedom of assembly.⁸⁶ Even if there is sporadic violence, the individual remains protected if he or she is peaceful in his or her intentions and behaviour.⁸⁷ If the violence reaches such a level that it cannot be described as sporadic, the ECtHR has accepted that the protest still falls within the scope of protection if there is disagreement as to which party was responsible for escalating the violence.⁸⁸

2.2 Interferences with the Right to Protest Peacefully

Interferences are actions taken by the state that limit the exercise of a right. If an interference is not justified, it is a violation of the right in question. The purpose of this subchapter is to determine whether national legislation – both when it is enforced and when is it not – may be considered to interfere with the right to protest peacefully. Since this thesis is especially concerned with laws that through their vagueness provide the states with a wide margin of discretion, special attention is dedicated to the way in which such laws may interfere with the right to protest peacefully.

⁸² C.S. v. the Federal Republic of Germany (App 13858/88). para. 2.

⁸³ Mead (2010) p. 68.

⁸⁴ Christians Against Racism and Fascism v. United Kingdom (App 8440/78), ECommHR inadmissibility decision on 16 July 1980. D.R. 21, p. 138-167. p 148, para. 4.

⁸⁵ Plattform "Ärzte für das Leben" v. Austria (App 10126/82), ECtHR judgment on 21 June 1988. Series A no. 139. para. 32.

⁸⁶ Ezelin v. France (App 11800/85) ECtHR judgment on 26 April 1991, para. 41; Galstyan v. Armenia (App 26986/03). paras. 116-117.

⁸⁷ Ziliberg v. Moldova (App 61821/00) ECtHR inadmissibility decision on 4 May 2004. p. 10, para. 2.

⁸⁸ Primov and Others v. Russia (App 17391/06), ECtHR judgment on 12 June 2014. para 156.

2.2.1 *De facto* criminalisation as an interference with the right to protest peacefully

According to the jurisprudence of the ECtHR, criminal convictions based on national law for participating in a protest clearly constitute interferences with the right to protest peacefully.⁸⁹ This is also the case when administrative sanctions are handed down for participating in a protest, even when they are handed down subsequent to the protest,⁹⁰ which confirms that whether the sanction is considered administrative or criminal in national law is irrelevant to whether it is considered an interference. Moreover, the CCPR confirmed in *Ross v. Canada* that placing a teacher on leave without pay and removing him to a non-teaching position because of his anti-Semitic statements was an interference with his freedom of expression.⁹¹

Nevertheless, as illustrated by the case *Petropavlovskis v. Latvia*, it is not a given that a denial of an application for a benefit will be considered a sanction interfering with the right to protest. In the case, the applicant had had his application of citizenship denied and he argued that it was a violation of his freedom of expression and assembly because the denial was a punishment for participating in demonstrations against the government. The ECtHR maintained that neither national or international law recognises an unconditional right to citizenship and that there was nothing to indicate that the applicant's application had been denied arbitrarily. Therefore, the court did not consider that denying the application actually interfered with the applicant's right to protest. The court also noted that the denial of his application had had no concrete impact on his possibility to express his views.⁹²

The ECtHR has been criticised by Heri for taking a too narrow approach with respect to what can be considered an interference given that interferences usually are interpreted broadly. Moreover, Heri argues that the court did not sufficiently consider the chilling effect that such denials may have on the exercise of the freedom of expression and the right to protest.⁹³

⁸⁹ See for example *Galstyan v. Armenia* (App 26986/03). para. 102.

⁹⁰ *Ezelin v. France* (App 11800/85) ECtHR judgment on 26 April 1991, para. 39.

⁹¹ *Ross v. Canada* (Communication No. 736/1997) CCPR decision on 18 October 2000, CCPR/C/70/D/736/1997. para. 11.1.

⁹² *Petropavlovskis v. Latvia* (App 44230/06) ECtHR judgment on 13 January 2015. ECHR 2015. paras. 77-87. Note that there is a strong presumption in international law that citizenship falls within the national prerogative. This preposition is apparent in the court's reasoning (see paras 80-84 where the court also refers to the *Nottebohm Case (Lichtenstein v. Guatemala)* judgment of 6 April 1955 of the International Court of Justice).

⁹³ Heri, Corina (28 January 2015). "The Fourth Section's Curious Take on Article 10 in *Petropavlovskis v. Latvia*: Two Comments" in *Strasbourg Observers*.

2.2.2 Whether laws and laws that are vague can interfere with the right to protest peacefully despite not being enforced

Whether a law in itself, irrespective of whether it is enforced, may constitute an interference⁹⁴ depends according to the ECtHR on whether it risks affecting the individual directly.⁹⁵ Such was the case in *Dudgeon v. UK*, where the court maintained that the criminalisation of homosexual acts committed in private between consenting adults constituted an interference with the right to private life even when the law is not applied.⁹⁶ Nevertheless, the ECtHR can only review national legislation when there is an impugned violation of someone's right according to the convention. This means that abstract review is not possible.⁹⁷

The ECtHR has held that general prohibitions on demonstrations may interfere with the right to protest peacefully even if the prohibition is not enforced,⁹⁸ but to be considered affected by such a ban the applicants must prove that their rights are interfered with in a direct and personal manner.⁹⁹ Likewise, directly denying an application for permission to hold a protest may according to the court be an interference even when the decision is not enforced, because demonstrators cannot rely on receiving official protection if they defy the denial and hold the protest anyway. Prospective participants may furthermore be deferred from participating. The court therefore held that legal recognition in national law of the right to assemble and to protest is vital to the exercise of this right.¹⁰⁰

In *Paty and Others v. Hungary* the court held that there is no doubt that those organising a demonstration are affected by a prohibition of holding a demonstration. Prospective participants, on the other hand, must prove that they intended to participate in the demonstration, even though the court recognising the difficulties in proving the intention to participate in an event that never occurred.¹⁰¹ Moreover, in *Altuğ Taner Akçam v. Turkey*, a case concerning the freedom of speech, the court noted that the chilling effect

⁹⁴ Individual application according to article 34 ECHR presuppose that the applicant is the victim of the interference. Being a victim means that a person is "directly affected by the act or omission which is in issue" (*De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium* (App 2832/66; 2835/66; 2899/66) ECtHR judgement on 10 March 1972. Series A no. 12. para. 23). Since being a victim is related to being affected by an interference, jurisprudence related to the standing of the applicant as a victim is used to discuss whether legislation can be an interference with the right to protest peacefully.

⁹⁵ *Marckx v. Belgium* (App 6833/74) ECtHR judgment on 13 June 1979. Series A no. 31. para. 27.

⁹⁶ *Dudgeon v. United Kingdom* (App 7525/76) ECtHR judgement on 22 October 1981. Series A no. 59. paras 40-41.

⁹⁷ *Marckx v. Belgium* (App 6833/74). para. 27.

⁹⁸ *Christians Against Racism and Fascism v. United Kingdom* (App 8440/78). p. 147, para. 2.

⁹⁹ *Paty and Others v. Hungary* (App 5529/05) ECtHR judgment on 7 October 2008. paras. 25-28.

¹⁰⁰ *Baczkowski and Others v. Poland* (App 1543/06) ECtHR judgement of 3 May 2007. paras. 67-68.

¹⁰¹ *Paty and Others v. Hungary* (App 5529/05). paras. 25-26.

that the fear of possible prosecution must be considered in determining whether a law in itself is an interference.¹⁰²

In a report from 2015, the Inter-American Commission on Human rights stated that people who set out to defend human rights are often subject to criminal proceedings on the basis of legislation that is vague. Examples include “incitement to crime”, “sabotage” and “terrorism”. These provisions may contradict human rights on both substantial and formal grounds.¹⁰³ Moreover, the United Nations Special Rapporteur on the situation of human rights defenders notes that vague legislation can interfere with the right to protest peacefully because the scope of the unpermitted act is uncertain. These laws both limit the ability of defenders to express themselves and lead to self-censorship because the scope of the law is unknown.¹⁰⁴

Drawing on the report of the United Nations Special Rapporteur on the situation of human rights defenders, this thesis proposes that it is possible to identify two ways in which legislation may interfere with human rights defenders’ rights by being vague or overly broad. The first case refers to legislation that is overly broad and vague with respect to the criminalised act.¹⁰⁵ This is the case with legislation that uses an over inclusive definition of terrorism where any act interrupting traffic is defined as terrorism,¹⁰⁶ or legislation that criminalising condoning homosexuality.¹⁰⁷ The second case involves legislation that is vague or overly broad with respect to in what situations it is applicable.¹⁰⁸ Examples include legislation that permits the restriction of rights “to avoid public disorder” or “to ensure that public services are not interrupted” without defining the conditions under which such a situation emerges.¹⁰⁹

Anstis’ case study on Cambodian law is illustrative of what the properties are of law that is either vague with respect to the criminalised act or vague with respect to the situation where the law is applicable. When comparing Cambodian and Canadian law, she notes that the Cambodian version lacks defences – that is conditions under which the act should not be considered a crime. This makes the scope of the criminalised act unspecific.¹¹⁰ Concerning legislation that is vague with respect to its applicability, Anstis notes that a deficiency with the Cambodian law is that it does not specify the conditions according to which it can be applied further than that it can be applied to protect public order. The law therefore lends itself to arbitrary application.¹¹¹

¹⁰² *Altuğ Taner Akçam v. Turkey* (App 27520/07) ECtHR judgment on 25 October 2011. para. 68.

¹⁰³ Inter-American Commission on Human rights (2015). paras. 41-43.

¹⁰⁴ *Sekaggya* (10 August 2012). para. 24.

¹⁰⁵ *Ibid.* para. 15.

¹⁰⁶ *Ibid.* 2012 para. 15.

¹⁰⁷ *Ibid.* 2012 para. 30.

¹⁰⁸ *Ibid.* 2012 para. 20.

¹⁰⁹ *Ibid.*

¹¹⁰ Anstis, Siena (2012). “Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia” in *Journal of Human Rights Practice*. Vol. 4. No. 3. pp. 313-333. Oxford: Oxford University Press. pp. 316-317.

¹¹¹ *Ibid.* pp. 319-320.

2.3 Justifications for Interferences with the Right to Protest Peacefully

Once it is established that an action falls within the scope of the right to protest peacefully and that the state has interfered with this right, it is necessary to determine whether the interference can be justified. If it cannot be justified, the interference violates the right.

According to article 21 ICCPR and article 11.2 ECHR, three conditions must be fulfilled for an interference with the right to protest peacefully to be permissible. First, there must be a legal basis for the interference, secondly the restriction must pursue a legitimate aim, and thirdly it must be necessary in a democratic society. These three criteria make up a three-tier test of permissible limitations and if one them is not fulfilled, the interference is impermissible. Moreover, there are two fundamental assumptions underlying permissible grounds for interferences that are equally applicable to the ICCPR and the ECHR. The first, which is not stated explicitly, is that no other interferences except for those permitted by article 21 ICCPR and article 11.2 ECHR are permissible.¹¹² The second assumption is that limitations shall not be applied for any other purpose than that which is prescribed. This principle is explicitly stated in article 18 ECHR.¹¹³

The first condition of the three-tier test is that there must be a legal basis for the interference. According to ECtHR jurisprudence, this means that there must be a legal basis in the law as defined by national law, and that the law additionally must be sufficiently accessible and foreseeable to be considered valid law in the eyes of international human rights law.¹¹⁴ What these requirements entail more specifically will be discussed in detail in chapter 3.

The condition that there must be a legal basis for an interference is phrased differently in the ICCPR compared to the ECHR, as article 11 ECHR requires that the limitation is “prescribed by law”, whereas article 21 ICCPR requires that the interference is “in conformity with the law”. According to the *travaux préparatoires* of the ICCPR this difference in wording was intentionally chosen to permit restriction on the freedom of assembly in administrative decisions.¹¹⁵ Moreover, the ECHR uses a number of different formulations when requiring that an interference with a right has a legal basis. It prescribes that the rights set forth by the convention may only be interfered with “lawfully”¹¹⁶, “under national or

¹¹² Rainey, Wicks & Ovey (2014). p. 308. See also American Association for the International Commission of Jurists (1985). *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. para. I.A.1.

¹¹³ Rainey, Wicks & Ovey (2014). p. 308. See also American Association for the International Commission of Jurists (1985). para. 1.A.6.

¹¹⁴ *The Sunday Times v. United Kingdom* (App 6538/74) ECtHR judgment on 26 April 1979. Series A no. 30. para. 49.

¹¹⁵ Bossuyt, Marc J (1987). *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*. Dordrecht: M. Nijhoff. p. 416.

¹¹⁶ Article 5 ECHR.

international law”¹¹⁷, “in accordance with the law”¹¹⁸, if the interference is “prescribed by law”¹¹⁹ or “provided for by law”¹²⁰. With reference to article 33 of the VCLT, the ECtHR maintains that these different expressions must be interpreted in a manner which reconciles them.¹²¹ Hence, “law” is interpreted in a uniform manner by the ECtHR,¹²² which means that the qualitative requirements on a law are the same regardless of which article is invoked. For this reason, the discussion in the chapter three will bring up other case law than that which deals exclusively with the right to protest peacefully.

The second condition is that the interference must serve a legitimate aim. These aims are listed in the articles. According to article 21 ICCPR these include national security, public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others. Article 11 ECHR does not list public order as a legitimate reason to restrict the exercise of the freedom of assembly, but instead lists the prevention of disorder and crime.

The third condition is that the limitation must be necessary in a democratic society. During the drafting process of the ICCPR it was noted that democracy is interpreted differently in different countries. It was therefore argued that a democratic society may be distinguished by its respect for the Charter of the United Nations, the UDHR and the international covenants.¹²³ The ECtHR has held that hallmarks of a democratic society include pluralism, tolerance, equality, freedom of religion, expression and assembly, and the right to a fair trial.¹²⁴ Furthermore, there is according to Humphrey a difference between a democratic state and a democratic society. A democratic state is not in itself a safeguard against that the minority will not be subject to the tyranny of the majority.¹²⁵

In *Silver and Others v. UK* the ECtHR summarises the criteria for whether an interference is necessary in a democratic society. That an interference is necessary is not the same as requiring that the interference should be indispensable, but it does not have the flexibility that follows from words such as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. The states have a margin of appreciation in determining whether restrictions are justifiable, but the court reserves the right to give the final ruling on the matter. For an interference to be necessary in a democratic society, it must be proportionate to the legitimate aim pursued

¹¹⁷ Article 7 ECHR.

¹¹⁸ Article 8 ECHR; Article 2 Protocol No. 4 ECHR.

¹¹⁹ Articles 9-11 ECHR.

¹²⁰ Article 1 of Protocol No. 1 ECHR.

¹²¹ *The Sunday Times v. United Kingdom* (App 6538/74). para. 48. See also *Silver and Others v. United Kingdom* (App 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) ECtHR judgment on 25 March 1983. Series A no. 61. para 85.

¹²² *C.R. v. United Kingdom* (App 20190/92) ECtHR judgment on 22 November 1995 Series A no. 335-C. para. 33.

¹²³ Bossuyt (1987). p. 418.

¹²⁴ *Refah Partîsî (The Welfare Party) and Others v. Turkey [GC]* (App 41340/98; 41342/98; 41344/98) ECtHR judgment 13 February 2003. ECHR 2003-II. paras. 86-95.

¹²⁵ Humphrey (1984). p. 173.

and correspond to a pressing social need. Necessity implies that exception to the rights guaranteed should be interpreted narrowly.¹²⁶

Conflicting ideas and the risk of conflict associated with protests are inherent to a democracy and therefore exceptions to the right must be interpreted narrowly.¹²⁷ Proportionality requires that that restrictions on the exercise of a right are taken as a last resort when no less invasive measures are available.¹²⁸ Moreover, according to the American Association for the International Commission of Jurists, limitation clauses shall be interpreted in favour of the right at issue and they may not be interpreted so that they jeopardise the essence of the right concerned.¹²⁹ The ECtHR has also confirmed that this line of reasoning is applicable to the ECHR. In *Sidriopoulos and Others v. Greece* the ECtHR held that exceptions to the freedom of association should be interpreted narrowly.¹³⁰ Hence, freedom of association is interpreted broadly in favour of the exercise of the right and exceptions should be interpreted narrowly in order to avoid that limitations are imposed arbitrarily.

2.4 Summary of the Scope of Protection of Peaceful Protest

In this thesis, the right to protest peacefully is considered both a right in itself and a mean to promote and protect international human rights. The following five criteria have been suggested to identify a protest that is defending human rights: (1) the aim of the protest is to influence policy on an issue falling within the scope of human rights; (2) the protest has a public element and is directed towards influencing policy-makers and/or public opinion; (3) the protest accepts the universality of human rights; (4) the protest is directed towards promoting and protecting human rights and; (5) the protest is peaceful.

The kind of action that can be defined as protest, as well as the requirement that protest must be peaceful, are interpreted broadly. Here, this means that a protest may be static or mobile, may be conducted indoors or outdoors, and may be conducted for a short time or for several months. There is moreover a high threshold for a protest not to be considered peaceful as this would mean that the conduct would fall outside of the scope of protection of human rights altogether. In principle, it is only when a protest is conducted through physically violent means and the individual whose right is being interfered with is responsible of those actions that the actions fall outside of the scope of the right to protest peacefully entirely.

¹²⁶ *Silver and Others v. United Kingdom* (App 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75). para. 97.

¹²⁷ *Ibid.*

¹²⁸ Nowak (2005). p. 491. para. 21.

¹²⁹ American Association for the International Commission of Jurists (1985). para. I.A.2-1.A.3.

¹³⁰ *Sidriopoulos and Others v. Greece* (App 26695/95) ECtHR judgment on 10 July 1998. Reports 1998-IV. para. 38. See also *Silver and Others v. United Kingdom* (App 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75). para. 97.

The right to protest peacefully is not unlimited, and the state can interfere with it in different ways. If a person is sentenced or subjected to a sanction for having participated in a protest, it is considered an interference irrespective of if the sanction is an administrative or criminal sanction according to national law. Nevertheless, it is not always certain that a negative administrative decision will be considered to interfere with the right to protest. The case *Petropavlovskis v. Latvia* has been criticised for defining interferences too narrowly. In the case, the ECtHR found that unless national law has been applied arbitrarily, there is an insufficient link between the administrative decision and the exercise of the right to protest for the decision to be considered an interference. Legislation and prohibitions may interfere with the right to protest even when they are not enforced, if the individuals risk being directly affected by them. It is quite clear that the organisers of a would-be protest are directly affected by a ban, but it is harder for would-be participants to show that they meant to attend an event that never took place.

For an interference not to be considered a violation of the right to protest peacefully, it must be justifiable. Interferences with the right to protest must have a legal basis, pursue a legitimate aim and be necessary in a democratic society. The requirement on a legal basis means that there must be a basis for the interference in national law and that the law must be sufficiently accessible and foreseeable. In determining whether an interference is proportionate to the aim, and hence necessary in a democratic society, the states are left a certain margin of appreciation. Nevertheless, given the importance of the right to protest peacefully in a democratic society, there is a presumption that exceptions to the right should be construed narrowly. For the interference to be proportionate, it should as a rule only be employed when no less invasive means are available.

3 A Human Rights Concept of Rule of Law

Human rights aim to protect individuals from arbitrary and excessive interferences with their rights. Although the human rights regime has developed to also entailing positive obligations, the focus lay historically on the negative obligation of non-interference.¹³¹ Since this thesis is concerned with national law as an interference with the right to protest, the perspective on human rights as a safeguard against arbitrary interference is suitable. Accordingly, just like the formal theory of law concept used in this thesis, the requirement on a legal basis of an interference limits state power by imposing conditions on the form and application of national legislation.¹³²

It follows from the formal rule of law concept that laws should both be formulated and applied in a foreseeable manner so that people can plan their actions according to the law. To be foreseeable, laws must be general, public, non-retroactive, understandable, free from contradictions and stable. Through these formal requirements, rule of law protects against arbitrary or unexpected use of state power although it does not go as far as protecting against any type of infringement on individual rights. It is the preposition of this thesis that this formal rule of law concept is comparable to the requirements on national law imposed by international human rights law because it too establishes formal requirements on national law. In this thesis, it is therefore considered to be a rule of law concept from a human rights perspective.

To answer the research question of this thesis, how the ECHR protects against national law interfering with the right to protest, it is necessary to investigate the content of the human rights concept of rule of law. This chapter aims to do so. It will first make a general overview of the requirements imposed by the human rights concept and then turn to studying how the requirement on foreseeability is employed with respect to vague laws interfering with the right to protest. This will be done both through studying the application of the quality of law test itself, but also through studying the reasoning with respect to whether the interference is necessary in a democratic society. At first glance, it might not seem obvious why this latter criterion is relevant to the human rights rule of law concept, but as will be discussed below the quality of law assessment is often undertaken as a part of a joint assessment of whether the interference is proportionate to its aims and hence necessary in a democratic society.

¹³¹ European Commission for Democracy through Law (Venice Commission) (18 March 2016). *Rule of Law Checklist*. Study No. 711 / 2013. CDL-AD(2016)007. Council of Europe. paras. 33-36.

¹³² Lautenbach, Geranne (2014). *The concept of the rule of law and the European Court of Human Rights*. Oxford: Oxford University Press p. 213.

3.1 Human Rights Requirements on National Law

For an interference with the right to protest peacefully to be justified, it must have a legal basis. According to ECtHR jurisprudence, this requirement means that there both must be a legal basis as defined by national law and that the law must have a certain quality as determined by international law to be considered as valid law.¹³³ Because of the duality of this requirement, Lautenbach has described the requirement on a legal basis as a semi-autonomous concept.¹³⁴ This thesis adopts this view and structures the discussion on the content of these requirements accordingly. This chapter will also discuss how national law is defined from the perspective of the ECHR.

3.1.1 The national side of the requirement on a legal basis

As set out above, a precondition for an interference to be permissible even before turning to the issue of whether the law has sufficient quality is that the interference has a legal basis according to the national law. A concrete example of where there was no legal basis in national law justifying an interference, is the ECtHR case *Djavit An v. Turkey*. The court found that since the government had failed to refer to any national legal basis for hindering the applicant from travelling to the Greek part of Cyprus in order to participate in a peaceful meeting, the interference was not prescribed by law.¹³⁵ Moreover, for there to be a sufficient legal basis as determined by national law, the national legal order must be clear regarding what law is applicable. Even if it may take some time to establish a legislative framework during a transitional period, a delay of over a decade in regulating such an important right as the freedom of assembly cannot be justified.¹³⁶

Sometimes it is necessary to assess the domestic application of national law in order to determine whether the decision was properly based on law. The ECtHR case *Steel and Others v. UK* illuminates this point. In the case

¹³³ *The Sunday Times v. United Kingdom* (App 6538/74). para. 49.

¹³⁴ Lautenbach (2014). p. 79.

¹³⁵ *Djavit An v. Turkey* (App 20652/92) ECtHR judgment of 20 February 2003, para. 61. ECHR 2003-III. paras. 66-67. See also *Adali v. Turkey* (App 38187/97) ECtHR judgment of 31 March 2005. paras. 273-274. Both cases concerned Turkish Cypriots who wished to travel to the Greek side of Cyprus to participate in peaceful meetings. In *Adali v. Turkey*, the ECtHR found that a general rule was insufficient in the absence of a specific rule regulating the conditions under which travel permits should be issued to individuals wishing to participate in peaceful assemblies.

¹³⁶ *Mkrtchyan v. Armenia* (App 6562/03) ECtHR judgement of 11 January 2007. para. 43; *Vyerentsov v. Ukraine* (App 20372/11) ECtHR judgment of 20 February 2003. para. 54-55. In *Mkrtchyan v. Armenia* there had been a delay of almost 13 years before the enactment of relevant legislation regulating the freedom of assembly, whereas in the case of *Vyerentsov v. Ukraine* there was a delay of over 20 years. See also *Shmushkovich v. Ukraine* (App 3776/10) ECtHR judgment of 14 November 2013. para. 40.

the court found that there was no legal basis for the interference because the national authorities had applied the law erroneously.¹³⁷ Nevertheless, when it comes to assessing the application of national law, both the ECommHR and the ECtHR have consistently emphasised their role as a subsidiary organ and that they should not act as a fourth instance by assessing the application of domestic law to the facts of the case. This approach is known as the fourth instance doctrine.¹³⁸

It follows from the fourth instance doctrine that it is the court that exercises international supervision by taking the case as a whole into account and assessing whether the national decision complies with the ECHR.¹³⁹ Meanwhile, the states are considered to be better equipped than an international judge to assess the proportionality of the interference and are therefore awarded a certain margin of discretion.¹⁴⁰ Allowing the states a margin of discretion means in principle that the level of scrutiny of the court is limited to whether the law has been applied arbitrarily.¹⁴¹ In *Ross v. Canada* the CCPR shows similar deference to the decision of national courts. It held that even though the law on which the impugned interference had been based on was vague, there was no reason to question the findings of the domestic court given the quality of the national proceedings.¹⁴²

An example of a case where the ECtHR found that national law had been applied arbitrarily is *Huseynli and Others v. Azerbaijan*. The applicants of the case, who were all members of political opposition parties, had been sentenced to administrative detention just a few days prior to a demonstration. The ECtHR found that the detention interfered with their right to protest peacefully and since the interference was based on law that was inapplicable to peaceful protest, the interference lacked a legal basis.¹⁴³ The case *Rasul Jafarov v. Azerbaijan* is an illustration of the importance of the facts of a case when considering whether national law has been applied in bad faith, although the case concerns a violation of article 18 ECHR. In finding that national law had been applied to punish Jafarov for actively

¹³⁷ *Steel and Others v. United Kingdom* (App 3776/10) ECtHR judgment of 14 November 2013. paras. 55-56 and 64. Note that the court referred to its reasoning on article 5 ECHR in determining whether the restriction on article 10 was prescribed by law (para. 94). Since the case concerned a direct action protest it treated it as an interference with the freedom of expression rather than an interference with the freedom of assembly (para. 92).

¹³⁸ *X v. Federal republic of Germany* (App 1169/61) ECommHR inadmissibility decision on 24 September 1963. Recueil 13, pp. 1-41. para. 120. The case concerns the application of article 6 ECHR, but the same principles are applicable to restrictions on article 11 ECHR (Rainey, Wicks & Ovey (2014). p. 310. footnote. 22). See also *Winterwerp v. the Netherlands* (App 6301/73) ECtHR judgment on 24 October 1979. Series A no. 47. para. 46; *X v. Federal republic of Germany* (App 1169/61) and Lautenbach (2014). pp. 80-83.

¹³⁹ *Winterwerp v. the Netherlands* (App 6301/73). para. 46. See also *X v. Federal republic of Germany* (App 1169/61); *Handyside v. United Kingdom* (App 5493/72) ECtHR judgment on 7 December 1976. Series A no. 24. para. 49.

¹⁴⁰ *Winterwerp v. the Netherlands* (App 6301/73). para. 40. See also *Handyside v. United Kingdom* (App 5493/72). para. 48.

¹⁴¹ *Klaus Altman (Barbie) v. France* (App 10689/83) ECommHR inadmissibility decision on 4 July 1984. D.R. 37, pp. 225-235. pp. 234-235.

¹⁴² *Ross v. Canada* (Communication No. 736/1997) CCPR decision on 18 October 2000, CCPR/C/70/D/736/1997. para. 11.4.

¹⁴³ *Huseynli and Others v. Azerbaijan* (App 67360/11; 67964/11; 69379/11) ECtHR judgment on 11 February 2016. paras. 93-98.

defending human rights rather than in pursuance of the legitimate aims set forth by the convention, the court considered both Jafarov's position as a well-known human rights defender and that the general environment for human rights defenders in Azerbaijan was hostile.¹⁴⁴

As will be discussed in more detail below with respect to the assessment of vague laws, the ECtHR sometimes resorts to a proportionality assessment of the interference rather than assessing whether there is sufficient legal basis for the interference. This same tendency can be seen with respect to the assessment of if there is a legal basis in national law. Two examples are the cases *Hyde Park and Others v. Moldova* and *Gülcü v. Turkey*. While in *Hyde Park v. Moldova*, the court indicated that the fact that the denial of an application to hold a demonstration had been based on other reasons than those set forth in national law meant that there was an insufficient legal basis for the interference, it held that issue of compliance with the law could not be separated from the issue of whether the interference was necessary in a democratic society.¹⁴⁵ In *Gülcü v. Turkey*, the court found that the failure of the national court to properly describe the illegal acts of the applicant and to motivate the sentence made the interference disproportionate rather than lacking a legal basis.¹⁴⁶

3.1.2 The international side of the requirement on a legal basis

Once it is established that there is a legal basis for an interference according to national law, the next issue that needs to be determined is whether that law has sufficient quality to be considered valid from the perspective of international human rights law. According to ECtHR jurisprudence these requirements are that the law must be sufficiently accessible and foreseeable.¹⁴⁷ These quality requirements form the basis to assess national law according to international standards, and as Merrills note it is crucial to the effective protection of the rights set forth. If the compliance with the requirement on a legal basis for the interference was left wholly up to the national definition of law, the determination of whether the criteria is fulfilled would be left entirely to state discretion.¹⁴⁸

Yet, there is a tendency among the judges of the ECtHR to consider the fourth instance doctrine also when it comes to assessing the autonomous

¹⁴⁴ Rasul Jafarov v. Azerbaijan (App 69981/14) ECtHR judgment on 17 March 2016. paras. 156-163. Because the ECtHR had already considered the case under article 5 and 18 ECHR, the court found it unnecessary to assess whether it also was a violation of article 11 ECHR (see paras. 169-170).

¹⁴⁵ *Hyde Park and Others v. Moldova* (App 33482/06) ECtHR judgment on 31 March 2009. paras. 25 and 30. See also *Alekseyev v. Russia* (App 4916/07; 25924/08; 14599/09) ECtHR judgment on 21 October 2010. paras. 69 and 77-79. In the case, the ECtHR found that it was unnecessary to assess the lawfulness of the ban of the demonstration as the interference was not necessary in a democratic society.

¹⁴⁶ *Gülcü v. Turkey* (App 17526/10) ECtHR judgment on 19 January 2016. paras. 108 and 112-114.

¹⁴⁷ *The Sunday Times v. United Kingdom* (App 6538/74). para. 49.

¹⁴⁸ Merrills, J. G. (1993). *The development of international law by the European Court of Human Rights*. Manchester: Manchester University Press. p. 130.

side of the requirement on a legal basis. In *Maestri v. Italy*, the dissenting judges argued that the majority had set the fourth instance doctrine aside because they evaluated the national law in order to determine whether it had sufficient quality rather than accepting the assessment of the national court.¹⁴⁹ However, Lautenbach argues that there is not necessarily a contradiction between the fourth instance doctrine and an assessment of the quality of the domestic law because the latter is concerned with assessing national law from the point of view of international standards rather than correcting mistakes of law.¹⁵⁰

What does it then mean that national legislation must be sufficiently accessible and foreseeable? According to the ECtHR, the requirement that laws must be accessible means that people must have an adequate indication of what rules are applicable to a given case. The requirement on foreseeability entails that people should be able to foresee the consequences of their actions, but it does not go as far as requiring complete certainty considering that laws often must be able to keep up with changing circumstances and therefore often are vague and subject to interpretation. It is therefore sufficient that laws are reasonably foreseeable.¹⁵¹ As Lautenbach points out, generality is also a requirement of foreseeability because too detailed regulation would make it difficult to determine which rule is applicable to which situation.¹⁵² Sometimes, the court adds that national law should be in compliance with the rule of law as a third criterion.¹⁵³ As a requirement on national law, this means that the law must provide safeguards against arbitrary interference with the rights set forth by the convention,¹⁵⁴ because rule of law does not permit unrestricted state power.¹⁵⁵

Lautenbach argues that foreseeability favours precision,¹⁵⁶ but that the court uses a flexible standard of foreseeability because it requires that the level of foreseeability should be “reasonable”.¹⁵⁷ When commenting on *Cantoni v. France*, Murphy notes that the yardstick that the ECtHR uses to determine whether a law is sufficiently foreseeable is whether the individual can know that there is a real risk of criminal liability.¹⁵⁸ According to

¹⁴⁹ *Maestri v. Italy* [GC] (App 39748/98) ECtHR judgment of 17 February 2004. ECHR 2004-I. paras. 30-42. and Joint Dissenting Opinions of Judges Bonello, Strážnická, Bîsan, Jungwiert and Del Tufo. paras. 7-9.

¹⁵⁰ Lautenbach (2014). p. 95.

¹⁵¹ *The Sunday Times v. United Kingdom* (App 6538/74). para. 49.

¹⁵² Lautenbach (2014). pp. 112-113.

¹⁵³ See for instance *Gillan and Quinton v. United Kingdom* (App 4158/05). para. 76; *Gülçü v. Turkey* (App 17526/10). para. 103; *Kruslin v. France* (App 11801/85) ECtHR judgment on 24 April 1990. Series A no 176-A. para. 27; *Malone v. United Kingdom* (App 8691/79) ECtHR judgment on 2 August 1984. para. 67; *Piroğlu and Karakaya v. Turkey* (App 36370/02; 37581/02) ECtHR judgment on 18 March 2008. para. 65.

¹⁵⁴ *Malone v. United Kingdom* (App 8691/79) ECtHR judgment on 2 August 1984. para. 67

¹⁵⁵ *Piroğlu and Karakaya v. Turkey* (App 36370/02; 37581/02) ECtHR judgment on 18 March 2008. para. 65.

¹⁵⁶ Lautenbach (2014). p. 211.

¹⁵⁷ *Ibid.* p. 90.

¹⁵⁸ Murphy, Cian C. (2010). “The principle of legality in criminal law under the European Convention on Human Rights” in *European Human Rights Law Review*. Vol. 2. pp. 192-207. Sweet & Maxwell p. 200. See also *Cantoni v. France* (App 17862/91) ECtHR judgement on 11 November 1996. Reports 1996-V. para. 35.

ECtHR jurisprudence, the precision required by domestic legislation varies according to the content of the law, the field it is designed to cover and the number and status of those who are addressed by the law.¹⁵⁹ Constitutional norms may for example be more general than other legislation.¹⁶⁰ Fenwick argues that considering that there are various factors influencing the degree of foreseeability required, states are given a certain leeway with respect to what is needed to fulfil the requirement on a legal basis for interferences.¹⁶¹

Furthermore, the ECtHR has held that jurisprudence may clarify grey areas of the law,¹⁶² and in cases where the statute law is vague this may be rectified through the availability of clear jurisprudence.¹⁶³ Hence, the law is sufficiently precise if the individual through the relevant provision and with the assistance of the courts' interpretation can know what acts or omissions are unpermitted.¹⁶⁴ This is equally applicable in the case where the jurisprudence of lower instance court is unclear if the higher instance court's case law is consistent.¹⁶⁵

If it does not appear clear to the individual what the law bids him or her to do, the ECtHR has held that the law still fulfils the foreseeability requirement if the individual can obtain clarity by seeking legal advice to assess the consequences of an action. In so finding, the court stressed that the applicant in the instant case was carrying out a professional activity and therefore was expected to take special care in assessing the consequences of his actions.¹⁶⁶ Nevertheless, this requirement is not only applicable to professionals. The ECtHR reiterated that the requirement on foreseeability may be fulfilled through legal advice in a case that concerned an individual acting in his private capacity.¹⁶⁷

In criminal cases, the requirement on foreseeability is set higher according to the European Commission for Democracy through Law.¹⁶⁸ The categorisation of the interference with the right to protest therefore becomes significant. This thesis suggests that if interferences with the right to protest peacefully are considered from the perspective of *de facto* criminalisation, the requirements on national legislation are raised. Additionally, the principle of legality is applicable to criminal convictions and penalties.¹⁶⁹

¹⁵⁹ *Rekvényi v. Hungary* [GC] (App 25390/94) ECtHR judgment on 20 May 1999. ECHR 1999-III. para. 34.

¹⁶⁰ *Ibid.* para. 34.

¹⁶¹ Fenwick, Helen (2007). *Civil liberties and human rights*. Abingdon: Routledge-Cavendish. pp. 68-69.

¹⁶² *Cantoni v. France* (App 17862/91). para. 32.

¹⁶³ *Kokkinakis v. Greece* (App 14307/88) ECtHR judgment on 25 May 1993. Series A no. 260-A. para. 40.

¹⁶⁴ *Ibid.* para. 55. However, judge Martens argued that jurisprudence is not sufficiently stable to safeguard against arbitrary interpretation of the law (*Kokkinakis v. Greece* (App 14307/88) ECtHR judgment on 25 May 1993. Partly Dissenting Opinion of Judge Martens paras. 5-6).

¹⁶⁵ *Cantoni v. France* (App 17862/91). para. 34-35.

¹⁶⁶ *Ibid.* para. 35.

¹⁶⁷ *Achour v. France* [GC] (App 67335/01) ECtHR judgment on 29 March 2006. ECHR 2006-IV. para. 54.

¹⁶⁸ European Commission for Democracy through Law (Venice Commission) (18 March 2016). para. 59.

¹⁶⁹ Article 15 ICCPR; Article 7 ECHR.

The principle of legality is incorporated into the human rights regime through article 15 ICCPR and article 7 ECHR.¹⁷⁰ There is some discussion in the literature on whether the law must be enforced for the principle to become applicable. According to the *travaux préparatoires* of the ICCPR there must be a conviction,¹⁷¹ whereas Bleichrodt argues that the principle also prohibits the legislator from prescribing retroactive application of a law.¹⁷² Murphy maintains that if the principle of legality is applicable first when the law is applied, the protection offered by it may be rendered ineffective when criminal prosecution is not undertaken.¹⁷³

Article 15 ICCPR and article 7 ECHR expressly recognise that no one shall be held accountable for an act or offence that did not constitute a criminal offence at the time, nor be subject to a heavier penalty than the one prescribed when the crime was committed. Hence, criminal law may not be applied retroactively to the detriment of the accused. According to the literature commenting on the ICCPR and the ECHR, this also implies that criminal laws must be clearly defined both with respect to the criminalised act and the punishment, and that they may not be interpreted extensively to the detriment of the accused, for example by analogy.¹⁷⁴ With reference to the comments of the CCPR regarding Belgium, Joseph and Castan point out that the principle of legality prohibits punishment under laws that are so vague that they do not define the punishable conduct.¹⁷⁵ The ECtHR confirmed in *Gillan and Qinton v. UK* that this principle is equally applicable to the ECHR.¹⁷⁶

In comparison to the protection offered by the requirement on a legal basis, the principle of legality offers a stricter view on retroactivity. In *Baskaya and Okçuoğlu v. Turkey*, the ECtHR held that according to the principle of legality, there must be a legal basis for the conviction or punishment at the time when the act or omission is committed, whereas it is only required that there is a legal basis for an interference with the right to protest peacefully at the time of the interference.¹⁷⁷ As Murphy notes, this means that if the principle of legality is not applicable it is acceptable to apply law retrospectively with regard to the unpermitted conduct, as long as there is a legal basis at the time of the interference.¹⁷⁸ Moreover, European Commission for Democracy through Law maintains that retroactivity outside of the realm of criminal law is permitted if it is considered proportionate.¹⁷⁹

¹⁷⁰ Lautenbach (2014). p. 56.

¹⁷¹ Bossuyt (1987). p. 325.

¹⁷² Bleichrodt (2006). p. 658.

¹⁷³ Murphy (2010). p. 199.

¹⁷⁴ Bleichrodt (2006). p. 652; Nowak (2005). pp. 359-360, para. 4; Rainey, Wicks & Ovey (2014). p. 296.

¹⁷⁵ Joseph & Castan (2012). pp. 521-522, para. 15.02.

¹⁷⁶ *Gillan and Qinton v. United Kingdom* (App 4158/05). para. 87.

¹⁷⁷ *Baskaya and Okçuoğlu v. Turkey* [GC] (App 23536/94; 24408/94) ECtHR judgment on 8 July 1999. ECHR 1999-IV. para. 50.

¹⁷⁸ Murphy (2010). pp. 198-199.

¹⁷⁹ European Commission for Democracy through Law (Venice Commission) (18 March 2016). para. 62.

3.1.3 Recognition of jurisprudence as valid law and its influence on foreseeability

National law is understood by the ICCPR as written parliamentary law or as unwritten common law.¹⁸⁰ The ECtHR uses a wide definition of national law that does not consider its formal origin. This means that law is not limited to statutory provisions but may also include enactments of lower ranks than statute, jurisprudence or unwritten law.¹⁸¹ In *Leyla Şahin v. Turkey*, the court summarised its position by maintaining that law is the provision in force as the competent courts have interpreted it.¹⁸² However, both the ICCPR and the ECHR presuppose that there is a delegated authority or a legal basis for coercive administrative action.¹⁸³

The ECtHR has motivated its wide understanding of what may be considered national law by that otherwise both civil and common law systems where jurisprudence is a fundamental source of law would risk being undermined.¹⁸⁴ Lautenbach argues that a wide understanding of law enables the court to consider the various legal systems of the member states, but that it should be careful not to permit vague administrative provisions to pass as laws.¹⁸⁵ Moreover, Mead points out that there is a risk that the application of national law becomes unforeseeable when it is permitted that it is extended through jurisprudence. A law that at first glance seems to be unrelated to the events at hand can thus become applicable through the adjudication of the national courts.¹⁸⁶ As a starting point, jurisprudence may not extend the scope of a criminalisation beyond the constituent elements of the offence. The courts may however extend the scope of the criminalised act by interpreting the elements of the crime. This was the case in *C.S. v. Federal Republic of Germany* where German jurisprudence had extended the scope of “unlawful coercion by force” to cover sit-ins.¹⁸⁷

C.R. v. UK is a case that has been criticised for departing from the prohibition on retroactive criminal legislation by permitting criminalisation on the basis of jurisprudence.¹⁸⁸ The case concerned a man who had been sentenced for raping his wife. According to the law at the time the act was committed, rape was defined as unlawful sexual intercourse where unlawful was interpreted as excluding marital rape. Nevertheless, the ECtHR found that at the time the act was committed there was development in

¹⁸⁰ Nowak (2005). p. 360, para. 5.

¹⁸¹ *Kruslin v. France* (App 11801/85). para. 29. See also Lautenbach (2014). p. 83.

¹⁸² *Leyla Şahin v. Turkey* [GC] (App 447774/98) ECtHR judgment on 10 November 2005. ECHR 2005-XI. para. 88.

¹⁸³ Lautenbach (2014). p. 84; Nowak (2005). p. 490. paras. 18-19. See also *P.G. and J.H. v. United Kingdom* (App 44787/98) ECtHR judgment on 25 September 2001. ECHR 2001-IX. para. 62. The case concerned the use of secret surveillance. In the view of the ECtHR, there must be a statutory or other express legal authority in trite law that authorises more invasive measures.

¹⁸⁴ See *The Sunday Times v. United Kingdom* (App 6538/74). para. 47; *Kruslin v. France* (App 11801/85). para. 29.

¹⁸⁵ Lautenbach (2014). p. 86.

¹⁸⁶ Mead (2010). p. 86.

¹⁸⁷ *C.S. v. the Federal Republic of Germany* (App 13858/88). para. 1.

¹⁸⁸ See for example Lautenbach (2014) p. 107.

jurisprudence that called the marital immunity for rape into question. Therefore, the court found that it was foreseeable to the applicant that marital immunity no longer was a valid defence.¹⁸⁹ The ECtHR also noted that considering the debasing character of rape it cannot contradict the object and purpose of article 7 ECHR to criminalise marital rape. To the contrary, criminalising marital rape is in conformity with the fundamental objectives of the ECHR.¹⁹⁰

Murphy argues that the ECtHR accepted that the national courts extended the scope of the criminalised act beyond the letter of the law, which is a power he thinks should be reserved for the legislature. Even if there was legal development under way, the law as it stood at the time did not criminalise marital rape.¹⁹¹ Greer on the other hand argues that that the ECtHR defined the scope of the rights by referring to the objects and purpose of article 7 ECHR, which is to safeguard against arbitrary prosecution, conviction and punishment. Because of the nature of the acts and the legal development, it was not unforeseeable that the acts were unpermitted.¹⁹²

Whether or not the ECtHR permitted jurisprudence to extend a criminalisation in violation of the prohibition of retroactive application of the law depends according to Murphy on the perception of the relationship between foreseeability and non-retroactivity. If foreseeability is given primacy, retrospective application of law is acceptable as long as it is foreseeable.¹⁹³ Lautenbach argues that given the flexible approach the court has taken to foreseeability, its standard on non-retroactivity is lenient. Considering that the principle of legality is central to the rule of law and it is applied strictly on the national level, she argues that the court should apply article 7 ECHR in a strict manner.¹⁹⁴

Nevertheless, in *Piroğlu and Karakaya v. Turkey*, handed down more than ten years later, the ECtHR took a more restrictive view on the role of jurisprudence in extending the scope of criminalisation. In the case, the national court had found that the applicants had participated in an illegal association by issuing a joint statement to the press through a platform consisting of several organisations.¹⁹⁵ The ECtHR both found that the definition of association was not sufficiently clear for the applicant to foresee that her actions fell within the scope of the provision and maintained that the national court had overstretched the definition of the concept in finding it applicable to participating in the platform.¹⁹⁶

¹⁸⁹ C.R. v. United Kingdom (App 20190/92). paras. 38-41.

¹⁹⁰ Ibid. para. 42.

¹⁹¹ Murphy (2010). pp. 199-200.

¹⁹² Greer, Steven (2006). *The European Convention on Human Rights: achievements, problems and prospects*. Cambridge: Cambridge University Press. p. 240.

¹⁹³ Murphy (2010). pp. 202-203.

¹⁹⁴ Lautenbach (2014). p. 107.

¹⁹⁵ *Piroğlu and Karakaya v. Turkey* (App 36370/02; 37581/02). paras. 20-25.

¹⁹⁶ Ibid. para. 54.

3.1.4 Analysis of the requirement on a legal basis for interferences

The requirement that there must be a legal basis for an interference is semi-autonomous because it is both determined by whether there is a basis for the interference in the law as it is defined domestically and whether the law has such a quality that it is considered valid from the perspective of international law. The quality test entails that laws should be accessible and foreseeable. Sometimes, the ECtHR also requires that national laws should comply with the rule of law, which is understood as that there must be safeguards against arbitrary and unrestricted state power.

There are two ways in which an interference may fail to fulfil the requirement that there must be a legal basis for it as determined by national law. The first case is when there simply is no law regulating the interference or national law is unclear regarding what law is applicable. The second case is when the national law is applied arbitrarily. In the latter case, the ECtHR is required to review the domestic application of the law, but is normally reluctant to do so given that according to the fourth instance doctrine the ECtHR should not replace the national adjudicator. Moreover, the court sometimes assesses this latter case as a part of its overall proportionality assessment rather than making a final decision on whether there is a sufficient legal basis or not. In the cases where the ECtHR has found that national law has been applied arbitrarily, the specific facts of the case have been important for the assessment.

Considering interferences with the right to protest peacefully from the perspective of *de facto* criminalisation also entails a stricter standard on foreseeability and that the principle of legality becomes applicable. The principle prohibits convictions and punishments that are not based on law and prohibits the retroactive application of law. Laws must clearly define the unpermitted conduct. It differs from the requirement on a legal basis in the sense that it is applicable already from the time when the unpermitted act is undertaken rather than from the time of the interference. There is however disagreement in the literature on whether the principle of legality becomes applicable first when the law is applied to sentence or punish, or whether it also is applicable to legislation that constitutes interferences without being enforced. Given the ordinary meaning of article 15 ICCPR and article 7 ECHR, this thesis suggests that the principle does presuppose a criminal conviction or sanction to become applicable. Nevertheless, the perspective of *de facto* criminalisation broadens the scope of what kind of convictions and punishments are considered criminal. Additionally, this thesis suggests that even when the principle of legality is not directly applicable, legislation that could be *de facto* criminalising if applied should be considered in the light of the principle in order to ensure effective protection of the right to protest peacefully.

The quality of law criterion constitutes an autonomous basis to assess national legislation according to international standards. It is also the standard used by the court to determine whether national law is valid, rather than requiring that it originates from a particular legal source. Because of this, the ECtHR has to a large degree accepted that jurisprudence develop

legal concepts, even with respect to criminal law. In a criticised case, the court permitted retroactive application of criminal law because it considered that the changes in the law were foreseeable. It could be argued that the court has a lower standard with respect to retroactivity than what follows from the theory of law concept of the rule of law because it accepts retroactivity insofar as it is foreseeable. However, the circumstances of the case were special and in a later case regarding the freedom of association the court took a more restrictive approach the extension of the scope of the unpermitted act through legal interpretation.

Just like the rule of law concept derived from legal theory, the human rights regime considers foreseeability as desirable but unattainable in practice. The level of foreseeability required by the court is flexible because it suffices that a law is reasonably foreseeable or that an individual should know that there is a real risk that the law will become applicable. Moreover, the level of foreseeability required varies according to the type of legislation concerned, the availability of clarifying jurisprudence and whether the individual was able to actively seeking clarity through judicial counselling. In other words, foreseeability is treated as a matter of scale rather than being considered as a strict minimum standard.

3.2 Foreseeability as a Quality of Law Assessment

As noted above, the ECtHR sometimes requires that a national law provides safeguards against arbitrary application. In *Gillan and Quinton v. United Kingdom*, the court held that the law must provide safeguards against arbitrary application to meet the quality of law test. Moreover, the European Commission for Democracy through Law argues that unrestricted state power runs contrary to the rule of law and that laws must indicate the scope of the discretion that they afford to the state to protect against arbitrary application.¹⁹⁷ Therefore, this thesis considers that foreseeability entails both foreseeability with respect to what is included and excluded from the scope of the law.

This subchapter investigates how the requirement on foreseeability is applied with respect to what is included and excluded by the law in turn. Because the understanding of what is required by valid law is uniform throughout the ECHR, the jurisprudence discussed is not limited to that which discusses the right to protest, but the jurisprudence that is brought up is such that is considered to have relevance for the exercise of this right.

3.2.1 Precision with respect to what is included in the scope of the law

As already established, foreseeability does not go as far as requiring complete certainty to what is covered by the law. When it comes to the level

¹⁹⁷ European Commission for Democracy through Law (Venice Commission) (18 March 2016). para. 65.

of precision required by national law, this thesis finds that the ECtHR jurisprudence is rather inconsistent and highly dependent on the circumstances of the individual case.

According to Ovey, commenting on a string of cases prohibiting the breach of the peace, one criteria to determine whether the law is sufficiently clear with respect to what conduct is unpermitted is whether the law indicates what the unwanted effects of the prohibited conduct are.¹⁹⁸ In *Steel and Others v. UK* the ECtHR found that the concept breach of the peace was sufficiently clarified in jurisprudence to comply with the quality of law criteria,¹⁹⁹ and in *Chorherr v. Austria* the court found that there was nothing to lend weight to that the prohibition on offending public decency and breaching the peace by being likely to cause annoyance did not fulfil the quality of law criteria.²⁰⁰ In *Hashman and Harrup v. UK* the court clarified its position holding that a central reason for finding that the law was adequately clarified was that it indicated the unwanted effects of the conduct. In the case *Chorherr v. Austria* the effects a breach of the peace had been indicated as conduct that is likely to cause annoyance whereas in the case of UK law breaching the peace refers to provoking others to violence.²⁰¹

The applicants in *Hashman and Harrup v. UK* had been bound over by the court to not behave *contra bonos mores* during the coming twelve months for having disturbed a fox hunt.²⁰² Unlike breach of the peace that is defined by its outcome, the ECtHR found that the obligation to not behave *contra bonos mores* was only defined as conduct that was wrong in the opinion of the majority and that there therefore was no guidance as to what behaviour was considered wrong. Therefore, the law was considered too vague to serve as a basis of an interference.²⁰³

Nevertheless, the requirement that the consequences of the unpermitted conduct should be indicated in order to specify the scope of vague provisions is not upheld consistently in the jurisprudence of the ECtHR. In *Ziliberberg v. Moldova*, the ECtHR accepted that the criminalisation of active participation in an unpermitted assembly was sufficiently clear considering that active participation may take so many form that it is impossible to determine through an exhaustive list beforehand. The court therefore considered it legitimate that the national courts should determine the scope of active participation through judicial interpretation.²⁰⁴

In *Kudrevičius and Others v. Lithuania* the ECtHR found that a law criminalising “a person who [...] otherwise seriously breaches public order

¹⁹⁸ Ovey, Clare (2000). ”Human rights – freedom of expression – interference ‘prescribed by law’” in *Criminal Law Review*. March 2000. pp. 185-187. Sweet & Maxwell. p. 186.

¹⁹⁹ *Steel and Others v. United Kingdom* (App 3776/10) ECtHR judgment of 14 November 2013. Reports 1998-VII. para. 55.

²⁰⁰ *Chorherr v. Austria* (App 13308/87). paras. 12 and 25.

²⁰¹ *Hashman and Harrup v. UK* [GC] (App 25594/94) ECtHR judgment on 25 November 1999. ECHR 1999-VIII. para. 38. Note that the judgment was handed down 14 years prior to the *Steel and Others v. UK* judgement why the court refers to a judgment from the British High Court. The concept, however, is the same in both cases.

²⁰² *Hashman and Harrup v. UK* [GC] (App 25594/94). para. 27-28.

²⁰³ *Ibid.* para. 38.

²⁰⁴ *Ziliberberg v. Moldova* (App 61821/00). p. 10-11, para. 1.

[...]”²⁰⁵ was sufficiently clear. While recognising that the provision was vague to a certain extent, the court found that public order can be breached in so many ways that they cannot be determined beforehand. That there was no guiding jurisprudence was in this case accepted because the law had been amended shortly before the impugned protest took place. Moreover, the court noted that the application of the law had been sufficiently foreseeable because the national authorities had neither applied the law arbitrarily nor unpredictably.²⁰⁶

In *Primov and Others v. Russia*, the ECtHR considered whether the law could have been easily clarified. Among several other issues, the government and the applicants disagreed on whether the application asking for permission to hold a protest should be sent by the applicants or should be received by the authorities within the prescribed time limit,²⁰⁷ and hence the court was faced with two mutually exclusive interpretations of the law. Although it did not offer a definitive interpretation of the domestic law, the court found that as the government had failed to clarify the law even though it easily could have done so, it could not exclude that the applicants’ interpretation of the law was correct.²⁰⁸

3.2.2 Precision with respect to what is excluded from the scope of the law

This thesis suggests that laws must not only be foreseeable with respect to what is included by their scope, but also what is excluded from it. The case *Kokkinakis v. Greece*, illustrate the shortcomings of a definition of foreseeability that is limited to whether a conduct falls within the scope of the law or not. The case concerned the criminalisation of proselytism that was couched in very wide terms. Although the majority found that the provision complied with the quality of law test, the minority indicated that foreseeability should not be limited to the precision in defining what is not permitted, but there must also be a limit to the definitions that excludes certain conduct from their scope of application. Even if it may have been foreseeable that the law was applicable to the applicant, judge Pettiti argued that it is couched in such vague terms that its scope of application is left to the subjective interpretation of national courts.²⁰⁹ Additionally, judge Martens maintained that that the principle that criminal law should be interpreted restrictively should be strictly applied when the law is broad or vague.²¹⁰

²⁰⁵ Article 283 § 1 of the Lithuanian Criminal Code cited in *Kudrevičius and Others v. Lithuania* [GC] (App 37553/05). para. 112.

²⁰⁶ *Kudrevičius and Others v. Lithuania* [GC] (App 37553/05). para. 113-117.

²⁰⁷ *Primov and Others v. Russia* (App 17391/06). para 124.

²⁰⁸ *Ibid.* para 125.

²⁰⁹ *Kokkinakis v. Greece* (App 14307/88) ECtHR judgment on 25 May 1993. Partly Concurring Opinion of Judge Pettiti. pp. 21-22. See also the Partly Dissenting Opinion of Judge Martens para. 5.

²¹⁰ *Kokkinakis v. Greece* (App 14307/88) ECtHR judgment on 25 May 1993. Partly Dissenting Opinion of Judge Martens paras. 5-6

Nevertheless, the ECtHR had held that giving states a certain margin of discretion is not the same as giving them an unlimited and arbitrary power.²¹¹ An example of where discretion has not been considered unlimited is the ECommHR inadmissibility decision in *Rai, Allmond and "Negotiate Now" v. UK*. The applicants alleged that the ban on their demonstration had not been prescribed by law because the national law was so broad that its application was unforeseeable. However, the commission found that while the power to regulate assemblies was not subject to defined restrictions, the law was sufficiently foreseeable if it had been clarified by executive or administrative statements. In this case, the commission found that the authorities had clarified the provision by maintaining a general ban on demonstrations relating to Northern Ireland unless the meeting was uncontroversial.²¹²

Mead criticises this decision arguing first that it runs contrary to the essence of the protection of the right to protest peacefully as the right to protest also covers issues that may be controversial or offensive. Secondly, he argues that prohibiting demonstrations on the basis that they are controversial in fact gives the state unlimited discretion in the application of the ban as controversy is a subjectively defined concept.²¹³

In *Gillan and Quinton v. UK* the ECtHR found that a law permitting the police to stop and search vehicles and pedestrians if the officer considered it expedient to preventing terrorism was conferring unfettered powers on the state to interfere with the rights set forth by the ECHR. The court held that given the wide scope of the powers conferred on the state it would be virtually impossible to challenge such a decision in court. There was moreover no requirement that there should be a proportionality assessment or even a founded suspicion to warrant a search.²¹⁴ Hence, it may be inferred from this case that the safeguards against unfettered state discretion must include a proportionality assessment of the interference and access to an effective remedy. In *Altuğ Taner Akçam v. Turkey* the court held that the disputed national law, which criminalised publicly degrading the Turkish nation, was so broad that it could be applied to any opinion regarded as offensive or shocking. It therefore made it impossible for individuals to regulate their conduct according to the law or foresee the consequences of their conduct.²¹⁵

²¹¹ *Gorzelik and Others v. Poland* (App 44158/98) ECtHR judgment on 17 February 2004. para. 70.

²¹² *Rai, Allmond and "Negotiate now" v. United Kingdom* (App 2552/94). para. 1. Note that the commission considered, in its proportionality assessment, that the ban was only applicable to Trafalgar Square and that the applicants could have held their demonstration in another location in central London.

²¹³ Mead (2010). p. 88.

²¹⁴ *Gillan and Quinton v. United Kingdom* (App 4158/05). paras. 79-83. Note that the case was assessed under article 8 ECHR, but the ECtHR also notes the risk that widely framed powers could be used against protestors (para. 85).

²¹⁵ *Altuğ Taner Akçam v. Turkey* (App 27520/07). para. 92.

3.2.3 Analysis of how the requirement on foreseeability is applied to vague national laws

The jurisprudence that has been studied above is inconsistent and it is therefore difficult to draw general conclusions on what is required by a law to fulfil the quality of law criteria. With that said, this thesis suggests that the following conclusions can be drawn.

Foreseeability is a favoured ideal, but it is considered pragmatically and it is accepted that it is impossible to achieve full certainty as to the scope of the law in practice. Open-ended clauses are generally accepted considering that it is impossible to give an exhaustive list of unpermitted conduct beforehand. Judicial interpretation conducted by the national authorities is accepted insofar as the law has not been applied arbitrarily nor unpredictably.

There is a tendency towards requiring that laws that are unclear should be specified through indicating the unwanted effects of the prohibited conduct. Moreover, when the ECtHR has been forced to choose between two mutually exclusive interpretations of a national law, it has faulted the state for not clarifying laws that easily could have been clarified. Nevertheless, holding that a conduct may breach the peace is adequately clarified as it has been identified as conduct that causes annoyance, is in the view of this thesis not very clarifying at all. What causes annoyance is in itself a vague concept that leaves considerable scope for subjective interpretation. Moreover, the court did not offer any guidance on how to determine whether or not a vague law easily could have been clarified.

To fulfil the quality of law requirement, laws must not only be foreseeable with respect to what is included but also with respect to what is excluded from their scope. The bottom line seems to be that even though states are afforded a margin of appreciation, broad laws must contain safeguards against arbitrary application. Necessary safeguards include that it should be required that the proportionality of the interference is considered and that there is a real possibility to seek judicial redress of the decision based on the law. On the other hand, there is also a tendency of the ECtHR to accept that broad laws are sufficiently foreseeable if it is foreseeable that the applicant will be convicted, even though it might not be foreseeable how one should act to avoid criminal liability.

3.3 Foreseeability as Part of the Assessment of Whether an Interference is Necessary in a Democratic Society

The assessment of whether an interference is necessary in a democratic society is usually the last step in the assessment of whether an interference is justifiable. To pass this last test, the interference must respond to a

pressing social need and be proportionate to the aim pursued. *Vajnai v. Hungary* is an example where a national law interfering with the freedom of expression was assessed with respect its proportionality because the impugned law was broad without being vague. There was therefore no disagreement on whether there was a legal basis for the interference, but the ECtHR found that the blanket ban on wearing a red star in public was too far reaching to be proportionate given the multiple meanings associated with the red star.²¹⁶

Rather than focusing on the proportionality assessment generally of laws interfering with the right to protest, this subchapter focuses on the case where the quality of the law is assessed as a part of the proportionality assessment. This discussion is important considering that foreseeability is not treated as a fixed standard and the ECtHR in several cases assesses proportionality of the interference rather than the quality of the law.

In the first part of this subchapter, the width of discretion afforded to states in applying the principle of proportionality is discussed. This discussion is important because it gives an understanding of the factors influencing of the width of the deference that the ECtHR offers to the states. In the second part, this chapter discusses a number of concrete cases where the foreseeability of the law has been discussed as an assessment of the proportionality of the interference.

3.3.1 Proportionality and the margin of appreciation

The proportionality assessment makes it possible to balance general and individual interests.²¹⁷ When assessing the proportionality of an interference, the ECtHR allows the state a certain level of discretion called the margin of appreciation,²¹⁸ which makes it possible for the ECtHR to consider social, cultural and political differences of the states.²¹⁹ Spano,

²¹⁶ *Vajnai v. Hungary* (App 33629/06) ECtHR judgment on 8 July 2008. ECHR 2008. paras. 30-31 and 51.

²¹⁷ Lautenbach (2014). pp. 117-118.

²¹⁸ Brauch, Jefferey A. (2004-2005). "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" in *Columbia Journal of European Law*. Vol. 11. pp. 113-150. Columbia Law School. p. 115-116. The case *Handyside v. United Kingdom* (App 5493/72), which deals with an interference with article 10, is usually cited as the first case where the ECtHR employs the margin of appreciation. However, it was first used by the ECommHR in *Greece v. United Kingdom*, *Yearbook of the European Convention of Human Rights 1958-1959*, The Hague: Martinus Nijhoff. p. 176, which concerns the right to derogate according to article 15 ECHR (see Brauch (2004-2005) p. 117; Hutchinson, Michael R. (1999). "The Margin of Appreciation Doctrine in the European Court of Human Rights" in *The International and Comparative Law Quarterly*, Vol. 48, Issue 3. pp. 638-650; *British Institute of International and Comparative Law*. p. 639). The margin of appreciation has been developed through the jurisprudence of the ECtHR, but it has subsequently been endorsed by the Council of Europe member states (Brighton Declaration (19-20 April 2012). paras. 11-12.). When protocol 15 of the ECHR enters into force a recital will be added to the preamble that explicitly refers to the principle of subsidiarity and the margin of appreciation (Article 1 Protocol 15 ECHR, Strasbourg 24 June 2013, ETS No. 213).

²¹⁹ Mead (2010). p. 37.

judge at the ECtHR, argues that even though human rights are universal in the abstract, their application must take the domestic circumstances into consideration. The margin of appreciation makes this possible because it dictates that the scrutiny of the court should be less thorough when the case concerns articles 8 to 11 ECHR.²²⁰

There are different views as to whether the margin of appreciation doctrine is applicable to the interpretation of the ICCPR. By reference to CCPR General Comment No. 29 which states the scope of the freedom of expression cannot be assessed by reference to a margin of appreciation,²²¹ McGoldrick argues that the CCPR expressly has rejected the margin of appreciation.²²² Legg, on the other hand, argues that even though the CCPR has not expressly endorsed the terminology of the margin of appreciation doctrine, it has nevertheless accepted its ideas.²²³ Joseph and Castan suggest that the CCPR is more cautious than the ECtHR in its approach to using the margin of appreciation.²²⁴

According to Hutchinson, the width of the margin in a given case depends on whether there is a consensus among the member states on the issue, the right in question and the aim of the interference. When there is a large degree of consensus, the margin is narrow and *vice versa*.²²⁵ If the right concerns the freedom of speech the margin is narrow,²²⁶ and according to the jurisprudence of the ECtHR it is especially narrow when it comes to the speech of politicians²²⁷ and journalists,²²⁸ or when the speech concerns criticism of the government.²²⁹ In the same vein, the United Nations Special rapporteur on human rights defenders has argued that interferences with the rights of human rights defenders should meet an especially high standard.²³⁰ On the other hand, when the aim of the interference is the protection of national security²³¹ or the protection of public morals²³² the state is afforded a wide margin of appreciation. In determining whether the state has

²²⁰ Spano, Robert (2014). "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" in *Human Rights Law Review*. Vol 14. pp. 487-502. Oxford University Press. p. 494.

²²¹ Human Rights Committee (12 September 2011). *General Comment No. 34. Article 19: Freedom of Opinion and Expression*. CCPR/C/GC/34. para. 36.

²²² McGoldrick, Dominic (2016). "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" in *International and Comparative Law Quarterly*. Vol. 65. Issue 1. pp. 21-60. Cambridge University Press. pp. 41-42.

²²³ Legg, Andrew (2012). *The margin of appreciation in international human rights law: deference and proportionality*. Oxford: Oxford University Press. pp. 5-6.

²²⁴ Joseph & Castan (2012). p. 29, para. 1.77.

²²⁵ Hutchinson (1999). p. 641.

²²⁶ *Ibid*.

²²⁷ *Castells v. Spain* (App 11798/85) ECtHR judgment on 23 April 1992. Series A no. 236. para. 42.

²²⁸ *Jersild v. Denmark* (App 15890/89) ECtHR judgment on 23 September 1994. para. 31.

²²⁹ *Castells v. Spain* (App 11798/85). para. 46.

²³⁰ Sekaggya (July 2011). p. 102.

²³¹ Hutchinson (1999). p. 641.

²³² *Handyside v. United Kingdom* (App 5493/72). para. 48.

overstepped its margin, the ECtHR considers the degree to which the convention has been considered in weighing competing interests.²³³

Even though the jurisprudence of the ECtHR gives some guidance as to the width of the margin of appreciation, Mead points out that it does not clearly explain why a state is acting within its margin or, if the state is found to be at fault, what it should have done differently.²³⁴ Hutchinson argues that the margin of appreciation doctrine hinders the court from clearly defining where the minimum standard as required by the ECHR is, because the width of the margin expands and contracts depending on the individual circumstances of the case. Even though the state may not have chosen the ideal policy in fulfilling its convention obligations, it will not be at fault as long as it acts within its margin.²³⁵

Furthermore, Mead points out that it is not clear how the assessment should be made when different factors collide. For example, it is not clear what the assessment would be if a right with a narrow margin would be restricted by an interest where the state is recognised a wide margin, as would be the case if the freedom of expression is limited with reference to national security.²³⁶ Brauch also criticises that the scope of the margin of appreciation is made dependent on the existence of a European consensus. A consensus is not a legal standard and there are no guidelines on how to determine whether such a consensus exists. It therefore undermines the foreseeability of the jurisprudence and risks weakening the protection of human rights if the European consensus moves towards accepting a lower standard of protection.²³⁷

Finally, ECtHR jurisprudence illustrate that when it comes to the right to protest peacefully, it is important to distinguish between the right to protest and the rights promoted through the protest. In *Alekseyev v. Russia* a gay pride march and picket had been banned. The government argued that there should be a wide margin of appreciation in determining the permissibility of gay pride marches given the absence of a European consensus of what rights people who identify themselves as gay or lesbian are entitled to. The ECtHR rejected this argument and held that the applicant's right to campaign for these rights is not affected by whether there is a margin of appreciation as to whether these rights should be afforded.²³⁸

²³³ See for example *Animal Defenders International v. United Kingdom* [GC] (App 48876/08) ECtHR judgment on 22 April 2013. ECHR 2013. paras. 114-117. The case concerned whether a ban of paid political advertising was an undue restriction of article 10. In the proportionality assessment, the ECtHR attached particular importance to the careful assessment of the freedom of expression that the national authorities had undertaken in enacting the legislation.

²³⁴ Mead (2010). p. 37.

²³⁵ Hutchinson (1999). pp. 644-645.

²³⁶ Mead (2010). pp. 37-38.

²³⁷ Brauch (2004-2005). pp. 145-146.

²³⁸ *Alekseyev v. Russia* (App 4916/07; 25924/08; 14599/09). paras. 83-84.

3.3.2 Joint assessment of proportionality and quality of law requirements

According to Viljanen, the ECtHR sometimes make a joint assessment of the permissibility of the interference rather than trying each prerequisite in turn. In those cases, the court especially focuses on the proportionality of the interference.²³⁹ An example of such a case is the abovementioned case *Primov and Other v. Russia* where there was disagreement as to whether an application to hold a demonstration had to be sent or received within a certain time limit. Instead of dividing the assessment into different segments the court assessed the quality of the law and the proportionality of the interference jointly. Although the court indicated that the law in the present case had not been sufficiently foreseeable, it never reached a decisive conclusion on the matter. Instead the court went on to stating that the time limit for lodging an application to hold a demonstration was too narrow and that the delay in this case had had no concrete influence on the ability of the authorities to take adequate action.²⁴⁰

There are also cases where the ECtHR finds that there is a lacking legal basis for an interference, but nevertheless assesses its proportionality. In *Steel and Others v. UK* the court found both that the interference was not prescribed by law and that it was disproportionate because it was not prescribed by law.²⁴¹ Moreover, in *Novikova and Others v. Russia* the court both held that the prosecution for an administrative offence was not sufficiently clear to be prescribed by law and that an amendment to the law was disproportionate because it both afforded the state a wide discretion and had insufficient safeguards against abuse.²⁴²

According to Viljanen, the assessment of a case under the auspices of proportionality rather than quality of law is not only a matter of work economics. Even though it might be politically sensitive to find that a state acted disproportionately in interfering with a right, it may be more sensitive still to find that the national legislation is inadequate.²⁴³ Another reason may be that the ECtHR does not focus on the quality of law assessment unless the applicant has argued that there is a lacking legal basis of the interference,²⁴⁴ or, as suggested by Lautenbach, that the breach of the prescribed by law requirement is in itself insufficient to establish a violation of the ECHR.²⁴⁵ As both Lautenbach and Viljanen argue, the drawback of the joint assessment is that it is not always clear which factor is

²³⁹ Viljanen, Jukka (2003). *The European Court of Human Rights as a developer of the general doctrines of human rights law: a study of the limitation clauses of the European Convention on Human Rights*. Tampere: Tampere University Press. pp. 174-177.

²⁴⁰ *Primov and Others v. Russia* (App 17391/06). paras 125-127.

²⁴¹ *Steel and Others v. United Kingdom* (App 3776/10). paras. 64 and 110.

²⁴² *Novikova and Others v. Russia* (App 25501/07; 57569/11; 80153/12; 5790/13; 35015/13) ECtHR judgment on 26 April 2016. paras. 131 and 190-196.

²⁴³ Viljanen (2003). p. 201.

²⁴⁴ See *Novikova and Others v. Russia* (App 25501/07; 57569/11; 80153/12; 5790/13; 35015/13). paras. 119-120.

²⁴⁵ Lautenbach (2014). p. 120.

determinative,²⁴⁶ and the clarity of the concepts is therefore muddled.²⁴⁷ Moreover, the lacking clarity of the assessment has a detrimental effect on the foreseeability of the ECtHR's judgments.²⁴⁸

Lautenbach moreover argues that it is misguided to assess the prescribed by law criteria under the auspices of a proportionality assessment. A proportionality assessment entails the weighing of an individual interest against that of the general public whereas the quality of law requirement is a formal assessment of the law. Treating the quality of law assessment as a proportionality test is especially problematic when the individual risks criminal sanctions as no general interest should be able to override the individual's interest in foreseeability.²⁴⁹ On the other hand, Lupo and Piccirilli argues that within the context of the quality of law assessment, the purpose of the margin of appreciation is not to balance moral values but to stress the ECtHR's subsidiary role by giving precedence to national policy.²⁵⁰

3.3.3 Analysis of the use of a proportionality assessment in determining the level of foreseeability of vague national laws

Instead of assessing the quality of law requirement on its own, the ECtHR sometimes makes a joint assessment of all of the factors or chooses to determine the case on the basis of whether the interference is necessary in a democratic society, instead of making a stand on the quality of the national law. When making these assessments, the court emphasises the proportionality tests and affords the state a margin of appreciation with respect to the proportionality of the interference.

The margin of appreciation is originally a judge made doctrine, but it has been endorsed by the Council of Europe member states. It is consequentially a doctrine that has a strong standing in the interpretation and the application of the ECHR. When it comes to the ICCPR, there are different opinions on whether it is equally applicable. It has not been fully rejected by the CCPR nor been unconditionally endorsed, why the better view is that the CCPR has a more cautious approach to the margin of appreciation. It should also be noticed that such concepts as the existence of a European consensus of course cannot be transposed to a global context.

Several factors affect the width of the margin. It is especially narrow when the freedom of expression is interfered with and when those exercising their right fill an especially important function in a democratic society. Given that peaceful protest is closely related to the freedom of expression and the important role human rights defenders play in promoting and protecting human rights, a correspondingly narrow margin of

²⁴⁶ Viljanen (2003). pp. 177-179,

²⁴⁷ Lautenbach (2014). P 118.

²⁴⁸ Viljanen (2003). p. 179.

²⁴⁹ Lautenbach (2014). pp. 118-120.

²⁵⁰ Lupo, Nicola & Piccirilli, Giovanni (2015). "The Relocation of the Legality Principle by the European Court's Case Law: An Italian Perspective" in *European Constitutional Law Review*. Vol 11. pp. 55-77. Cambridge University Press. p. 66.

appreciation ought to be applicable. The case *Alekseyev v. Russia* is a case in point where the ECtHR recognises that the margin of appreciation of the right that is being promoted by human rights defenders is irrelevant for the determination of the scope of the margin of appreciation when interfering with the right.

From studying the jurisprudence, it is possible to discern two different ways in which the ECtHR combines the quality of law assessment with the proportionality assessment. The first way is when the court combines the different components of the three-tier test and makes an overall assessment combining them all. In these cases, the court defers to a proportionality assessment and thus avoids taking a stand on the quality of law issue. The second way is where the court both finds that the law does not pass the quality of law test and that the interference is disproportionate.

The advantage with combining the quality of law and proportionality assessment is that it makes it possible to consider quality of law aspects when they in themselves are insufficient for an interference to be considered a violation. It may also be more politically difficult for the court to find that the national law lacks sufficient quality. This may especially be the case when the ECtHR finds that national authorities have applied domestic law arbitrarily or in bad faith, which may also explain why the court also determines the proportionality of the interference.

Proportionality and the margin of appreciation that follows with it is however not a minimum standard. As Hutchinson points out, it rather determines a range of acceptable practices. Thus, treating the quality of law as a proportionality assessment prevents the ECtHR from developing more precise standards for the quality of law assessment. Moreover, assessing the different factors jointly makes it hard to determine which factor that was decisive in the reasoning of the court.

On the one hand, Lautenbach suggests that a proportionality assessment entails weighing general and individual interests against each other and that there should be no general interest overriding the individual's interest in knowing the scope of an unpermitted act or its applicability. On the other hand, it is the view of this thesis that rather than weighing interests against each other, the proportionality assessment fills the function of determining what level of foreseeability is required in a specific case, considering that foreseeability is treated as a flexible standard.

4 Closing Analysis

In this chapter, this thesis turns to an analysis of the main research question through discussing the sub-questions. To a certain extent, this chapter recapitulates what has already been said, but the aim is to bring the discussion one step further in order to fulfil the purpose of this thesis. In the first part of the analysis, it reiterates the findings of what a peaceful protest is and in what way laws may interfere with it. This is a necessary part of the analysis because it gives a context to the discussion on rule of law requirements on national laws that interfere with international rights – in this case the right to protest peacefully. Thereafter, the analysis turns to the findings on what the rule of law concept applied by the ECtHR is and how it relates to the formal rule of law concept derived from legal theory. The two subchapters analyse the operationalisation of the human rights rule of law concept, both with respect to the assessment of whether there is a basis in national law and whether that basis is sufficiently foreseeable in the eyes of international law. All of these questions are part of answering the overarching research question, which is how the ECHR protects against national law being used as a mean to restrict the right to protest.

4.1 Threshold for Interferences with a Democratic Expression

Peaceful protest is both a right in itself and a mean to defend other rights. In both functions, it serves an essential role in a democratic society by providing a way in which dissenting opinions can be expressed. Given its importance, the types of conduct that fall within its scope is broadly construed and interferences with the right are as a starting point only considered proportionate when no less invasive means are available. At the same time, protests are inherently disruptive because they entail voicing dissent and may physically disrupt the movement of passers-by.

This thesis has dedicated special attention to protest as a mean to defend human rights. By drawing both upon the definition of protest as separated from the freedom of assembly and the definition of human rights defence, this thesis suggests the following criteria as defining whether a protest is considered a protest defending human rights: (1) the protest aims to influence policy on an issue that falls within the scope of human rights; (2) the protest is conducted in public and is directed towards influencing policy-makers and/or public opinion; (3) the message conveyed through the protest, or the manner in which the protest is conducted, acknowledges the universality of human rights; (4) the protest is deliberately directed towards protecting human rights and; (5) the protest is peaceful. To be peaceful, a protest cannot be undertaken through physically violent means, but whether it is legal or whether it promotes something that is illegal according to national legislation is irrelevant to whether the conduct falls within the scope of protection of the right to protest peacefully.

Punishments and convictions for participating in a protest are interferences with the right even if the sanction is handed down subsequent to the protest, irrespective of if the sanction is determined as an administrative or criminal sanction according to national law. Moreover, the national determination as a sentence or sanction is not determinative of whether it is considered a criminal sanction from the perspective of international law. What matters is whether it is a *de facto* criminal conviction or sanction.

When it comes to sanctions that normally are considered administrative, such as the denial of a permit, it is sometimes hard to establish the link between having participated in the protest and the negative administrative decision. This was the case in *Petropavlovskis v. Latvia* where the ECtHR found that since there was no proof that the administrative authorities had applied the law arbitrarily, there was no interference. It is troubling if interferences are interpreted narrowly because this may lead to cases where laws that seem unrelated to peaceful protest can be used to *de facto* penalise the exercise of that right without being subject to international review.

National law may constitute an interference with the right to protest even when it is not enforced, if potential protesters risk being directly affected by the provision. Vague and overly broad legislation may interfere with the right to protest peacefully either by being vague with respect to what is covered by the unpermitted act, or with respect the situations in which the law is applicable. There are obvious difficulties for would-be protesters to show that they were directly affected by a ban of a protest that never took place, and for this reason the level of protection offered against legislation that interferes with the right to protest is lower when the law is not enforced compared to when it is enforced. This is troubling because laws that are not enforced may be just as efficient in hindering protest since their chilling effect leads to self-censorship.

4.2 The Human Rights Concept of Rule of Law

The ECtHR works with a dual semi-autonomous concept to determine whether the requirement that the interference should have a legal basis is fulfilled. According to the first aspect of the concept there should be a legal basis as defined by national law, whereas the second aspect requires that the law has sufficient quality as determined by an independent international standard. In other words, the concept is semi-autonomous because it has both a domestic and an international aspect.

The international quality requirements on the law are that it should be sufficiently accessible and foreseeable. Sometimes it is also required that the law should comply with the rule of law in the sense that the law should provide safeguards against unlimited or arbitrary state power. This thesis suggests that the formal requirements, which human rights law impose on national law, constitute a human rights concept of rule of law that is comparable to the formal rule of law concept derived from legal theory. Both concepts aim to protect individuals from arbitrary interferences and

stress that law should be foreseeable. Foreseeability, according to both of the concepts, means that laws should be sufficiently foreseeable for individuals to adjust their conduct according to them and foresee the consequences of their actions. Complete certainty is however an unattainable ideal and judicial interpretation will therefore always be required to a certain extent.

Nevertheless, the concept derived from legal theory specifies that foreseeability can be achieved if laws are general, public, non-retroactive, understandable, free from contradictions and stable. Compared to the human rights concept of rule of law, what is required for a law to be sufficiently foreseeable is expressed in a more nuanced and precise manner. Meanwhile, the ECtHR has a tendency to apply foreseeability in the narrow meaning of whether it is foreseeable that the law will be applied and thus considering that laws with a vague scope are sufficiently foreseeable even if it may not be clear when they are not applicable. This is also a result of that the ECtHR as a human rights court is limited to assessing the facts of the case at hand and does not consider all aspects of the disputed provision. For example, in *Kokkinakis v. Greece* the majority found that since it was clear that the disputed law would be applicable to the applicant's conduct it was sufficiently foreseeable, although it did not provide limits as to when it was *not* applicable.

It is the preposition of this thesis that to be sufficiently foreseeable, a law must, provide for limitations of its scope. In other words, foreseeability entails that the law should be clear both with regards to what falls inside and outside of its scope. For individuals to be able to adjust their behaviour according to the law, they must be able to know not only what conduct the law is applicable to, but also how they can behave without risking breaking the law. Indeed, in *Gillan and Quinton v. UK*, the ECtHR determined that laws empowering the state with a wide margin of discretion must require a proportionality assessment of the interference and access to an effective remedy. Additionally, the ECtHR has found that uncertainties regarding whether a law is applicable may lead to that there is no legal basis for an interference as determined by national law. It can therefore be argued that if the law is not clear regarding whether it is applicable, it is an insufficient basis to warrant an interference.

The case *CR v. UK* brought the ECtHR's position on non-retroactivity into question because it found that although the law as it stood at the time of the act did not criminalise martial rape, it was foreseeable that it would become criminalised. It has therefore been suggested that the court may permit retroactivity insofar as it is foreseeable. Meanwhile, the principle of legality offers a strict requirement on that criminal convictions and punishments must have a clear basis in national law and prohibits retroactivity to the detriment of the accused. In criminal cases, the standard of foreseeability is raised.

According to the jurisprudence of the ECtHR the principle of legality and the requirement on a legal basis justifying an interference differ with respect to the time from which they become applicable. However, if the purpose of requiring that a law is foreseeable is that it should be possible to adjust

one's conduct accordingly, it is curious to permit retroactive application of a law as long as it is in place at the time that the interference is undertaken.

There has moreover been discussion in the literature whether the principle of legality presupposes that the law is actually applied or whether it also is applicable to legislation that is not enforced, but it is the position of this thesis that it follows from the ordinary meaning of the articles that they presuppose enforcement to be directly applicable. Nevertheless, through the perspective of *de facto* criminalisation the scope of the principle of legality is broadened to include some interferences that are considered to fall within the scope of administrative law according to the national legislation. In order to ensure the effective protection of the right to protest against national law that is not enforced, this thesis suggests that legislation that could be *de facto* criminalising if it were applied should be considered in the light of the stricter requirements following from the principle of legality.

4.3 Deference to National Assessment

When it comes to the national component of the semi-autonomous requirement that there is a legal basis for an interference to be permissible, it requires the court to determine whether there is a legal basis for the interference as determined by national law. Traditionally, the ECtHR is reluctant to review the domestic authorities' application of domestic law because it should not take the place of the national authorities by becoming a court of fourth instance. This deference to national decision-making is motivated both by the principle of subsidiarity and by the fact that the ECtHR as an international court is ill equipped both to investigate the facts of a domestic case and to interpret national legislation. Yet, it follows from both the fourth instance doctrine and the doctrine on the margin of appreciation that the court is entitled to exercise its supervisory role. Exercising this role does not entail taking the place of the national adjudicator. Moreover, in the case when an interference is based on vague law it is compelled to interpret national legislation simply because it is not clear from the letter of the law whether it actually justifies the interference.

In *Steel and Others v. UK*, the ECtHR found that there was a lacking basis in national law because the national authorities had applied the law erroneously. Mostly, however, the court limits its review to assess whether the domestic law has been applied arbitrarily. While there is good reason to argue that the ECtHR's review should be limited considering the limitations following from it being an international court, it would be desirable in order to afford the right to protest peacefully effective protection that it takes a clearer stance on under what conditions the application of domestic law is arbitrary. If the national assessment of whether an interference has a legal basis as determined by national law is accepted as a fact, this part of the test is shielded from international supervision. This in turn risks leading to that overstretched interpretation of national law passes unnoticed because it is not apparent that the application is arbitrary.

It has been argued that the quality of law test equips the ECtHR with the tool to determine whether national law is of sufficient quality to be

considered a valid basis for justifying an interference with the right to protest. Although the court has proven more willing to apply this test to national legislation, it has been met with opposition with reference to the fourth instance doctrine. Just as with the assessment of whether there is a basis in national law, the ECtHR often refrains from determining whether the national law complies with the quality of law test. Instead, it assesses whether the interference is proportionate.

Assessing whether there is a basis according to national law for an interference and whether that law has sufficient quality according to international standards as a part of a proportionality test is problematic for several reasons. First, when all factors are assessed in combination it is difficult to decide which factor is decisive. Proportionality often ends up in an assessment that is highly dependent on the facts that are specific to the case rather than in the application of general legal standards. For this reason, the criteria making up the human rights rule of law concept are not as developed as the one derived from legal theory. Second, it is important that the quality of law criteria are applied to determine whether a national law is a valid ground for interfering with the right to protest, given that definition of a law hinges on its quality rather than it deriving from a particular formal source. In other words, in the quality requirements are not duly applied, any provision may pass as a law, which also explains the cases where the ECtHR has accepted that the scope of the law is extended through jurisprudence. Third, when foreseeability is treated as a proportionality issue, focus is shifted from the formal to the substantive nature of law. In other words, the issue that is considered is no longer whether the law is repressive because it departs from the rule of law but whether it materially violates the right to protest peacefully.

4.4 Foreseeability as a Flexible Standard

A starting point for both legal theory and international human rights law is that it is inescapable that laws are vague to a certain degree. Rule of law understood as foreseeability is hence an ideal that can be achieved to a larger or a lesser extent. The practical assessment of whether a law is sufficiently foreseeable is therefore combined with the assessment of the proportionality of the interference, where the margin of appreciation is treated as a tool to determine the margin of discretion of the states. It has been argued that the standard required by the ECtHR is lenient because it is only required that the results of the application of a law are reasonably foreseeable. Moreover, the standard varies according to a number of criteria, including what type of legislation is concerned, whether there is clarifying jurisprudence available and whether the individual could seek clarifying legal advice.

The ECtHR affords the states a margin of discretion both when assessing the quality of law requirement and whether an interference is necessary in a democratic society. In other words, foreseeability is not a specific requirement. It is therefore the suggestion of this thesis that the court in practice uses the proportionality assessment and the margin of appreciation as an operationalisation of the degree to which a law must be foreseeable

depending on the case. In the literature it has been questioned whether proportionality is applicable at all to rule of law standards given that an assessment of competing interests is uncalled for when the foreseeability of a restricting provision is concerned. What is under scrutiny is however what degree of foreseeability is required given that full foreseeability is unattainable.

The margin of appreciation has been described as an area in which several different conducts are permissible, rather than a minimum standard. This area expands and contracts depending on a number of factors. On the one hand, when the conduct that is interfered with is significant to a democratic society, such as freedom of expression of politicians and journalists, the margin is narrow. On the other hand, when the conduct that is interfered with affects public order or national security the margin is wide. As there are no clear standards to determine what margin is applicable when these interests collide, the framing of an issue becomes important.

The example of peaceful protest illustrates the importance of how an issue is framed. Protests are inherently disruptive and even though the scope of the right to protest as such is given a wide interpretation, this very nature of the right means that it easily raises security and public order issues. In this respect it should be recalled that although a protest may cause inconvenience, this is not determinative of whether it is considered peaceful. While protests may be inconvenient and may express unpopular views, the right to protest is considered a right that is fundamental to society. Therefore, exceptions to the right should be interpreted narrowly.

When protest is framed as a mean to defend human rights, the issue is brought to a head. Strictly speaking, human rights defenders and their actions to defend human rights are afforded the same protection as people are generally. Whether a protest is considered a protest defending human rights is nevertheless significant to the proportionality assessment of the interference. Given the recognition that human rights defenders have been given internationally, the margin for limiting their right to protest ought to be a narrow one. In *Rasul Jafarov v. Azerbaijan* the ECtHR expressly considered that the applicant was a well-known human rights defender in finding that the national law had been applied in bad faith. Here, it should also be recalled that whether the defenders are right or wrong in their material assessment of the underlying issue is irrelevant to whether the protest defends human rights as long as it raises human rights concerns. Moreover, it is important to separate the right to protest from the right that is being advocated through the protest. In *Alekseyev v. Russia*, the ECtHR found that the margin of appreciation of the right that is being promoted through a protest is not automatically transferred to the right to protest itself.

De facto criminalisation is a conceptual tool that makes it possible to identify provisions that in practice are penalising although they formally may not be considered parts of criminal law. Coupling criminal law standards with interferences generally of the right to protest raises the standard by requiring a high level of foreseeability. It follows from both the principles of criminal law and the human rights principle of legality that criminal provisions should moreover be interpreted narrowly according to their ordinary meaning and in favour of the defendant. Strict interpretation

of the law, including prohibitions on analogies and retroactivity, can limit the consequences of vague laws and be a mean to achieve effective protection of internationally recognised rights that are interfered with by national law. In the context of the right to protest peacefully this means that when several interpretations are possible because the law is vague, the one favouring the exercise of the right to protest should be chosen.

In conclusion, there are two strong arguments in favour of a narrow margin of appreciation and a close scrutiny of national laws interfering with human rights defenders who protest peacefully. First, peaceful protest is fundamental to a democratic society and in a democracy dissenting and even unpopular views must be heard. Although protests as such may be disruptive, limitations should be allowed restrictively and only when less invasive means are unavailable. When framed as an act essential to defend human rights, and hence in its role as a mean rather than a right in itself, the requirements on the specificity of the law should be raised even higher. Second, when framed as an issue regarding criminal rather than administrative law, the requirement on foreseeability is raised and the principle that laws interfering with rights should be interpreted in favour of the right becomes applicable. In practice, however, these standards are not consistently upheld by the ECtHR.

5 Conclusion

In this concluding chapter, it is time to return to and answer the main research question, which is how the ECHR protects against national law being used as a mean to restrict the right to protest. This thesis has started from a formal theory of rule of law in order to identify the rule of law requirements the ECtHR imposes on national law. Because both concepts impose formal requirements on national law and thus restrict state power, they are considered comparable concepts. Moreover, both stress that law should be foreseeable and accessible.

For an interference with the right to protest peacefully to be permissible according to the ECHR, it must have a legal basis. According to the ECtHR jurisprudence this means that there must be both a legal basis as determined by national law and that the law must have a certain quality as determined by international standards. These requirements are that the law must be sufficiently accessible and foreseeable. A third requirement, which is not reiterated consistently in the court's jurisprudence, is that the law must provide safeguards against arbitrary application. In this thesis, this latter requirement has been considered a part of the foreseeability requirement.

When it comes to the determination of whether there is a legal basis according to national law, vague laws cause certain difficulties because they compel the ECtHR to assess the domestic authorities' application of the national law. Traditionally, the court is reluctant to do so because it is not meant to replace the domestic authorities by becoming a court of fourth instance. In these cases, the court does consider whether the law has been applied arbitrarily, and rather than focusing solely on whether there is a legal basis at all for the interference it undertakes the investigation as a part of an overall proportionality assessment. By doing so the court's assessment of the law becomes obscure and it is not entirely clear what standards the court uses to determine whether national law is applied arbitrarily. Moreover, there is a risk that if national law is accepted as a fact, this part of the test of whether there is a legal basis for the interference may be exempted from international review. This is especially worrisome when it comes to vague laws, because given their inherent ambiguity it may not be apparent if these laws are misapplied to prevent or punish protest. If only apparent cases of arbitrary application of law are subject to closer review, these cases may pass unnoticed.

Based on the ECtHR jurisprudence assessing the foreseeability of vague laws, it is difficult to discern any overall criteria for how a foreseeable law should be. The criteria suggested by the court for how vague laws should be clarified have been applied rather inconsistently. For example, it follows from the jurisprudence studied in this thesis that vague laws should be clarified by indicating the effect that they seek to avoid. Meanwhile, a law that criminalise active participation in unpermitted protests was considered sufficiently clear although it did not give any example of what active participation may be. Additionally, the court has indicated that a law is too vague if it easily could be clarified and one of two mutually exclusive

interpretations must be chosen. No guidance was nevertheless offered to determine when this is the case.

In most cases, however, the ECtHR has treated foreseeability as a matter of whether the interference is proportionate and hence necessary in a democratic society. From the perspective of both the human rights and the theory of law concept of rule of law, complete foreseeability is considered unattainable in practice. Consequently, foreseeability becomes a matter of degree. This thesis suggests that the ECtHR uses the assessment of whether the interference is proportionate towards a legitimate aim and the margin of appreciation that it is coupled with as the operationalisation of what standard of foreseeability is required in a given case.

When the issue of foreseeability and whether national law has been applied arbitrarily becomes a matter of proportionality, the facts of the case become determinative for the level of foreseeability required. Therefore, the rule of law protection offered by the human rights regime is not the same for everyone. This is troubling because it may lead to that arbitrary application of vague laws is accepted when applied to less well-known human rights defenders or defenders who have been stigmatised.

Foreseeability as defined by the ECtHR is not as mature as a concept as the one that follows from the formal definition of rule of law derived from legal theory. In order to develop a more specific standard, this thesis argues that it is necessary to apply and develop the human rights rule of law standard. Rather than resorting to a discussion on the proportionality in relation to the facts, the ECtHR should develop the foreseeability criteria as a legal standard that can be generalised. Even though exhaustive lists of all unpermitted conduct are unfeasible, a way forward in assessing vague laws is requiring that they are specified through examples or with respect to their undesired effect and that broad laws are limited in their scope through defences.

Finally, this thesis suggests that the ECHR offers a basis for a high level of protection against interferences based on vague national legislation for two reasons. First, the right to peaceful protest is fundamental to a democratic society both as a mean and an end. Second, from a criminal law point of view doubtful cases should be interpreted in favour of the right. What is required for there to be effective protection against national laws interfering with the right to protest peacefully, is that these standards are enforced consistently in practice.

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