XXXII

LIBERTY OF MOVEMENT WITHIN THE TERRITORY OF A STATE

(Article 2 of Additional Protocol No. 4 ECHR)

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SUMMARY: I. PROTECTION OF THE LIBERTY OF MOVEMENT IN ADDITIONAL PROTOCOL No.4 TO ECHR. RELATIONSHIP AND EQUIDISTANCE BETWEEN INTERNATIONAL LAW, EUROPEAN UNION LAW AND THE SPANISH CONSTITUTION (ART. 19 SC). II.-SUBSTANTIVE DEFINITION OF THE RIGHT TO LIBERTY OF MOVEMENT FROM JURISPRUDENTIAL PRAXIS. III. PERMITTED RESTRICTIONS ON THE LIBERTY OF MOVEMENT: THE PRINCIPLE OF PROPORTIONALITY AS HERMENEUTIC CRITERION: 1. NECESSARY AND APPROPRIATE NORMATIVE PROVISION. 2. LEGITIMACY OF THE PUBLIC AIM AND THE MEANS EMPLOYED, TWO INDEPENDENT, SUCCESSIVE TESTS. DEFINITION OF THE NOTION "NECESSARY IN A DEMOCRATIC SOCIETY": THE PRINCIPLE OF PROPORTIONALITY. IV. FINAL CONSIDERATIONS. V. APPENDIX: SELECTED CASE LAW.

I.-PROTECTION OF THE LIBERTY OF MOVEMENT IN ADDITIONAL PROTOCOL No. 4 TO ECHR. RELATIONSHIP AND EQUIDISTANCE BETWEEN INTERNATIONAL LAW, EUROPEAN UNION LAW AND THE SPANISH CONSTITUTION (ART. 19 SC).

Although the right to liberty of movement does not belong to the hard kernel of rights inherent in human dignity, it is one of the most important facets of individual freedom while also constituting the basis of many other expressions of that freedom[1]. Its importance lies therefore not only in its substantive nature but also in the consideration of its enjoyment as a prerequisite or prior condition for other human rights. According to the Human Rights Committee liberty of movement is an indispensable condition for the free development of a person[2], and thus arbitrary restrictions on liberty of movement may mean the denial of other rights. Thus it occasionally acts as a bridging norm whose infringement is the prelude to the violation of other guarantees[3].

Liberty of movement is considered to be a fundamental right and therefore intrinsic to the person (Art. 13 Universal Declaration of Human Rights)[4] . It gradually acquired greater consistency, reflected in the drafting of the International Covenant on Civil and Political Rights

[1] Alonso F. FERNÁNDEZ MIRANDA: "Artículo 19. Libertad de circulación y residencia", *Comentarios a la Constitución Española de 1978,* (O. Alzaga Villaamil, editor), Edersa, Madrid, 1997, p. 487.

[2] Human Rights Committee. General Comment 27, Freedom of movement (Art. 12), U.N. Doc CCPR/C/21/Rev 1/Add.9 (1999)

[3] From the case law analysed the Court has found violation of freedom of movement alone only in **Raimondo v. Italy**, of 22 February 1994, **Gartukayev v. Russia**, of 13 December 2005, **Sissanis v. Romania**, of 25 April 2007 and **Bartik v. Russia**, of 21 March 2007. In **Iletmiş v. Turkey**, of 6 March 2006 the Court did not hesitate to affirm that the applicant's freedom of movement – whose passport had been withdrawn for over seven years without taking into account the fact that he had family, economic and professional ties outside Turkey was "an aspect of his right to respect for his private life (…)". Thus the fact that Turkey had not ratified Additional Protocol No. 4 was, according to the Court "irrelevant". This restriction on liberty of movement was in fact considered to be a breach of Art. 8 ECHR.

[4] G.S. GOODWIN-GILL: *International Law and the Movement of Persons between States,* Oxford University Press, 1978, p.20.

(Art. 14) and *a posteriori* in the European legal protection framework where it was given individual attention in the Fourth Additional Protocol[5].

Freedom of movement is not safeguarded in the main body of the European Convention on Human Rights but in one of its supplementary Additional Protocols, additional norms to the Convention which extend the catalogue of protected rights. This characteristic does not only mean that in procedural terms all the rules contained in the treaty apply to the article but also more abstractly suggests the qualified importance of its content, as a right whose absence from this normative framework needed to be remedied.

The content of these Protocols supplements and enshrines the European public order of human rights represented by ECHR[6], despite the spatial fragmentation. Although not all Member States of the Council of Europe have ratified Additional Protocol 4[7], it can be said that there is a "common European law" on the matter because the constitutional definition of the right in domestic systems is established on similar bases which simply confirm it: an extensive guarantee of freedom of movement (movement, residence and the right to leave the country); not exclusively applicable to nationals; restrictions on freedom of movement must be exceptional; and any restrictions must be subordinated to the general interest.

Thus there has been no reluctance on the part of States to ratify Protocol No. 4 in relation to freedom of movement[8] , no rejection of the Convention extension of their legal obligations in that regard. In fact, the opposite is true and the way law has evolved, particularly in the European Union, is proof that States have decided to bind themselves through positive obligations to an extended concept of freedom of movement. ECHR and the Court's case law represent a minimum common denominator for fundamental rights which is intended to be inescapable content that does not prevent the adoption of instruments with greater scope.

Freedom of movement is therefore given special consideration in the European Union to avoid any overlap in the fourfold concurrence of jurisdictions (state, community, conventional and international). The content of freedom of movement in this case goes further than the adoption of measures intended to facilitate travel and residence for beneficiaries of the right; as a fundamental principle for constructing the community in conjunction with the free movement of goods, services and capitals, it is intended to eliminate all obstacles to free interstate movement under the principle of non discrimination. It also includes the right to leave any State including one's own State and the right to enter the territory of another Member State, as well as measures intended to facilitate access and the exercise of economic

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[5] Marc BOSSUYT: *Guide to the Travaux Preparatoires to the International Covenant on Civil and Political Rights,* Nihjoff, Dordrecht, 1987, p. 253. *Apud*. Chaloka BEYANI: *Human Rights Standards and the Free Movement of Peoples within States,* Oxford University Press, London, 2000, p. 14. As can be seen the first paragraphs of Article 12 in the Covenant do not differ grosso modo from those in P4-2. Given that they share the same historical period, it is not surprising that they share a similar notion of freedom of movement.

[6] On this point, see Pablo A. FERNÁNDEZ SÁNCHEZ: *Las obligaciones de los Estados en el marco del Convenio Europeo de Derechos Humanos,* Ministry of Justice, Madrid, 1987, p.44.

[7] Additional Protocol 4 was adopted in Strasbourg on 16 September 1963. It came into force on 2 May 1968. Greece and Switzerland have still not signed. The United Kingdom and Turkey have signed it but have not ratified it. Under Article 18 of the Vienna Convention on the Law of Treaties (23 May 1969), although it is not legally binding on these States they must abstain from any acts which might frustrate the object and aim of the treaty.

[8] Although it may seem that States have more difficulties ratifying the Protocol in relation to its article 4: "prohibition of collective expulsion of aliens", this statement has become meaningless in relation to Spain and the United Kingdom. As States members of the European Union they are bound by the Charter of Fundamental Rights of the European Union which prohibits such expulsions in Article 19.1

activity (the right to stay, reside and remain in the Member State after professional activity has ceased, after compliance with certain conditions). These premises have been ratified by the recent adoption of the Charter of Fundamental Rights of the European Union (Art. 45). These rights have their origin in the integration process and consequently are affected by the construction of a single market. The main object of the principle of free movement regulated by Article 45 TFEU is not to ensure free movement of individuals out of respect for dignity or freedom of the person but seeks directly to permit mobility of the factors of production, in this case the workforce which is essential for establishing a common market.

However, as Pi Lloréns has emphasised, it must not be forgotten that on the basis of provisions with essentially economic objectives, Court of Justice of the European Union has managed to deduce a series of rights which occasionally go beyond the exercise of economic activity[9]. Furthermore, the inclusion in the Treaty of the status of citizenship points towards an increasingly political vision of community space expressly reinforced by the Treaty of Amsterdam.

II. SUBSTANTIVE DEFINITION OF THE RIGHT TO FREEDOM OF MOVEMENT UNDER THE CONVENTION FROM JURISPRUDENTIAL PRAXIS.

It must be emphasised that despite the fact that the case law has focused mainly on the basic notion of freedom of movement it is a fundamental right with an overarching content. In this regard, in keeping with the usual drafting of international legal instruments Article 2.1 of Additional Protocol No. 4 recognises the right to liberty of movement together with freedom to choose one's residence[10]. Likewise and as a corollary to the above, the second paragraph provides that everyone shall be free to leave any country, including his own. Obviously this does not involve an automatic right to enter another State but does include the guarantee to obtain the necessary travel documents[11] and prohibits any illegitimate direct or indirect sanction such as restricting or eliminating social, housing, employment or education benefits that might affect those wishing to move to another country[12].

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[9] Montserrat PI LLORÉNS: "El ámbito de aplicación de los derechos fundamentales en la jurisprudencia del TJCE: balance y perspectivas" in *Unión Europea y Derechos Fundamentales en Perspectiva Constitucional,* (Natividad FERNÁNDEZ SOLA, Coordinator), Dykinson, Madrid, 2004, p. 132.

[10] Although according to a sector of academic writers, it seems more reasonable to locate the latter in relation to the inviolability of home. See Louis-Edmond PETTITI, Emmanuel DECAUX, Pierre-Henri IMBERT: *La Convention Européenne des Droits de l'Homme,* Commentaire article par article, Economica, Paris, 1995, p. 1044. According to the Human Rights Committee in its general comments on Article 12 ICCPR, this right would include protection against any form of internal displacement. Human rights Committee. General comment no. 21, Article 12 freedom of movement, *op.cit*., para. 7. The cases in this regard examined by the Court concern the legitimacy of the obligation that some States impose on their citizens to notify authorities every time they intend to change residence or visit families and friends, a practice which the Court considers to be an interference in freedom of movement (**Denizci and others v. Cyprus**, of 23 May 2001, **Bolat v. Russia**, of 5 January 2007 and **Tatishvili v. Russia**, of 9 September 2007.

[11] In **Bartik v. Russia**, of 21 March 2007, the Court reflected the analysis of the Human Rights Committee. See also **Sissanis v. Romania**, of 25 April 2007. The judgments analysed show that restrictions on freedom to leave the country are usually related to the individual being involved in judicial proceedings (**Baumann v. France**, of 22 May 2001, **Napijalo v. Croatia**, of 13 February 2003, **Rosengren v. Romania**, of 24 July 2007 and **Sissanis v. Romania**, of 25 April 2007). **Bartik v. Russia** of 21 March 2007 was the first opportunity for the Court to decide on the prohibition to leave the country imposed on an individual only on the grounds of the fact that he was in possession of "State secrets".

[12] in this regard it would have been extremely interesting if ECtHR had been able to examine the merits of the claims against Romania in **Lidner and Hammermayer** of 3 December 2002; **Oprescu** of 14 January 2003 and **Todorescu** of 30 September 2003, as they were cases where the State proceeded to expropriate property belonging to the applicants because they had left Romanian territory however the Court was not competent *ratione temporis*. There has been no decision in the case law on the legitimacy of this type of measures; See Colin HARVEY and Robert P. BARNIDGE, Jr. "Human Rights, Free Movement and the Right to Leave in International Law", *International Journal of Refugee Law,* vol. 19, no. 1, 2007, pp. 1-21.

According to Santamaría Pastor, the content of freedom of residence and movement is obvious. Their consecration protects the freedom to move throughout national territory in the time and manner that each citizen deems opportune and the right to freely determine the place or places where they wish to reside, whether temporarily or permanently[13]. The case law definition can be found in **Baumann v. France**: P4-2 "is intended to secure to any person a right to liberty of movement within the territory and to leave that territory, which implies a right to leave for such country of the person's choice to which he may be admitted"[14]. The rule is intended to be recognised throughout the territory of the State, with land, air and sea as the spatial area of application[15] and in favour of any person who is legally in the country as the particular subjective area of application.

Consequently, the right can be extended to all individuals, regardless of the purpose of the movement, but not their property as the article does not contemplate the free movement of goods. It is therefore recognised not only for those who pursue a specific objective such as people who travel to exercise a given activity as employees whatever their nationality. Finally, both European nationals and third country nationals can invoke this right, although aliens can only do so if they are legally in the country. This specification in fact can only be directed at nationals of third States because nationals cannot be in a situation that would make them illegally present in their place of birth; furthermore Article 3 of the Protocol requires nationals to be admitted in their territory and categorically prohibits their expulsion. This non-exclusivity of nationals is also present in the other international legal instruments on the matter[16].

The only legal relationship which must join non-nationals to the State is that their presence must be lawful. This prior requirement is so important that it can be said that without lawful presence in the territory there can be no interference by public authorities and consequently there can be no breach of the article that concerns us here. Strasbourg case law has therefore focused on specifying this characteristic.

However, neither the Convention nor the Court has assessed the conditions under which a person can be considered to be legally present in the territory of a State because this area is not part of its sphere of competence. On the contrary, the States have absolute discretion, closely linked to their sovereignty[17]. Rules or conditions that are arbitrary, irrational,

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[13]Juan Alfonso Santamaría Pastor. "Comentario al artículo 19", *Comentario a la Constitución*, (F. Garrido Falla, editor), second edition, Cívitas, Madrid, 1985, p. 385.

[14] **Baumann v. France**, of 22 May 2001, see also **Napijalo v. Croatia**, of 13 February 2003 and *mutatis mutandis,* **Peltonen v. Finland**, Commission decision of 20 February 1995, Decisions and Reports (DR) 80-A, p. 43, no. 31). As the Commission was able to point out in **Bozano v. France**, of 18 December 1986, this article does not refer to the expulsion of an alien but guarantees the right to travel in a given state. Any other attacks on individual freedom can be addressed through Article 5 of the Convention which according to the Commission can be considered a lex specialis in relation to P4-2.

[15] In territories for which the signatory State is responsible Article 5 of Additional Protocol 4 applies. From the judgments analysed only **Piermont v. France** of 27 April 1995, examines this point given that the events took place in French Polynesia and New Caledonia. There is also the case of the Republic of Azerbaijan which attaches an interpretative declaration to its ratification instrument of 15 April 2002 stating that it does not guarantee the application of the provisions of the Convention in the territories occupied by Armenia.

[16] See also Article 5 d) I; ii) of the *International Convention on the Elimination of All Forms of Racial Discrimination,* adopted by the General Assembly of the United Nations in resolution 2106 A (XX) of 21 December 1965; Articles 5.2 a) and 5.3 of the *Declaration on Human Rights of Individuals Who are not Nationals in the Country in which They Live*, adopted by the General Assembly of the United Nations in resolution 40/144 of 13 December 1984 and Article 8 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* adopted by the General Assembly of the United Nations in resolution 45/158 of 18 December 1990

[17] According to the Explanatory Report attached to the Protocol the final replacement of the expression *legally, légalement* with *lawfully, réguliérement* was intended precisely to make this discretional power as wide as possible. See P. van DIJK; G.J.H. van HOOF: *Theory and Practice of European Convention on Human Rights,* Third Edition, Kluwer Law, The Hague/London/Boston, p.

discriminatory or lacking sufficient legal basis, however, must be held incompatible with the Convention. One thing is States' legitimate margin of appreciation that the Court must recognise and another quite different matter is that it should lack any power of scrutiny even if limited to cases of manifest unreasonableness. In keeping with this margin of appreciation, the Court attaches particular importance to deportation orders or bans on entry in the territory provided there is minimum normative cover as they are equivalent to unlawful presence and therefore absence of State interference in the right to freedom of movement.

As shown in **Piermont v. France**, the duration of the presence does not appear to be a determining factor, suggesting that the Article could be invoked both for long and short-term residents and even those who are just passing through. In any event, it only safeguards the right to free movement in the territory of the State for aliens who are lawfully present. Consequently, this provision cannot be invoked to demand admission to the territory, an extension of the stay or even definitive residence. This is not the object of the guarantee; on the contrary those aspects depend on the State's domestic laws[18].

In cases that are difficult to determine, such as cases of aliens awaiting a decision on their entry or residence in the State, their presence can only be held to be lawful to the extent that it meets the requirements and conditions under which their temporary stay in the State was determined. Thus in the inadmissibility decision in **Omewenyeke v. Germany**, of 20 November 2007, the claim by a Nigerian asylum seeker based on P4-2 was rejected as manifestly unfounded due to the applicant's reiterated non-compliance with the condition of remaining in the city under his temporary residence permit. Thus the Court emphasised that "Article 2 of Protocol No. 4 cannot be interpreted as awarding an alien the right to reside or continue residing in a country of which he or she is not a citizen and it does not concern the conditions under which a person has the right to remain in a country (...). Thus, foreigners provisionally admitted to a certain district of the territory of the state, pending proceedings to determine whether or not they are entitled to a residence permit under the relevant provisions of domestic law, can only be regarded as "lawfully" in the territory as long as they comply with the conditions to which the admission and stay are subjected (...)".

III. LEGITIMATE RESTRICTIONS ON FREEDOM OF MOVEMENT: THE PRINCIPLE OF PROPORTIONALITY AS HERMENEUTIC CRITERION.

The conventional or constitutional normative safeguard of freedom of movement is compatible with the recognition that States are competent to issue the rules necessary to ensure the exercise of the right, either according to general interest requirements or to secure coexistence with the rights of others[19]. It is not an unlimited or absolute right; there must be a

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667. Due compliance with such requirement in national law has led some authors to consider that this discretion is so wide that more than "a right to freedom of movement" it can be considered a "favour" conceded to the individual (Jacques VELU; Rusen ERGEC: *La Convention Européenne des Droits de l'Homme,* Bruylant, Brussels, 1990, p. 318. Also, P. van DIJK; G.J.H. van HOOF: *op.cit.,* p. 668 Bardo FASSBENDER: "El principio de Proporcionalidad en la jurisprudencia del Tribunal Europeo de Derechos Humanos", in *Cuadernos de Derecho Público,* no. 5 (1998), pp. 51-73.

[18] Thus in **Demir v. France**, of 4 July 2006, the Court considered inadmissible *ratione materiae* the indication of P4-2 in relation to the refusal of an entry visa

[19] Juana Goizueta alludes to the generic limitations stemming from private property, compliance with constitutional duties (e.g. National service), government detention or the rights of exception and health emergency and those concerning the particular status of the right holder (e.g. public servants, soldiers, members of state security bodies). See Juana GOIZUETA VERTIZ: "El Derecho Comunitario y la Libertad de Circulación y Residencia de las personas en España: Implicaciones del Estatuo de Ciudadanía de la Unión", *Working paper no. 189, Institut de Ciències Polítiques I Socials,* Barcelona, 2001: www.diba.es

dialogue between the system and norms to ensure an adequate balance between individual and collective interests. Nevertheless, the legal instruments which enshrine this right also recognise the possibility of limiting its exercise, as the Convention explicitly or implicitly does with regard to the other rights and freedoms. Exception clauses authorise certain restrictions on the exercise of the right to freedom of movement (in general or circumscribed to a part of the territory) provided that, firstly, they pursue "aims" in the general interest (aims which can be summarised in the notion of public order in the wide sense) and secondly, the means used to satisfy such aims must be necessary or proportionate (the principle of proportionality of means). Legitimate general interest aims and appropriate means are the two dimensions used to analyse restrictions or interferences by public authorities on the right in question. In addition the restriction in question must be prescribed in law. These limitations are contemplated in paragraphs 3 and 4 of P4-2[20].

Paragraphs 3 and 4 reflect the desire to achieve a fair balance or reasonable relationship of proportionality between the general interest requirements of society and imperatives of individual fundamental rights. In this regard, arbitrary interferences from public authorities are not admitted, the admissibility of such restrictions on recognised rights is subordinated to a threefold condition. ECtHR has recognised three criteria or essential tests which basically coincide with those defined in other international legal instruments and are also those which feature in the debate on modern dogmatic theory; firstly, any restriction must be prescribed in the law; secondly it must pursue a legitimate aim and finally, it must be necessary in a democratic society.

The margin of appreciation doctrine is most fertile in the field of restrictions on Convention rights. When achieving an adequate balance between individual and general interests the State is best placed to decide given its proximity to the circumstances being safeguarded. Acceptance of the national margin of appreciation consists in a sort of judicial self limitation stemming from awareness that the respondent State is better informed about its domestic, social and legal life[21]. That does not mean that States have a blank cheque to do as they please. The legitimacy of the restrictions is subject to strict interpretation and application[22]. There is an important line of case law which indicates that limitations and restrictions on the exercise of recognised rights must not impair the substance of the guaranteed right. It is this balance than that the Court is called upon to decide.

1.-THE NECESSARY PRESCRIPTION IN LAW

When the Court finds interference in the right to freedom of movement[23] this provision indicates the first test for the restriction, that is, it must have the guarantee of legality or have

[20] The drafting of paragraph 4 of Article 2 was controversial. The Committee of Experts discussed the possibility of including "economic well-being", which was expressly rejected although the formula "public interest" does not exclude this interpretation. However it must be remembered that the above clause only applies to paragraph 1 of Article 2 and not to the freedom to leave any country. For example, it would not be possible to restrict emigration to avoid a brain drain. See P. van DIJK; G.J.H. van HOOF, *op.cit*, p 670.

[21] This fact simply recognises the subsidiary nature of the Convention system. See Marc-André EISSEN: *El Tribunal Europeo de Derechos Humanos* Editorial Cívitas, Madrid, 1985, p. 82.

[22] Despite the fact that the principle of restrictive interpretation of these limitations as enshrined in the case law, the scope of this principle must not be overestimated as the Court makes it compatible with the doctrine of margin of appreciation and does not therefore appear to apply it intransigently. Marc-André EISSEN, *op.cit, p. 90.*

[23] Thus in all the cases analysed the Court dedicates the first paragraph to declaring that the measure object of the decision is an interference in the freedom of movement. The cases analysed include a) restrictions as a consequence of special surveillance:

sufficient legal basis. The requirement is intended to ensure lawfulness and certainty in the application of legitimate restrictions in order to prevent any privileged or discriminatory action by government powers. This presupposes firstly the existence of and compliance with domestic norms, as "law" must be interpreted in the wide sense as a legally binding, formal act adopted by State authorities and so includes other types of normative acts which do not necessarily have to take the form of a formal or parliamentary law in the strict sense. In fact, from the outset, the Court has adopted a substantive extensive interpretation of the term rather than a formal interpretation in order to silence the differences between Continental Law and Common Law. It is a reference to the set of laws in force, regardless of whether their origin is legislative, administrative or jurisprudential[24].

ECtHR has insisted on what is known as the "quality" of the law[25]. Thus, in **Landvreugd v. The Netherlands**, of 4 June 2002, the Court states that "the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects". The inescapable normative provision referred to in Article 2.3 has a bearing on certain qualities which must be observed in the provisions applicable to the case. Accessibility, precision and foreseeability of the consequences thus become quality criteria for the legislation applicable to the specific case, used to verify whether it constitutes sufficient basis for ordering individual conduct.

A norm is held to be "accessible" when there are sufficient references for the citizen on the legal norms applicable to the case in question. In an exercise of self-control over the scope of its jurisdiction, the Strasbourg Court usually finds it sufficient if the legal basis for the interference has appeared in an official publication[26]. But it is not simply a matter of the norm being accessible, it must also be "precise and foreseeable as to its effects" interpreted in the sense that the rule must define with sufficient precision the conditions and modalities of the restriction on the right so that the citizen can reasonably foresee the consequences which might flow from a given action and thus regulate his conduct and benefit from appropriate protection against arbitrariness. Furthermore, it also worth noting that provided the restriction

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Denizci and others v. Cyprus, of 23 May 2001, **Raimondo v. Italy**, of 22 February 1994 and **Labita v. Italy**, of 6 April 2000; b) the prohibition on accessing the centre of the city for 14 days: **Landvreugd v. the Netherlands**, of 4 June 2002; c) the prohibition on abandoning the place of residence in the case of bankruptcy of the company or personal insolvency: **Luordo v. Italy**, of 17 July 2003 and d) confiscation of passport: **Napijalo v. Croatia**, of 13 February 2003 and **Baumann v. France**, of 22 May 2001.

[24] It is different if the respondent party itself (in this case Russia) considers that the restriction on rights is based on a norm which does not have the status of law, in which case it can be considered that the interference did not have sufficient legal basis as in **Gartukayev v. Russia**, of 13 March 2006. By way of comparative analysis it is interesting to point out that although the Human Rights Committee has adopted an identical interpretation to the one analysed here, the Inter-American Court of Human Rights has instead opted for a formal consideration of the term "law", under which interferences in recognised rights can only be contemplated in normative acts adopted by legislative authorities. See Frédéric SUDRE: *Droit International et européen des droits de l'homme,* 5th edition, Presses Universitaires de France, France, 1989, p. 155.

[25] Of the seven cases where the Court has found breach of P4-2 as a consequence of "lack of normative provision", in three cases it discusses the "quality" of the law (**Landvreugd v. The Netherlands**, of 4 June 2002, **Gartukayev v. Russia**, of 13 March 2006 and **Sissanis v. Romania**, of 25 April 2007) whereas in the other four the restriction on freedom of movement did not even have a legal basis (**Denizci and others v.Cyprus**, special surveillance measures to which the applicants were subjected were not contemplated in domestic legislation; in **Timishev v. Russia**, of 13 March 2006, the measure was imposed by means of an "oral" order which was not formalised in any way; in **Bolat v. Russia**, of 5 January 2007, the measure was adopted by a police officer in a clear situation of abuse of authority, and in **Tatishvili v. Russia**, of 9 July 2007, a law was applied without taking into account the Constitutional Court's interpretation .

[26] See **Baumann v. France**, of 22 May 2001; **Luordo v. Italy**, of 17 July 2003 and **Napijalo v. Croatia**, of 13 February 2004; in **Landvreugd v. The Netherlands**, of 4 June 2002 the publication of the case law on the restrictive measure was considered sufficient although there were three votes against that led to the formulation of a dissenting opinion over a controversial unprecedented decision from Strasbourg.

is contemplated in the law it is likely to be accompanied by the necessary jurisdictional guarantee so that the citizen can defend himself against any abuse of authority[27].

Nevertheless, as Sudre claims, these requirements are relative. The level of precision required can vary in relation to the area being regulated and the number and status of those affected by the restriction[28]. In the cases examined by the Court on freedom of movement it has been considered that the applicable rule was foreseeable if "it is formulated with sufficient precision to enable any individual – if need be with appropriate advice - to regulate his conduct"[29].

Thus, under this principle, the Court has taken into account four conditions to decide whether a rule is sufficiently precise: the drafting of the norm, sufficient experience in application of the provision; the applicant's background; and diligence of the authorities in suitably informing the affected party.

2. LEGITIMACY OF THE PUBLIC AIM AND THE MEANS EMPLOYED, TWO INDEPENDENT, SUCCESSIVE TESTS. DEFINITION OF THE NOTION "NECESSARY IN A DEMOCRATIC SOCIETY": THE PRINCIPLE OF PROPORTIONALITY.

As can be advocated from the other Convention provisions, the interference must be in pursuit of an aim in the general interest. Restrictions that can be imposed on rights and freedoms can only be applied for the purpose for which they were contemplated, hence the *aims test* which the restrictive measure must pass if it is to be in accordance with law. The exercise of rights and freedoms can therefore be restricted but any restrictions must respond to a legitimate need. Restrictions are expressly formulated in reference to state interests (national security, public safety, public order, crime prevention); social life (public safety, public order, health, public morals) or to protect the rights and freedoms of others in society although according to Sudre they could all be contained in a wide notion of "public order"[30]. Of course, the content of these concepts is variable and subject to diverse interpretations and States have a certain margin of appreciation that can vary in extent according to the right in question.

In relation to freedom of movement in particular the Court has held certain restrictions to be legally valid having regard to the object and aim of the restrictions, which have mostly been intended as a sanction, a preventive measure or to safeguard the rights of others[31]. Nevertheless, interferences can often be contemplated in law, pursue legitimate aims and even then not be "necessary in a democratic society"[32], this is where the principle of proportionality comes into play as the measure of the idea of substantive justice, that is, the proscription of any useless, unnecessary or disproportionate sacrifice of freedom. The Court has used the principle of proportionality in the strict sense as a parameter to control the necessary balance or reasonable relationship between the benefit and the sacrifice imposed (except in **Bartik v. Russia** as will be seen below).

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[27] **Sissanis v. Romania**, of 25 April 2007.
[28] Frédéric SUDRE, *op.cit.,* p. 156.
[29] **Landvreugd v. The Netherlands**, 4 June 2002 and **Sissanis v. Romania**, 25 April 2007.
[30] Frédéric SUDRE: *op.cit.,* P. 157.
[31] See **Raimondo v. Italy**, **Labita v. Italy**, **Landvreugd v. The Netherlands**, **Luordo v. Italy**, **Peroni v. Italy**, **Bassani v. Italy**, **Bottero v. Italy**.
[32] The specification of its particular characteristics: pluralism, tolerance, openness, have been analysed in typical judgments such as the case of **Young, James and Webster** of 13 August 1981. See Frédéric SUDRE, *op.cit.,* P. 158-159.

In cases related to the protection of freedom of movement, the Court begins its analysis with a detailed study of the procedure carried out by the national authorities. It analyses whether the interference is contemplated in the law and pursues a legitimate aim and also decides whether the measure has been applied with due diligence and sufficient legal guarantees taking into account the particular circumstances of the case, with proper administration and compliance with the essential principles of criminal justice and appropriate channels of appeal. Thus, in cases of bankruptcy and personal insolvency, the Court has not questioned the limitation on freedom of movement because it is considered an appropriate measure for protecting the rights of the company's creditors. Excessive duration of the proceedings, however, can be considered to constitute breach of P4-2[33]. Similarly, the short duration of proceedings can, on its own, involve no breach of the article (3 years and 8 months in **Campagnano v. Italy**, of 23 March 2006). However, when the duration reaches an intermediate point (5 years and 10 months in **Fedorov**; 4 years and 6 months in **Fedorov and Fedorova v. Russia** and 5 years and 3 months in **Antonenkov and others v. Ukraine**) the Strasbourg Court analyses the circumstances of the case and has held that provided the restrictive measure is not too intrusive, bearing in mind they are criminal proceedings and that it was not automatically applied for the whole duration of the proceedings(having regard to any permits enjoyed by the applicant) the interference was not burdensome and consequently there was no violation of P4-2[34].

The obvious interference with freedom of movement through the confiscation of a passport is held to be unjustified if the Court finds anomalies and inconsistencies in the procedure. Thus in **Baumann v. France**, after confiscating the passport during investigation of a robbery the authorities did not respond to Mr. Baumann's request for it to be returned despite the fact that he was never charged or even considered as a witness, and therefore the deprivation of a strictly personal document such as a passport was not justified. Furthermore, the Court also considered it significant that the passport did not appear on the inventory of objects seized during the proceedings; this lack of diligence meant that the State could not rely on its contention. In **Napijalo**, the seizure of a passport takes the form of a sanction by the customs authority for non-payment of a fine for failing to declare the import of cigarettes and cooking oil. However, the authorities did not institute any other proceedings against the applicant for non-payment of the fine; he was never charged with any customs offence, and no appropriate administrative procedures took place. Consequently, the Court found that the interference in the applicant's liberty of movement was not a measure necessary in a democratic society.

Nor did the Court find the restrictive measure necessary in **Labita**. Although it recognised the importance of preventive measures during an investigation where suspected Mafia members were concerned, it was disproportionate to put an individual under such restrictions[35] when he

[33] 14 years and eight months in **Luordo**, 15 years and one month in **Peroni**, 24 years and five months in **Bassani**, 12 years and six months in **Bottaro**, 13 years and six months in **Goffi**, 15 years and two months in **Forte**, 14 years and five months in **Matteoni**, 19 years and two months in **Gasser** and 10 years and four months in **Ivanov**. Since the adoption in Italy of the "Pinto Law" similar cases of restrictions on freedom of movement during legal proceedings for bankruptcy have been declared inadmissible by the Strasbourg Court because domestic appeals have not been exhausted. See among many others **Vitielo v. Italy**, of 3 July 2006, La **Frazia v. Italy**, of 11 December 2006, **Martellacci v. Italy**, of 26 March 2007.

[34] In **Hajibeyli v. Azerbaijan**, of 10 October 2008, restrictions on freedom of movement applied to a member of the opposition party were considered to interfere with freedom of movement despite being applied for a total of five years and four months due to irregularities in the proceedings

[35] In particular, the applicant was required not to leave his home without informing the authorities responsible for supervising him; not to associate with persons who had a criminal record or who were subject to preventive measures; not to return home

had no criminal record or any closer ties to the Mafia than being married to the sister of a Mafia chief who had died during the course of the investigation. The period of three years to which he was subjected to those restrictions was not necessary in a democratic society.

Per contra, in **Landvreugd** diligent State action meant the restriction was necessary in a democratic society. The applicant had already been banned from accessing the centre of Amsterdam for the overt use of hard drugs in public places. He totally ignored the ban and was informed of the consequences of his reiterated behaviour; the authorities took into consideration the individual's personal circumstances.

Finally in **Bartik v. Russia**, the Court had its first opportunity to pronounce on a ban on leaving the country imposed on the applicant because he was in possession of "State secrets". The extraordinary nature of the judgment lies not only in the topic of debate but also in the interpretation criteria used in the reasoning. It is the first time that the Court uses the three aspects of the principle of proportionality and not only in the strict sense as it has done in the cases analysed so far. Thus it alludes to the principle of appropriateness of the measure when it considers the fact that the applicant surrendered all the classified information when his contract ended; the Court also criticises the fact that the authorities did not consider whether the restriction was necessary for achieving the legitimate aim and consequently had not proceeded to assess whether a less restrictive measure could have been applied; and finally it applies the test of proportionality in the strict sense when it considers that the prohibition on leaving the country applied to the applicant for 24 years was an excessive sacrifice. The Court therefore found that the restriction on the applicant's right to leave his own country was not necessary in a democratic society.

IV. FINAL CONSIDERATIONS

1.- The judgments analysed suggest, firstly, that the content of the right to liberty of movement has not caused any particular problems in the case law. There seems to be a broad consensus on the powers that the right includes and in this regard it is possible to identify the existence of a "common European law" on the matter, including a wide guarantee of freedom of movement; right holders are not exclusively nationals; and exceptional interference by public authorities is subordinated to the public interest. The case law has focused on determining the compatibility of restrictions on the right. Nevertheless, from the case law it is impossible to infer the legal framework for this right which determines its content. Since **Bozano v. Italy** the bases for the content of the right have been established by determining the underlying respect for dignity and liberty of the person and consequently, in direct relation with Article 5 ECHR which is thus held to be *lex especialis* in relation to P4-2. The powers it includes fall solely within the territory of the State (and do not even cover cases of expulsion as the judgment specifies). Other purposes which may provide the article with a more ambitious content are therefore left aside.

2.- Art. 2.3 and P4-4 include clauses of an exceptional nature authorising certain restrictions on the exercise of the right to freedom of movement. In order to verify whether the right to freedom of movement has been breached the Court applies the traditional system of the test

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after 8 p.m. or leave home before 6 a.m.; not keep or carry weapons; not go to bars or attend public meetings; and to report to the relevant police station on Sundays between 9 a.m. and 12 noon.

of proportionality under the principle of strict interpretation and application of legitimate restrictions on the freedom of movement. According to the judgments analysed it appears that the test of means (proportionality) is the most relevant determining factor. The principle and test of proportionality is applied to this right with intense control. There is no apparent controversy over the test of aims and as regards the test of the legal basis **Landvreugd v. The Netherlands** and **Sissanis v. Romania** are the only cases where the reasoning goes into greater depth and the latter case even has a dissenting opinion. In short, the right has only been held to be infringed as a result of the disproportionate nature of the measure adopted, not because of lack of compliance with the other criteria.

3. The judgment in **Landvreugd v. The Netherlands** confirms, first of all, the substantive, non-formal and extensive interpretation of the term "law" which includes, for these purposes, the set of laws in force, regardless of whether their origin is legislative, administrative or jurisprudential. Similarly, the inescapable requirement for prescription in law must have the quality of being accessible, precise and foreseeable, corrective criteria which are intended to ensure that the rule offers and guarantees sufficient legal basis to order individual conduct.

The novelty, in cases of excessively vague rules that can give rise to a discretionary application of restrictions on the freedom of movement, has been to hold publication of the case law on application of the restriction to be sufficient. In addition the Court considers that the corrective criteria (accessibility, precision and foreseeability) can compensate each other so that the lack of one can be made good by the presence of others. In short, it is a case of demonstrating that by one means or another, the individual could have organised his conduct according to law. Deficient drafting of the norm can thus be overcome if there is sufficient precedent (objective criteria); if the individual has a previous record (subjective criteria); and if the authorities have been suitably diligent in informing the individuals involved of the consequences of their acts.

We do not consider that the judgment in **Sissanis v. Romania** substantially alters this line of case law, although it must be highlighted that the Court nevertheless has held that to meet the legal basis test the rule must necessarily define of the aim of the interference and provide suitable jurisdictional guarantees to combat abuse of power.

4. In most cases, the right to freedom of movement is breached because the measure is unnecessary in a democratic society. The burden on the individual in pursuit of the legitimate aim is not balanced and that is defined by prior breach of other fundamental rights, especially Articles 5 and 6 ECHR. Only to the extent to which these other rights are infringed does the situation in which the individual is placed become excessively burdensome and therefore disproportionate. In such cases, the right to freedom of movement has been violated, thereby demonstrating its instrumental nature.

Bozano v. Italy, of 18 December 1986

Raimondo v. Italy, of 22 February 1994

Piermont v. France, of 27 April 1995

Labita v. Italy, of 6 April 2000

Baumann v. France, of 22 May 2001

Denizci and others v. Cyprus, of 23 May 2001

Landvreugd v. The Netherlands, of 4 June 2002

Luordo v. Italy, of 17 July 2003

Napijalo v. Croatia, of 13 February 2003

Goffi v. Italy, of 6 July 2005

Federov and Federova v. Russia, of 13 January 2006

Forte v. Italy, of 10 February 2006

Antonenkov and others v. Ukraine, of 22 February 2006

Timishev v. Russia, of 13 March 2006

Gartukayev v. Russia, of 13 March 2006

Campagnano v. Italy, of 8 September 2006

Mateonni v. Italy, of 8 September 2006

Bolat v. Russia, of 5 January 2007

Blasi v. Italy, of 12 February 2007

Gasser v. Italy, of 12 February 2007

Ivanov v. Ukraine, of 7 March 2007

Bartik v. Russia, of 21 March 2007

Sissanis v. Russia, of 25 April 2007

Tatishvili v. Russia, of 9 September 2007

Rossengren v. Romania, of 24 July 2007

Hajibeyli v. Azerbaijan, of 10 October 2008